NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-1140 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, et al.,
Petitioners,
v.

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

Petition for Review of Actions of Environmental Protection Agency

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PROOF BRIEF FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, AND EPA ADMINISTRATOR ANDREW WHEELER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties and intervenors are listed in the brief for the State and Municipal Petitioners.

The amici include the Institute for Policy Integrity at New York University School of Law; National Association of Home Builders of the United States; Maximillian Auffhammer; Philip Duffy; Kenneth Gillingham; Lawrence H. Goulder; James Stock; Gernot Wagner; Union of Concerned Scientists; National Parks Conservation Association; Coalition to Protect America's National Parks; Thomas C. Jorling; American Thoracic Society; American Academy of Allergy, Asthma, & Immunology; American College of Occupational and Environmental Medicine; National Medical Association; American College of Chest Physicians; Todd S. Aagaard; Blake Emerson; Daniel Farber; Kathryn E. Kovacs; Richard J. Lazarus; Ronald Levin; Nina Alexandra Mendelson; Environment America; National Trust for Historic Preservation; Patagonia Works; Columbia Sportswear Company; Service Employees International Union; Sheldon Whitehouse; Michael Greenstone; National Council of Churches USA; Evangelical

Environmental Network; Coalition on the Environment and Jewish Life; Hazon; Maryknoll Sisters; Sisters of Mercy of the Americas; Institute Leadership Team; Union for Reform Judaism; Women of Reform Judaism; Men of Reform Judaism; Central Conference of American Rabbis; National Baptist Convention, USA, Inc.; Dallas Burtraw; Charles T. Driscoll, Jr.; Amelia Keyes; Kathy Fallon Lambert; Benjamin F. Hobbs; Brendan Kirby; Kenneth J. Lutz; James D. McCalley; National League of Cities; City of Boston; U.S. Conference of Mayors; City of Boulder; City of Albuquerque; Town of Chapel Hill; City of Asheville; City of Coral Gables; Mayor and City Council of Baltimore; Town of Cutler Bay; Detroit Mayor Mike Duggan; City of Houston; Mayor of City of Durham; City of Las Cruces; Mayor of Borough of Glen Rock; City of Minneapolis; Harris County; City of New Orleans; City of Phoenix; Mayor of Salt Lake City; City of Pittsburgh; City of Santa Fe; City of Portland; City of Providence; City of Saint Paul; David Battisti; Kim Cobb; Andrew E. Dessler; Kerry Emanuel; John Harte; Daniel Kirk-Davidoff; Katherine Mach; Michael MacCracken; Pamela Matson; James C. McWilliams; Mario J. Molina; Michael Oppenheimer; Joellen L. Russell; Noelle Eckley Selin; Drew Shindell; Abigail Swann; Kevin

Trenberth; Diana H. Wall; Charles B. Curtis; Elizabeth Anne Moler; James John Hoecker; Nora Mean Brownell; Jon Wellinghoff; John Norris; Norman C. Bay; Colette Honorable; Paul Tonko; Jared Huffman; Nancy Pelosi; Steny H. Hoyer; James E. Clyburn; Ben Ray Lujan; Frank Pallone, Jr.; Kathy Castor; Peter A. DeFazio; Eliot L. Engel; Raul M. Grijalva; Eddie Bernice Johnson; Marcy Kaptur; James P. McGovern; Jose E. Serrano; Nanette Diaz Barragan; Joyce Beatty; Donald S. Beyer, Jr.; Earl Blumenauer; Lisa Blunt Rochester; Suzanne Bonamici; Julie Brownley; Salud O. Carbajal; Tony Cardenas; Sean Casten; Yvette D. Clark; Emanuel Cleaver; Steve Cohen; Gerald Connolly; Jason Crow; Diana DeGette; Debbie Dingell; Michael F. Doyle; Anna G. Eshoo; Adriano Espaillat; Jesus G. Garcia; Al Green; Debra A. Haaland; Alcee L. Hastings; Brian Higgins; Joseph P. Kennedy, III; Ann M. Kuster; Andy Levin; Mike Levin; Ted Lieu; Alan S. Lowenthal; Doris Matsui; A, Donald McEachin; Jerry McNerney; Grace Napolitano; Joe Neguse; Eleanor Holmes Norton; Ilhan Omar; Ed Perlmutter; Scott. H. Peters; Chellie Pingree; Mark Pocan; Mike Quigley; Raul Ruiz; Bobby Rush; John P. Sarbanes; James D. Schakowsky; Darren Soto; Dina Titus; Rashida Tlaib; Marc Veasey;

Deborah Wasserman Schultz; Peter Welch; Michael F. Bennet; Benjamin L. Cardin; Thomas R. Carper; Dianne Feinstein; Edward J. Markey; and Chris Van Hollen.

B. Ruling Under Review

The ruling under review is the final action by EPA entitled: "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," published at 84 Fed. Reg. 32,520 (July 8, 2019).

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTERS

LEGISLATIVE HISTORY

OTHER

GLOSSARY

ACE Rule	Affordable Clean Energy Rule
BACT	Best Available Control Technology
BSER	Best System of Emission Reduction
CAA	Clean Air Act
CO_2	Carbon Dioxide
CPP	Clean Power Plan
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
NAAQS	National Ambient Air Quality Standards
RIA	Regulatory Impact Analysis

INTRODUCTION

The Environmental Protection Agency (EPA) is a statutory servant of the Clean Air Act (CAA). It wields no more authority than Congress granted there. EPA's defined span of authority does not vary with the gravity of the environmental problem EPA is confronting, Petitioners' preferred policy approach, or a perceived failure by Congress to act. In the simplest terms, the Clean Power Plan (CPP) exceeded the authority Congress granted to EPA. This required its repeal. Its replacement, the Affordable Clean Energy rule (ACE Rule),[1] is consistent with the statute. The ACE Rule should be upheld.

Section 7411(d) as Particular-Source Regulation. Here, the text of the CAA, 42 U.S.C. § 7411(d)(1), delineates in unambiguous terms the extent of EPA's power to superintend state regulation of existing sources. States are to establish "standards of performance" under Section 7411(d) for "any existing source." And when States apply "a standard of performance to any particular source," they must be

[1] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019).

allowed to consider "the remaining useful life" of "the existing source." Congress's singular focus on "applying *a* standard of performance," "to any *particular* source," and "*the* remaining useful life of *the* existing source," 42 U.S.C. § 7411(d)(1) (emphasis added)—all singular—reflects an obvious and straightforward Congressional constraint on EPA's authority to design an "existing source" framework for guiding state regulation.

Thus, EPA's regulations must be based on control measures applied to a particular "existing source." The statute defines an "existing source" as "any building, structure, facility, or installation" that is not "new." *Id.* § 7411(a)(3), (6). Hence, the emission limitation must be achievable at such a "building, structure, facility, or installation. As both the font of EPA's regulatory mandate and its authority, it is Section 7411(d) that defines the scope of EPA's power to "prescribe regulations" for state plans.

The terms "existing source" and "standard of performance" in Section 7411(a)(1) and (3) are fixed in their meaning as "Definitions." Reading these definitions into Section 7411(d)(1) confirms what is already evident from the baseline text: A State submits a plan that

"establishes standards [for emissions of air pollutants which reflect[ ] the degree of emission limitation achievable through application of the best system of emission reduction] for any [building, structure, facility, or installation]." 42 U.S.C. § 7411(d)(1), (a)(1) (with bracketed alterations simply substituting in the definition provided at 42 U.S.C. § 7411(a)(1)). And EPA's regulations

> shall permit the State in applying 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] to any particular [building, structure, facility, or installation] under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing [building, structure, facility, or installation] to which such standard applies.

42 U.S.C. § 7411(d)(1) (with bracketed alterations similarly just substituting in the definitions provided at 42 U.S.C. § 7411(a)(1), (3), (6), respectively); *see also* Statutory Addendum at ADD01.

The statute's plain language thus restricts the scope of state plans for existing sources under Section 7411(d). They must be limited to "achievable" emission limitations—"achievable" via a limitation reflecting "application" of the best system of emission reduction" (BSER) "to any particular" "building, structure, facility or installation" itself.

EPA's Historical Approach to Section 7411(d). EPA followed this approach in the *more than seventy* Section 7411 rules. Many were for new sources under Section 7411(b). A handful were for existing sources under Section 7411(d). But each understood and applied this unambiguous meaning: they were all based on BSER control measures that applied at and to the level of a particular facility, plant, or unit. So the Agency's approach for nearly fifty years cohered with the statutory text. And it cohered with the CAA's structure, including the interplay between Section 7411's BSER and Section 7475's "best available control technology" (BACT) requirements. This is the only interpretation that gives effect to each and every one of Congress's words, phrases, prepositions, and choice of singular vs. plural, once considered in the actual context in which they were intended to be read.

Section 7411(d) Respects Federalism. No doubt Section 7411(d)(1) imposes constraints on EPA. They are constraints that were important to the federalism-minded Congresses of 1970, 1977, and 1990—the years of the three major bills addressing Section 7411(d). They preclude EPA from forcing States to base their plans for an "existing source" on a far-flung "system" of emission control that is not

applied to individual sources. They preclude systems that rely on controlling the aggregate interaction of groups of sources and facilities and entities outside any regulated source category, and even outside each State. They also preclude a system that imposes statewide caps EPA devises. For only an interpretation recognizing the particular, individual character of "*any* particular source" allows the States, as the primary movers under Section 7411(d), to properly consider "the remaining useful life of the existing [building, structure, facility, or installation]" when "applying a standard of performance."

The CPP Ignored History and Congress's Instructions. The CPP took a radical new approach. Adopting a nearly unbounded and acontextual interpretation of "system," in 2015 EPA turned its back on the notion that BSER must be applied through at-the-source control measures. Instead, EPA selected "generation shifting" as the BSER. Under this "system," EPA looked not just to the individual source that is the focus of Section 7411(d)(1). Rather, EPA looked to the electrical grid as a whole. Namely, EPA set standards to require States, source owners and operators, and grids to increase the power dispatch from lower- and zero-emitting electricity generation in place of dispatch from

coal- and other fossil fuel-fired generation. Indeed, the CPP set standards that EPA fully recognized would not be realistically "achievable" by particular coal-fired power units.

In this way, in 2015 the CPP inverted Congress's expectations, upending the uniform practice of EPA's own long history of regulation under Section 7411. EPA did not set standards applicable to particular units and achievable by those units, with only *incidental* effects on electricity generation. EPA instead *intentionally* pursued the reordering of the aggregate dispatch of electricity generation onto the grid itself. When it repealed the CPP in 2019, EPA acknowledged it is one thing for *some* generation shifting to occur as a result of imposing an at-the-source environmental control (for instance, because imposing those controls changes the marginal costs of production). It is quite another for EPA to devise a rule designed to *intentionally* change and indeed, leverage, the marginal cost of production, thereby shifting the aggregate mix of electric generation dispatch from various existing sources. Succinctly put, the 2015 EPA determined to reduce emissions by fundamentally changing the *nationwide economics of electricity generation*.

EPA's sudden discovery of power to look beyond controls imposed at the individual-source level to look at overarching grid regulation reflected a sweeping expansion of authority. This is precisely what the Supreme Court envisioned when it noted: "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*) (citation and quotation marks omitted); *see also U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, No. 18-1584, Slip. Op. at 14-16 (U.S. June 15, 2020). This is why—catalyzed by an unprecedented Supreme Court stay of an EPA rule—EPA later confessed error and repealed the CPP.

The CPP Radically Contrasts with Both EPA's Past Actions in* Chevron *and the Act Itself. In a quirk of history, the CPP's attempt to sidestep the CAA's unambiguous text construes one of the same provisions at issue in the seminal case of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 859, 866 (1984). There, the Supreme Court considered a question about the scope of the term "source" in Section 7411. *Id.* Recognizing some inherent ambiguity in that term, the

Supreme Court held that employing a "bubble" approach to regulate plantwide emissions was "a permissible construction of the statute." *Id.*

But in the CPP, EPA burst the modest "bubble" around particular facilities approved in *Chevron*. This time, EPA's interpretation implausibly allowed "owners and operators" to offset emissions across its entire generating fleet—regardless of the emitting facility's location. Here, EPA did not just attempt to incrementally expand the "bubble" concept to a larger "dome" placed over closely neighboring facilities. No, the CPP instead relied on the interconnected nature of the power sector to look broadly to geographically disparate sources across the electricity grid.

To implement the CPP's fleet- and grid-wide approach, EPA explained at the time that, when generation shifting, "[a]s a practical matter, the 'source' include[d] the 'owner or operator'" of the source. CPP, 80 Fed. Reg. 64,662, 64,762/3 (Oct. 23, 2015). But Congress provided *separate definitions* of the terms "owner and operator" and "stationary source." 42 U.S.C. § 7411(a)(3), (5). And Congress directed that States would apply "a standard of performance to any *particular source*." Section 7411(d) is not directed toward the actions an "owner

and operator" can take across its aggregated fleet of sources. Congress also required the "standard," derived from the "system," be "achievable" by "application" to the *particular* "building structure, facility, or installation." *Id.*; *cf. Chevron*, 467 U.S. at 862 (observing "the agency's power to regulate *particular* sources") (emphasis added).

Conflating these terms violated basic canons of statutory construction. When Congress defines terms differently, those different meanings must be given effect. Yet the 2015 EPA openly acknowledged that the "system" it implemented in the CPP depended on, "as a practical matter," conflating and equating these differently defined terms.

The CPP Ignored Statutory Restrictions Designed to Allow the States to Take into Account the Useful Lives of Power Plants. Similarly, the CPP did not respect Congress's intent that state plans setting standards for "*any* particular source" be allowed to individually calibrate for "*the* remaining useful life of *the* existing source to which such standard applies." 42 U.S.C. § 7411(d)(1)(B) (emphases added). This language reflects clear Congressional intent. States must have the ability to consider "the remaining useful life" of *each* and *every* (*i.e.*,

"any") existing source. The CPP, however, unlawfully linked the consideration of an individualized building, structure, facility, or installation's remaining useful life to emissions performance at *other* sources. And the CPP created statewide rate- and mass-based emission "goals" (*i.e.*, caps). Under the CPP's approach, a State had to balance increased emissions at one plant in consideration of its remaining useful life against increased stringency for another plant or plants in the State. So the CPP denied States the authority that Congress granted them to consider legacy investments in, and the remaining useful life, of "*any* particular existing source." 42 U.S.C. § 7411(d)(1).

State ability to consider facility-specific characteristics is especially relevant to the electric generation industry. There, Congress, the Supreme Court, and EPA recognize "the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." ACE Rule, 84 Fed. Reg. at 32,530/1 (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (*PG&E*)); CPP, 80 Fed. Reg. at 64,691/2. Stranded costs of prior state-approved investments in coal-fired units by state public

utility commissions are not evenly distributed across States. *See* CPP, 80 Fed. Reg. 64,825; CPP RIA, Ch. 2 at 9, Fig. 2-3, EPA-HQ-OAR-2013-0602-37105, JAXXXX. Particularly "[i]n states with cost-of-service regulation of vertically-integrated utilities," *id.* at 64,693/2, many States objected that added costs of switching (including acquiring needed "emissions credits" if a State is to get "lower overall costs," *id.* at 64,726/1) may be inequitably distributed. Worse yet, such costs when borne by some state consumers might effectively operate to subsidize the reduction of electricity costs in other States.

"Federal law '*may not be interpreted* to reach into areas of state sovereignty *unless* the language of the federal law *compels* the intrusion." ACE Rule, 84 Fed. Reg. at 32,530/3 (quoting *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005)) (emphases added). And no such language of Section 7411 compels the interpretation advanced in the CPP.

The issue before the Court is not whether generation shifting and trading across a power grid can serve to efficiently reduce greenhouse gas emissions.[2] That question can be answered in lobbying for a new

[2] Carbon dioxide (CO_2) is the principal greenhouse gas of concern here.

statute. The issue here is whether Congress already authorized EPA to mandate any of that: Can EPA force States to order the "owner or operator" of an "existing source" to either shut down certain investments, reduce their output, or pay subsidies (including to competitors) to achieve an EPA-imposed, minimum threshold of emissions reduction[3] across an owner/operator's and state's power fleet in the aggregate? Did Congress allow EPA to deny states authority to make individual judgments regarding fixed costs and capital already invested—and to account for the "remaining useful life" of "any particular source" when doing so? *See* 42 U.S.C. § 7411(d)(1)(B). And did the relative "mousehole" of Section 7411(d)(1) authorize EPA to intentionally overthrow the cost economics of the American electricity industry, to alter the dispatch priority of generators on the grid, and shift generation among various sources as a "system of emissions reduction"—thereby overriding the energy, investment, and policy choices of state regulators and democratically accountable public utility

[3] The CPP set standards that EPA, in the RIA, both projected would require such shifting and also trigger it in practice. *See infra* at 104-05.

commissions? The answer to all of these questions is unambiguously "no." The CPP was rightly repealed.

EPA replaced the CPP with the ACE Rule. That rule returns to the Agency's longstanding practice under Section 7411(d). In determining the appropriate scope of regulation here, EPA faithfully executed the will of Congress. EPA determined the BSER not by broadly examining effective emission reduction techniques for the power sector as a whole. It looked instead to what systems could be applied to the particular coal-fired power plant that is the subject of regulation.

With this proper focus, EPA undertook a rigorous technical analysis. Considering the statutory factors, it identified a suite of heat rate improvement measures as the BSER. These measures, EPA concluded, would yield reductions of CO_2, and were widely available across the diverse coal-fired fleet.

EPA reasonably determined that certain other emission reduction systems that have been employed at some coal-fired power plants did not satisfy the statutory standards. For instance, carbon capture and storage is enormously expensive. It has been applied at scale to only a

single power plant in the United States. Natural gas co-firing is not broadly available across coal-fired power plants. The record showed that only about a third of power plants had such co-firing ability at all. And EPA concluded only a handful of those clearly employed co-firing for purposes of electricity generation. Tellingly, Petitioners do not seriously contest that these other technologies are cost prohibitive for most plants, or that they are only potentially applicable to some.

The heat rate improvement measures that are achievable from application of the ACE Rule's BSER do not promise the dramatic rate performance reductions that the CPP's generation shifting scheme projected. On this ground, Petitioners fault EPA for ignoring the problem of climate change. EPA did no such thing. Instead, it properly stayed within the limits of Congress's plain intent as to the scope and object of BSER. Within that scope, the Agency made a rational, technically supported decision based on the evidence before it.

EPA's definition of the degree of emission limitation achievable from the BSER is likewise consistent with the statute and supported by the record. EPA determined that the degree of emission limitation achievable from application of the suite of heat rate improvement

methods was a range of values, rather than a single number. It reflects that different power plants can impose different heat rate improvements, depending on their age, location, or design. Ironically, Petitioners fault EPA for failing to warp many provisions of Section 7411 to allow generation shifting. But they then argue they argue the phrase "degree of emission limitation achievable" does not allow for a range. This makes no sense.

Petitioners do not contest that the heat rate improvement range accurately reflect the reductions available from these technologies. Petitioners instead quibble with EPA's determinations. They suggest that EPA should have exercised its discretion differently given the importance of climate change. But Petitioners' approach is patently results-driven. They strain to paint the Agency as ignoring a key aspect of the problem. Yet, Petitioners ignore that CO_2 emissions from coal-fired power plants are plummeting as a result of market forces. Indeed, under projections for the ACE Rule, emissions from coal-fired power plants will continue to drop. The nation's coal-fired power plants are projected to emit fewer greenhouse gases under ACE by 2030 than EPA had projected plants would achieve under the CPP. And EPA obeyed the

law. For all of these reasons, the ACE Rule is a rational exercise of the Agency's authority under Section 7411(d). It must be upheld.

STATEMENT OF JURISDICTION

The consolidated petitions for review of the ACE Rule were timely filed in this Court pursuant to 42 U.S.C. § 7607(b).

STATEMENT OF THE ISSUES

The CAA, 42 U.S.C. § 7411(d), provides the EPA certain authority to regulate existing sources of air pollution, including coal-fired power plants.

1. Whether the CPP, which selected "generation shifting" at the aggregate, grid-wide level, away from coal and towards natural gas, and away from fossil fuel altogether towards renewable energy sources, as part of the BSER selected in 2015, was unlawful, requiring its repeal, because the text and structure of 42 U.S.C. § 7411 and the CAA limit EPA to basing Section 7411(d) regulations only on only emission reduction systems that are applicable to particular existing sources.

2. Whether Section 7411(d) confers authority on EPA to regulate CO_2 emissions from existing coal-fired power plants, where CO_2 emissions from new coal-fired power plants are subject to

regulation under Section 7411(b), and where EPA has not regulated CO_2 emissions under the Hazardous Air Pollutant Program in Section 7412, or National Ambient Air Quality Standards Program in Section 7410.

3. Whether EPA acted reasonably in 2019 in identifying the BSER for CO_2 from coal-fired power plants as a suite of technologies that improve a plant's heat rate, and identifying the expected emissions reductions from these technologies as a range of values, where no other technologies met the statutory criteria, and where the technologies could not be uniformly applied to yield a uniform emission reduction at all existing coal-fired power plants.

4. Whether the CAA precludes States from adopting averaging and trading programs as a method of compliance with standards of performance under Section 7411(d), where such trading programs apply among sources and may not result in the required emissions performance at an individual source.

5. Whether Section 7411(d) bars co-firing of biomass as a compliance option with standards of performance where such co-firing

indisputably does not improve a particular source's CO_2 emissions performance.

6. Whether, if a remand is necessary, it is appropriate for the Court to provide extraordinary relief and order EPA to promulgate a new rule by a set deadline.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations not contained in the Petitioners' briefs, are set forth in the addendum.

STATEMENT OF THE CASE

A. Statutory Background

1. Regulation of new and existing sources under the Clean Air Act, Section 7411.

Section 7411 "directs the EPA Administrator to list 'categories of stationary sources' that 'in [her] judgment . . . caus[e], or contribut[e] significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*) (alterations in original) (quoting 42 U.S.C. § 7411(b)(1)(A)). For each category, EPA prescribes federal "standards of performance" for emissions of pollutants from new or modified sources. 42 U.S.C. § 7411(b)(1)(B). In addition, EPA "shall

prescribe regulations" under Section 7411(d)(1) to govern state regulation of existing sources:

> The Administrator shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes *standards of performance for any existing source* for any air pollutant [subject to certain specifications] . . . .
>
> Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

42 U.S.C. § 7411(d)(1) (emphasis and paragraph break added).

Section 7411(d)(1) does not authorize EPA to regulate existing sources directly. The regulations EPA promulgates under this provision instead guide "each State" in submitting to EPA a "plan" that establishes "standards of performance" for any existing source of the relevant pollutant and the implementation and enforcement thereof. *Id.* Congress directed that EPA's regulations for Section 7411(d) "shall permit" each state plan to apply "a standard of performance" to "any particular source." And EPA's regulations are required to allow States to consider "the remaining useful life" of "the existing source" when "applying a standard of performance to any particular source." *Id.*

A "standard of performance" is defined 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 (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.

Id. § 7411(a)(1). Therefore, the "standards of performance" that States "establish" for their existing sources under Section 7411(d)(1) shall "reflect[]" the application of the best system of emission reduction as determined by EPA.

Specifically, Section 7411(d)(1), when the defined terms are replaced by their definitions as provided in Section 7411(a), reads as follows:

> The Administrator shall prescribe regulations . . . under which each State shall submit . . . a plan which (A) establishes [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] for any [building, structure, facility, or installation] for any air pollutant . . . and (B) provides for the implementation and enforcement of such standards of performance.

> Regulations of the Administrator under this paragraph shall permit the State in applying [a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction] to any particular [building, structure, facility, or installation] under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the [building, structure, facility, or installation] . . . .

42 U.S.C. § 7411(d)(1) (incorporating pertinent portions of 42 U.S.C. § 7411(a)(1), (3)) (paragraph break added).[4]

To this end, EPA identifies those "system[s] of emission reduction" that are "adequately demonstrated" for a particular source category; determines the "best" of these systems, based on the relevant criteria; and then identifies a degree of emission limitation from application of that system that is "achievable" by a source. *See* ACE Rule, 84 Fed. Reg. at 32,534/2-3.

EPA promulgates its determination in "emission guidelines,"[5] promulgated pursuant to EPA's implementing regulations that

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[4] For the Court's ease of reference, a color-coded version of Section 7411(d)(1), reflecting the incorporation of these "Definitions," 42 U.S.C. § 7411(a), into Congress's authorization for "Standards of performance for existing sources; remaining useful life of source" in Section 7411(d), is provided in the statutory addendum to this brief.

[5] The term "emission guidelines" is not in the statute. It is the label EPA chose to apply to its regulations articulating the emission

establish the framework for rulemaking under Section 7411(d). 40 C.F.R. Part 60, Subpart Ba.[6] As a practical matter, Section 7411 does not require sources to adopt the "best system." EPA instead sets an emissions guideline that EPA believes a source can achieve *if* the source applies the "best system." *See* 40 C.F.R. Part 60. The States then apply that guideline in establishing standards of performance for existing sources. *Id.* Individual sources may apply other measures to meet the standard performance. *Id.*

These implementing regulations and guidelines also provide procedures for States to submit, and EPA to approve or disapprove, the individualized state plans. The state plans specify the emission standards applicable to particular sources within a State, along with implementation measures. 42 U.S.C. § 7411(d)(1). If a State elects not to submit a plan, or does not submit a "satisfactory" plan, EPA is

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limitations under Section 7411(d) in 1975 when it first promulgated implementing regulations for that section, 40 Fed. Reg. 53,340 (Nov. 17, 1975).

[6] Subpart Ba contains the revised implementing regulations promulgated along with the ACE Rule, 84 Fed. Reg. 32,520, 32,564 (July 8, 2019). Subpart B contains the original 1975 implementing regulations.

authorized to promulgate a federal plan that directly limits emissions from the State's sources. *Id.* § 7411(d)(2).

Under Section 7411, Congress allows existing sources to be regulated less stringently than new sources. Section 7411 directs EPA to "tak[e] into account the cost of achieving" emission reductions in determining the BSER. 42 U.S.C. § 7411(a)(1). Because the cost of retrofitting controls to existing sources is typically higher than the cost of installing controls at the time a source is first constructed, EPA has long recognized that existing sources may need to be regulated less stringently than new sources. *See* State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340, 53,344 (Nov. 17, 1975). Moreover, Section 7411(d)(1) expressly directs EPA to allow States, in applying a standard of performance to "any particular source," to take into account "the remaining useful life of the existing source." 42 U.S.C. § 7411(d)(1). Although States may also consider "other factors," the "remaining useful life" factor is a critical factor that Congress *expressly* directed EPA to allow States to consider.[7]

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[7] In addition, existing sources cannot be regulated at all under Section 7411(d) in the absence of a predicate regulation of new sources in the same source category under Section 7411(b) for that pollutant. *See* 42

The various constraints on EPA's Section 7411(d) regulatory authority are consistent with that provision's role as a catch-all for pollutants not already addressed by the other regulatory mechanisms for stationary sources. Consequently, prior to the CPP, EPA has issued only six Section 7411(d) rules for existing sources. ACE Rule, 84 Fed. Reg. at 32,526/2 & n.63. By contrast, EPA has issued approximately seventy Section 7411(b) rules for new sources. *Id.* at 32,526/2.

2. Regulation of greenhouse gas emissions from power plants

In *Massachusetts v. EPA*, the Supreme Court held that the definition of "air pollutant" in the CAA can encompass "greenhouse gases"—so named because they "act[] like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat." 549 U.S. 497, 528-29 (2007) (citing 42 U.S.C. § 7602(g)). On remand, EPA assessed the effects of greenhouse gases in the atmosphere. EPA found "that six greenhouse gases taken in combination endanger both the

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U.S.C. § 7411(d)(1). Regulation of existing sources under Section 7411(d)(1) also excludes many pollutants. *Id.* Congress's predominant focus in Section 7411 on *new* sources is reflected in the title of Section 7411: "Standards of performance for new stationary sources." *Id.* § 7411; *see Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 399 (D.C. Cir. 2004) (*Cal. ISO*) ("[I]t is not too much to expect that [the section title] has something to do with the subject matter of the statute.").

public health and the public welfare of current and future generations." 2009 Endangerment Finding for Greenhouse Gases, 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA has subsequently issued a number of regulations to address greenhouse gas emissions.

Fossil fuel-fired power plants are sources of certain air pollutants. Many CAA regulatory programs apply to these plants, including in state implementation plans under Section 7410; new source performance standards under Section 7411; hazardous air pollutant regulations under Section 7412; and the regional-haze and acid-rain programs under Sections 7491-92 and CAA Title IV. *See* 42 U.S.C. §§ 7410, 7411, 7412, 7491-92, 7651–61o.

Greenhouse gases, as identified in the 2009 Endangerment Finding, are a composite of six well-mixed gases, including CO_2. The Supreme Court addressed the regulation of CO_2 from power plants in *AEP*. There, the utility industry opposed federal common law nuisance claims, citing EPA's ability to regulate power plant CO_2 emissions. *See AEP*, 564 U.S. at 410. The Court concluded that Section 7411(d) provides a means for EPA to provide the "same relief" sought by the plaintiffs—that is, limitations on power plant CO_2 emissions that would

abate their contribution to climate change. *Id.* at 412. The Court concluded that because the Act "'speaks directly' to emissions of [CO_2] from the defendants' plants," there was "no room for a parallel track," and so the Act displaced any federal common law claim that might have existed. *Id.* at 424-25.

The nation's electric utility industry features grids that interconnect electric generating capacity among certain States to varying degrees. Historically, electric utilities generally operated as state-regulated monopolies, supplying end-use customers with generation, distribution, and transmission service. CPP, 80 Fed. Reg. at 64,691/2. Vertically integrated utilities provided electricity to "states with cost-of-service regulation." *Id.* at 64,693/2. "On both a federal and state level, competition has entered the electricity sector to varying degrees in the last few decades." *Id.* at 64,691/2.

Under the Federal Power Act, "Congress limited the jurisdiction of FERC to those matters which are not subject to regulation by the States, including over facilities used for the generation of electric energy." ACE Rule, 84 Fed. Reg. at 32,530/1 (internal quotation marks omitted). States retain their traditional "authority over the need for

additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Id.* The "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Id.* n.107 (quoting *PG&E*, 461 U. S. at 205); *see also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). "[T]hese economic aspects of electrical generation have been regulated for many years and in great detail by the states." *PG&E*, 461 U.S. at 206.

3. The hazardous air pollutant program under Section 7412

Section 7412 was enacted by Congress to regulate the emission of toxic pollutants that are hazardous to public health. As amended, Section 7412 directs EPA to regulate hazardous air pollutant emissions using technology-based standards. *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 592-93 (D.C. Cir. 2016), *opinion modified*, 844 F.3d 268 (D.C. Cir. 2016). Congress identified the initial list of pollutants that were deemed to be hazardous, designating 189 hazardous air pollutants subject to regulation. It then required EPA to list "major" and "area" source categories of these pollutants, and establish emission standards for the listed sources of these pollutants. Major stationary sources are those

that emit more than ten tons per year of any covered hazardous air pollutant, or more than twenty-five tons per year of any combination of hazardous air pollutants. 42 U.S.C. § 7412(a)(1). Sources that emit lower levels of hazardous air pollutants are classified as "area sources." *Id.* § 7412(a)(2).

Congress further gave EPA specific direction regarding how it must promulgate emission standards for major sources. *Id.* § 7412(d)(1); *U.S. Sugar*, 830 F.3d at 594-95. Section 7412 requires EPA to establish national emission standards for both new and existing major sources of hazardous air pollutants. These standards must "require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable)" that the Administrator determines is achievable. 42 U.S.C. § 7412(d)(2).

To determine what is achievable, the Administrator takes existing technology, cost, and other specific factors into consideration. Accordingly, Section 7412 emission standards are referred to as "maximum achievable control technology" standards. *Id.*

These standards are set through a two-step process. *U.S. Sugar*, 830 F.3d at 594-95; *NRDC v. EPA*, 489 F.3d 1250, 1254 (D.C. Cir. 2007). For existing sources, emission standards in subcategories with 30 or more sources may not be less stringent than "the average emission limitation achieved by the best performing 12 percent of the existing sources" for which the Administrator has emissions information. *NRDC*, 489 F.3d at 1254 (internal quotation marks and citation omitted).

B. Regulatory Background

1. Overview of the Clean Power Plan

On October 23, 2015, EPA published two final rules. One established CO_2 emission standards under Section 7411(b) for new, modified, and reconstructed plants. New Source Rule, 80 Fed. Reg. 64,510 (Oct. 23, 2015).[8] The other, the CPP, established Section 7411(d) emission guidelines for States to follow in developing plans limiting CO_2 from existing plants. 80 Fed. Reg. 64,662. The CPP was immediately subject to a petition for review in this Court and motions to stay the

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[8] That rule is the subject of a separate set of consolidated petitions in this Court (Case No. 15-1381 and consolidated cases). Those proceedings are in abeyance. *See* Order, *North Dakota v. EPA*, No. 15-1381, Doc. No. 1673072 (D.C. Cir. Apr. 28, 2017). EPA has proposed revisions to that rule. 83 Fed. Reg. 65,424 (Dec. 20, 2018).

rule. *See, e.g.*, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015) (lead case). After this Court denied the petitioners' request for a stay in *West Virginia*, *id.* Doc. No. 1594951, the Supreme Court granted a stay on February 9, 2016. Order, *West Virginia v. EPA*, No. 15A773. This was the first, and to date only, time that the Supreme Court stayed an agency rule still under review by a lower court that had declined to do so.

In the CPP, EPA determined that the BSER for existing plants was a combination of three general types of pollution-control measures, referred to as "Building Blocks":

> (1) improving heat rates[9] at coal-fired steam plants (Building Block 1);
>
> (2) substituting generation [into the electrical grid] from lower-emitting existing natural gas combined cycle plants (gas plants) for generation from higher-emitting steam plants, which are primarily coal-fired (Building Block 2); and
>
> (3) substituting generation [into the electrical grid] from new zero-emitting renewable-energy generating capacity for generation from existing fossil-fuel-fired plants, which are primarily coal- or gas-fired (Building Block 3).

80 Fed. Reg. at 64,666-67.

[9] Heat rate represents the efficiency with which plants convert fuel to electricity. *See* 84 Fed. Reg. at 32,535.

For the first time, the emission guidelines EPA established based on Building Blocks 2 and 3 were not premised on measures applicable to and achievable by a particular individual facility, plant, or unit. The guidelines were based on the operation of "measures wholly outside a particular source." ACE Rule, 84 Fed. Reg. at 32,526/3. Power generators function within one of three interconnected "grids" in this country. CPP, 80 Fed. Reg. at 64,677, 64,692/1. EPA determined that when one power plant lowers its generation, another plant must provide substitute generation.

The emission guidelines that EPA derived from Building Blocks 2 and 3 were premised not on applying any emission reduction "system" at the particular fossil fuel-fired plants themselves. Instead, these building blocks "entail the production of the same amount of the same product—electricity, a fungible product that can be produced using a variety of highly substitutable generation processes—through the cleaner (that is, less CO_2-intensive) processes of shifting dispatch from steam generators to existing [gas-fired] units, and from both steam generators and [gas-fired] units to renewable generators." *Id.* at

64,776/3.[10] The CPP planned to achieve emission reductions by changing the cost economics of the power industry: "To comply with this rule, higher-emitting steam units will need greater emission reductions relative to lower-emitting [gas-fired] units which will, in turn, tend to raise steam unit costs compared to [gas-fired] units. As a result, the bids that a steam unit provides a market operator will rise relative to [gas-fired] units. This process of reducing generation from a higher-emitting unit will lead to substitution of lower emitting generation." *Id.* at 64,797/3.

Although the standards established in the CPP took the form of emission performance rates, these rates flowed from EPA's judgment as to how to reduce emissions by "shift[ing]" forms of production of electricity. *See, e.g.*, CPP, 80 Fed. Reg. at 64,728/3-29/2; *id.* at 64,795/1-803/1; *id.* at 64,803/1-11/1; *id.* at 64,811/1–19/3 (discussing EPA's "quantification of the BSER" in the form of emission performance rates). The emission performance rates were derived with an *economic* objective in mind—to change the operating costs of sources, encouraging

[10] For simplicity, natural gas combined-cycle units are referred to in this brief as "gas-fired units."

generation shifting in the industry, which would then impact *emissions*. *Id.*

EPA projected that the CPP-required emission performance rates would not be actually achieved by many existing sources. *Id.* at 64,728/1 ("[M]ost of the CO_2 controls need to come in the form of those other measures . . . that involve, in one form or another, replacement of higher emitting generation with lower- or zero-emitting generation."); *see also* ACE Rule, 84 Fed. Reg. at 32,523/1-2 ("The EPA in the CPP set standards that could only be achieved by a shift in the energy generation mix at the grid level . . . ."). EPA intended the standards set would instead be achieved by a change in the mix of electricity generation within the market as a whole, including by economically disadvantaging some existing sources to the benefit of others. *See, e.g.*, *id.* at 64,728/1, 64,723/2-24/1, 64,769/1-2 (describing measures the CPP concluded could be used to comply with its standards); *id.* at 64,749/2; ACE Rule, 84 Fed. Reg. at 32,523/1-2, 32,526/2-27/1, 32,530/3.

The CPP thus expected to rely extensively on tradable "emission rate credits" to implement Building Blocks 2 and 3. *See* CPP, 80 Fed. Reg. at 64,733-34/1 (such credits are "an integral part of [EPA's] BSER

analysis" underlying the CPP's performance rates). Otherwise, many individual sources in States would be unable to comply and would be forced to shut down or severely reduce utilization. *See* CPP, 80 Fed. Reg. at 64,731-36 (expected compliance methods); CPP RIA, Ch. 3 at 21-33 (projected impacts of CPP), JAXXXX-JAXXXX. An individual "owner or operator," defined in Section 7411(a)(5), was expected to comply in this way.

For instance, an owner/operator could account for all of the emissions from its fleet of electric generating units, and thereafter shift its mix of generating units or output within its fleet, toward more renewable energy plants. 80 Fed. Reg. at 64,804/3-805/2. Another unique aspect of the CPP compared to prior Section 7411(d) rules is that the BSER would facilitate credit trading among both regulated *and non-regulated* entities. Specifically, although not regulated under Section 7411(d), EPA designed the CPP so that new renewable energy electric generating units could generate tradeable emission credits that regulated entities would purchase to comply. *See* CPP, 80 Fed. Reg. at 64,734/1.

In other words, EPA in the CPP designed a rule, ostensibly governing performance standards for existing sources, under which sources would comply *not* by actually achieving those standards in terms of their own emissions performance. Rather, they would purchase or otherwise obtain credits arising from lower- or zero-carbon-dioxide-emitting generation occurring at other regulated sources or at facilities outside of any regulated source category.

EPA's Regulatory Impact Analysis (RIA) found that the CPP would lead to significant shifts in how electricity was generated in the United States compared to a base case in which the CPP was not promulgated. *See infra* at 103-05. The RIA noted the ripple effects in related markets such as coal production. *Id.*

In another departure from all prior Section 7411 rules, the CPP imposed requirements on each State to meet a state-specific rate- or mass-based "goal" (*i.e.*, budget or cap) for the emissions performance of all of its coal and gas plants in the aggregate.[11] *See id.* at 64,961-63.

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[11] The final CPP also offered states the alternative option of meeting default nationwide emission performance rates. *See* CPP, 80 Fed. Reg. at 64,961. These rates suffered from similar problems as EPA's state-wide goals.

These statewide caps would not be achieved by any particular plant on its own.[12] These state "goals" were derived from "baselines" reflecting existing generating units in the States. *Id.* at 64,821/2. EPA created a complex calculation, evaluating each state's electrical generation system, and EPA assessed the potential for future electrical generation development in the direction of enhanced renewable power sources. *Id.* at 64,820-26. EPA further calculated—to multiple decimal points—the capacity of each of the nation's three regional interconnection to increase renewable energy generation in each of the years from 2022 to 2030. *See id.* at 64,808-09.

Under these state caps, States were to consider all statewide emissions from electric generating units *in the aggregate*. Meeting the statewide rate-based caps would entail blending existing plants' performance with credits obtained from new or expanded lower-

[12] Doing so would either require measures that EPA determined would be prohibitively costly to constitute the BSER (such as co-firing) or, in some instances, were technologically impossible and would require, e.g., severely reduced utilization. CPP, 80 Fed. Reg. at 64,728/1, 64,749/2; ACE Rule, 84 Fed. Reg. at 32,523/1-2, 32,526/2-27/1, 32,530/3. EPA made clear that it was only the credit trading scheme incentivizing the aggregate shift of generation across the grid from one type of fuel source to another that made the performance rates achievable. *See* CPP, 80 Fed. Reg. 64,873, n.859.

emitting or new renewable generation. EPA projected that States would "incorporate emissions trading, and it is reasonable to expect that States will do so. These approaches lower overall costs." *Id.* at 64,726/1. Meeting the mass-based caps would similarly require a blending of source and extra-source actions, particularly the beyond-the-source "shifting" of generation from existing plants to lower-emitting or renewable sources. EPA designed the CPP for owner/operators to meet the EPA-prescribed state caps primarily by shifting electricity generation. In short, States would meet their "goals" in the aggregate, by lowering production from some sources and increasing it *elsewhere* (gas plants or renewable energy plants).

The CPP thus departed from EPA's long-held understanding of Section 7411(d) in several respects. Prior to the CPP, "[e]very one of [EPA's Section 7411(b) and 7411(d)] rulemakings applied technologies, techniques, processes, practices, or design modifications directly to individual sources."[13] ACE Rule, 84 Fed. Reg. at 32,526/2. EPA's

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[13] Certain Petitioners point to the Clean Air Mercury Rule, now vacated, which tried to include a form of trading as BSER. *See* Con. Ed. Br. at 27. As EPA noted in the ACE Rule—and discussed further below, *see infra* at 104-05—that rule's approach was fundamentally different from the CPP's. *See* ACE Rule, 84 Fed. Reg. at 32,526 n.65.

approach to regulation under Section 7411 was constrained to issuing standards of performance predicated on systems employed at a particular source to improve its emissions performance. These included, for example, add-on controls, operational changes, and the use of particular fuels. *See id.* at 32,524/2, 32,528/3. And no EPA Section 7411 rules had imposed a statewide cap constraining state consideration of the remaining useful life and other factors at any existing source.[14]

In short, the CPP represented a wholly new approach under Section 7411. EPA determined that the BSER was "generation shifting": consciously changing the cost structure of the electric power industry to shift the aggregate balance of production of a good (electricity) from some existing facilities (for example, coal-fired facilities) to other producers (for example, renewable energy facilities), with an attendant impact on emissions. *See supra* at 30-32 (describing the CPP's building blocks).

[14] *See infra* at 72, n.20 *see also supra* at 37, n.13.

2. Overview of the Affordable Clean Energy Rule

On June 19, 2019, EPA signed the Affordable Clean Energy Rule (ACE Rule). The Rule was published in the Federal Register on July 8, 2019. 84 Fed. Reg. 32,520. The ACE Rule finalized three separate and distinct rules. First, EPA repealed the CPP. Second, EPA finalized replacement Section 7411(d) emissions guidelines premised on an alternative regulatory approach to that set forth in the CPP. Third, EPA finalized new regulations for EPA and state implementation of those guidelines and any future emissions guidelines issued under Section 7411(d).[15] (For ease of reference, the three actions are referred to as the ACE Rule.)

a. Repeal of the Clean Power Plan

The ACE Rule returned to the Agency's longstanding approach to Section 7411 before the CPP. EPA concluded that it was required to

[15] These regulations were originally promulgated in 1975. As the ACE Rule noted, the 1975 regulations needed to be updated to reflect Congressional intent following the 1977 and 1990 CAA Amendments. *See* ACE Rule, 84 Fed. Reg. at 32,564/1-2.

repeal the CPP because Building Blocks 2 and 3 exceeded EPA's statutory authority.[16] ACE Rule, 84 Fed. Reg. at 32,521/1.

The ACE Rule reasoned that under Section 7411(d)(1), States are to develop plans establishing "standards of performance *for any existing source*." 42 U.S.C. § 7411(d)(1) (emphasis added); ACE Rule, 84 Fed. Reg. at 32,523/3-24/1. The focus of this provision is on the "existing source," which is referenced in the singular no fewer than three times. 42 U.S.C. § 7411(d)(1); *see also* 84 Fed. Reg. at 32,523/3, 32,524/2, 32,532/2. When States establish these standards of performance, they must be permitted to apply them at "any existing source," and to permit, as to a "particular source," consideration of "the remaining useful life" of "the existing source." 42 U.S.C. § 7411(d)(1).

EPA concluded that "[g]iven how Congress has defined the phrase 'standard of performance' for purposes of [Section 7411], the plain meaning of CAA section [74]11(d), therefore is that states shall submit a plan which 'establishes [a standard for emissions of air pollutants

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[16] The CPP rejected Building Block 1 in the absence of the other building blocks. *See* ACE Rule, 84 Fed. Reg. at 32,527 n.69. EPA also separately found in the ACE Rule that Building Block 1 as contained in the CPP would not reflect the BSER due to EPA's change in approach to analyzing heat rate measures. *Id.*

which reflects the degree of emission limitation achievable through the application of the [BSER] . . .] for any existing source.'" ACE Rule, 84 Fed. Reg. at 32,523/1-24/1. In light of this, EPA concluded that the BSER plainly cannot "contain measures other than those that can be put into operation at a *particular* source." *Id.* at 32,532/2 (emphasis added).

The ACE Rule further stated that the term "existing source" is statutorily defined. It means—as relevant here—a "building, structure, facility, or installation." 42 U.S.C. § 7411(a)(3), (6). It does not include the source's "owner or operator," which is a separately defined term. *Id.* § 7411(a)(5); ACE Rule, 84 Fed. Reg. at 32,527/3.

As the ACE Rule noted, "standard of performance" is defined, in pertinent part, 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." *Id.* at 32,523/2 (citing 42 U.S.C. § 7411(a)(1)) (emphases added). The ACE Rule concluded that the CPP unlawfully treated a key statutory term ("application") as if it were an entirely different word ("implementation"). This, combined with other errors of interpretation,

produced an impermissibly broad reading of this provision contravening the plain statutory text. *See id.* at 32,527/1-3.

As the ACE Rule explained, Congress's choice of the word "application" requires that the "best system of emission reduction" must apply "*to* another object (i.e., the source [of emissions])." *Id.* The ACE Rule concluded that the only coherent statutory referent to which this "best system of emission reduction" could "apply" is the individual "existing source" that is to be the subject of the state standard of performance. *Id.* EPA also observed that the structure and purpose of the statute similarly require that the BSER be applied to individual sources. *Id.* at 32,524/3-26/1.

Moreover, the ACE Rule concluded that the CPP adopted a "maximally broad" view of EPA's authority that departs from the statutory text. *Id.* at 32,528/1-3. It inappropriately read "system" to allow EPA to take nearly any approach whereby owners and operators could reduce emissions under some chain of causation. *Id.* The Agency explained that this expansion of EPA's authority was untenable because—among other things—it inappropriately construed "system" to offer an "'infinitude' of possibilities." *Id.*

The ACE Rule further concluded that the CPP's attempt to shift the mix of electricity generation required a clear statement from Congress authorizing this approach. *See id.* at 32,529/2 (noting that, although EPA's interpretation was the only permissible reading of the CAA, even without reference to the "major questions" doctrine, that doctrine further supported its conclusion). The Agency also reasoned that this sweeping view of EPA's authority would encroach on the sovereignty of States to determine the "facilities used for generation of electric energy" followed by "questions of need, reliability, cost, and other related state concerns." *Id.* at 32,530/1. The Agency also determined that reading the CAA to authorize EPA to require state "shifting" of electricity generation from such facilities requires that Congress's intent to authorize this approach be unmistakable from the statutory text. *Id.* at 32,529/3-31/1.

EPA thus concluded that, because the CPP "significantly exceeded the Agency's authority, it must be repealed." *Id.* at 32,523/1-2.

b. The ACE Rule's emission guidelines

EPA considered several systems of emissions reduction as part of the ACE Rule, including natural gas repowering, co-firing, and

refueling; biomass co-firing; carbon capture and storage; and heat rate improvement measures. ACE Rule, 84 Fed. Reg. at 32,543-49. EPA determined that a suite of heat rate improvement methods was the BSER for reducing CO_2 emissions from existing coal-fired power plants.[17] *See id.* at 32,535-36. Building Block 1 of the CPP was also based on heat rate improvement, although the ACE Rule's design is different from that aspect of the prior rule. CPP, 80 Fed. Reg. at 64,666-67. Electricity generating units with lower heat rates operate more efficiently. This reduces the amount of fuel they consume per kilowatt-hour of electricity generated, resulting in a lower emission rate. ACE Rule, 84 Fed. Reg. at 32,535. EPA's analysis of heat rate data indicated that there was the potential for heat rate improvement across the source category of existing coal-fired power plants. *Id.*

EPA identified seven heat rate improvement methodologies as "candidates" for application to existing coal-fired sources, depending on

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[17] The regulated pollutant in both the ACE Rule and the related Section 7411(b) 2015 New Source Rule is greenhouse gases, with the emission guidelines and standards in the form of a limitation on CO_2. *See* 40 C.F.R. 60.5705a(a), 60.5515(a). Thus, though the regulated pollutant is the group of greenhouse gases, the agency's discussion in both the record and this brief frequently refers to CO_2.

the particular circumstances of that source. So the ACE BSER included not just technological changes, but operational practices applicable to the source as well. These candidate systems were found to be the "most impactful" because they "can be applied broadly and are expected to provide significant heat rate improvement without limitations due to geography, fuel type, *etc.*" *Id.* at 32,536. EPA further supported its analysis with a detailed assessment of each candidate methodology. *Id.* at 32,538-41. EPA determined that each candidate was cost-reasonable in light of its associated emissions reductions, noting also that these measures may reduce expenses by reducing fuel costs. *Id.* at 32,541-42.

EPA also calculated the expected minimum and maximum heat-rate improvement—*i.e.*, the degree of emission limitation achievable through application of the BSER—associated with each such technology or practice. EPA provided this information in Table 1 of the ACE rule:

TABLE 1—SUMMARY OF MOST IMPACTFUL HRI MEASURES AND RANGE OF THEIR HRI POTENTIAL (%) BY EGU SIZE

HRI Measure	<200 MW		200–500 MW		>500 MW	
	Min	Max	Min	Max	Min	Max
Neural Network/Intelligent Sootblowers	0.5	1.4	0.3	1.0	0.3	0.9
Boiler Feed Pumps	0.2	0.5	0.2	0.5	0.2	0.5
Air Heater & Duct Leakage Control	0.1	0.4	0.1	0.4	0.1	0.4
Variable Frequency Drives	0.2	0.9	0.2	1.0	0.2	1.0
Blade Path Upgrade (Steam Turbine)	0.9	2.7	1.0	2.9	1.0	2.9
Redesign/Replace Economizer	0.5	0.9	0.5	1.0	0.5	1.0
Improved Operating and Maintenance (O&M) Practices	Can range from 0 to >2.0% depending on the unit's historical O&M practices.					

Id. at 32,536-37. EPA explained, however, that the specific heat rate improvement technologies or practices applicable to particular sources will vary. *See id.* at 32,535-36, 32,538. For example, certain technologies may not be technically feasible at some sources and certain sources have already implemented some of these measures. *See id.* EPA thus expressed the degree of emission limitation achievable through the application of heat rate improvement measures as a range of values, rather than a single number. *Id.* States must use this information to conduct unit-specific evaluations to determine the appropriate standards of performance. *Id.* at 32,537-38. Where the State fails to submit a satisfactory plan, however, EPA retains the authority to prescribe a plan for a State. *Id.* at 32,558/2.

One issue on which EPA had expressly solicited comment in the proposed rule was the potential for a "rebound effect" to occur. *Id.* at 32,542 (discussing the comments received). Specifically, EPA considered whether "it is possible that certain sources increase in generation (relative to some baseline) as a result of lower operating costs from adoption of the candidate technologies," leading to "a net increase in emissions from a particular facility." *Id.* In the final rule, EPA

explained that its analysis and modeling demonstrated that, while there were instances where a limited number of facilities might increase their net emissions after making heat rate improvements, the overall effect of these improvements would still be to reduce emissions. *Id.*; *see also id.* at 32,543.

Moreover, EPA explained that, even to the extent that a rebound effect was observed, the Rule was consistent with the CAA because the Rule was appropriately directed toward improving each source's emissions rate. *Id.* at 32,543 (noting that "Congress expressly acknowledged that standards of performance were to be expressed as an emissions rate"). Finally, States were left with discretion to address any rebound effect at a designated facility in setting standards of performance. *Id.*

c. State plan development

The ACE Rule provides that States must "evaluat[e] each" of the seven heat rate improvement technology or processes identified in Table 1, in establishing standards of performance for its existing sources. 84 Fed. Reg. at 32,580. The State will then establish a standard of performance based on that evaluation for each source. A State will

provide a summary to EPA, to include an evaluation of the degree of emission limitation achievable through application of the heat rate improvements that are identified in Table 1. *Id.* at 32,580/3. The summary must also "include a demonstration that each designated facility's standard of performance is quantifiable, permanent, verifiable, and enforceable." *Id.* at 32,580/1-81/1.

The State must also provide the plant's "annual generation," "CO_2 emissions," "[f]uel use, fuel price, and carbon content," "operation and maintenance costs," "[h]eat rates," "[e]lectric generating capacity," along with the "timeline for implementation," among others. *Id.* at 32,581/1. The regulation states that the plans must "adequately document and demonstrate the methods employed to implement and enforce the standards of performance such that EPA can review and identify measures that assure transparent and verifiable implementation." *Id.* at 32,558/2.

States have three years after EPA promulgates new emission guidelines to submit a state plan. 40 C.F.R. § 60.23a; 42 U.S.C. § 7410(a)(1). Within 60 days of receipt of a state plan, EPA must determine whether it is complete. 40 C.F.R. § 60.27a(g)(1); 42

U.S.C. § 7410(k)(1)(B). If EPA fails to make such a finding, the state plan will be deemed complete by operation of law. *Id.* Once a state plan is determined to be complete, EPA must take action to approve or disapprove the plan within one year. 40 C.F.R. § 60.27a(b); 42 U.S.C. § 7410(k)(2). If EPA finds that a State failed to submit a required plan, determines a plan to be incomplete, or disapproves a plan in whole or in part, then EPA must promulgate a federal plan within two years. 40 C.F.R. § 60.27a(c); 42 U.S.C. § 7410(c)(1).

SUMMARY OF ARGUMENT

1. The CPP was unlawful, requiring its repeal. The plain language of Section 7411(d), read using the traditional tools of statutory construction, expressly limits EPA's authority when selecting a BSER to those systems that can be applied to a particular, individual building, structure, facility, or installation, and achievable at such a source. The CPP adopted an impermissibly broad view of EPA's authority. It was based, in part, on its erroneous reading of the word "system," shorn from its context in the statutory provision defining the term "standard of performance." It also depended on implementing this system beyond the "source," by way of the "owner or operator" of sources. This reading,

which underpinned the Agency's finding that the BSER was "generation shifting" from coal-fired power plants to other sources, is contrary to the statute's express terms and structure. Moreover, this aggressive and unsupported interpretation cannot be correct because, among other reasons, Congress does not delegate such broad authority to an agency without a clear statement, especially when it would reach—and reach deeply—into traditional areas of state sovereignty. Here, Congress provided no such clear statement.

2. Section 7411 provides EPA with authority to regulate CO_2 emissions from existing coal-fired power plants. The ACE Rule lawfully regulates these existing sources based on EPA's 2015 New Source Rule for CO_2 from fossil-fuel fired power plants. The challenge claiming that EPA failed to make a pollutant-specific endangerment finding as part of the 2015 New Source Rule is an impermissible, time-barred collateral attack on that other rule. In any event, EPA did make such a finding in the alternative in that rule, although its position there was that it was not required.

Section 7412, which provides for regulation of hazardous air pollutants, does not bar regulation of coal-fired power plants under

Section 7411(d). As part of the 1990 Amendments to the CAA, both the Senate and House drafted amendments to Section 7411(d). Both amendments permit regulation of coal-fired power plants here, notwithstanding the fact that pollutants from those power plants are regulated under Section 7412. Lastly, nothing in Section 7410 bars regulation under Section 7411(d).

EPA need not regulate CO_2 under the National Ambient Air Quality Standards (NAAQS) program. Petitioners lack standing to bring this challenge, and it is untimely. Regardless, EPA had no such obligation.

3. EPA's determination of the BSER in the ACE Rule, and its identification of the degree of emission limitation achievable from application of the BSER, are rational and supported by the record. The Agency comprehensively reviewed the CO_2 reduction technologies and processes that met the standard set forth by Section 7411. The only systems available across the fleet, at reasonable cost, were the suite of heat rate improvement methods EPA selected as the BSER. These systems bring about reductions in power plants' CO_2 emissions and are otherwise reasonable. EPA then quantified the degree of emission

limitation achievable from application of these methods as a range of values. This range of values provides a standard for States to apply in formulating standards of performance. EPA then confirms state plans are satisfactory. Nothing more is required by statute or regulation.

4. The ACE Rule correctly concluded that Section 7411(d) required that a State plan's compliance measures—like the BSER itself—must be applied to a particular source. For this reason, EPA concluded that trading and averaging, which are applied *among* the source category as a whole and not to an individual source, were impermissible. Nothing in the CAA's savings clause, Section 7416, requires a contrary result. This provision does not speak to compliance measures in any respect.

5. For similar reasons, biomass co-firing was properly excluded as a compliance measure. Biomass co-firing does not reduce CO_2 emissions at the source—it increases them. Thus, the CAA expressly precludes biomass co-firing from being used for compliance with a state plan under Section 7411(d). Other, outside-the-source considerations are irrelevant to this conclusion.

6. The Court should not order EPA to promulgate a new rule regulating existing coal-fired power plants on particular deadlines if the ACE Rule is found to be inval*id*. The hypothetical possibility of some delay in the future is not a basis for imposing such extraordinary relief now.

STANDARD OF REVIEW

Questions of statutory interpretation are governed by the test set forth in *Chevron*, 467 U.S. 837, 842-45. Courts "first employ the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue." *Cal. ISO*, 372 F.3d at 399. This examines whether an agency interpretation "is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845. Congress's intent is determined by examining the statutory provision's "text, context, and purpose." *Coventry Health Care of Mo. v. Nevils*, 137 S. Ct. 1190, 1197 & n.3 (2017).

"[I]f Congress intends" a federal law to intrude on an area of traditional State sovereignty, Congress must do so in a fashion that is "unmistakably clear in the language of the statute." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks and

citation omitted). Congress must also "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *UARG*, 573 U.S. at 324 (internal quotation marks and citation omitted). After applying these tools, "[i]f the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842–43. Where "Congress did not actually have an intent," courts then examine if an agency interpretation "is a reasonable choice within a gap left open by Congress." *Id.* at 845, 866.

The Court may reverse EPA's action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or in excess of EPA's "statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(1)(E), (d)(9)(A), (C). This standard is narrow, and the Court does not substitute its judgment for EPA's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This Court gives an "extreme degree of deference" to EPA's "evaluation of scientific data within its technical expertise," especially "EPA's administration of the complicated provisions of the Clean Air Act." *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015) (internal quotation marks and citation omitted). In addition, the Court's review is "particularly deferential in matters implicating predictive judgments," requiring only that "the agency acknowledge factual uncertainties and identify the considerations it found persuasive." *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105, 1108 (D.C. Cir. 2009).

ARGUMENT

I. The Clean Power Plan Was Unlawful, Requiring Its Repeal.

After an unprecedented stay by the Supreme Court, hundreds of pages of legal briefing, and hours of oral argument regarding the legality of that controversial emissions program, EPA reconsidered the CPP. EPA correctly repealed it.

A. Applying Traditional Tools of Statutory Construction for Determining Congress's Intent, the CPP Unambiguously Exceeded EPA's Authority Under Section 7411(d)(1).

The starting point is the text of the statute. *United States* v. *Quality Stores, Inc.*, 572 U.S. 141, 145 (2014). Before going to *Chevron* Step 2, "we first employ the traditional tools of statutory construction" to determine Congress's intent. *Cal. ISO*, 372 F.3d at 399. An agency may not adopt an interpretation if it "is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845. Doing so reveals that Section 7411(d)(1) unambiguously precludes the CPP's novel adoption of "generation shifting" as BSER. It is not "within a gap left open by Congress." *Id.* at 866.

In particular, and incorporating the pertinent parts of the statutory definitions, Section 7411(d)(1) provides that:

> The Administrator shall prescribe regulations . . . under which each State shall submit . . . a plan which (A) establishes [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] for any [building, structure, facility, or installation] for any air pollutant . . . and (B) provides for the implementation and enforcement of such standards of performance.

> Regulations of the Administrator under this paragraph shall permit the State in applying [a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction] to any particular [building, structure, facility, or installation] under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the [building, structure, facility, or installation] . . . .

42 U.S.C. § 7411(d)(1) (incorporating pertinent portions of 42 U.S.C. § 7411(a)) (paragraph break added); *see also* Statutory Addendum at ADD01 (color-coded version of statutory text with definitions incorporated).

In this vein, Petitioners are exactly right that EPA has relied on a "chain of definitions" in understanding Section 7411(d)(1). *See* Con. Ed. Br. at 10-12. This is the purpose of definitional sections: to be read into the operative provision. "[A]mbiguity is a creature not of definitional possibilities but of statutory context." *Cal. ISO*, 372 F.3d at 400. For that reason, reading a definitional provision in isolation, rather than in the context of the statutory provisions it defines, is erroneous. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

1. The plain text of Section 7411(d)(1) requires systems applied to and emission limits achievable by individual sources.

When Section 7411(d)(1) is so read, directly informed by the definitions in Section 7411(a)—so that no (i) word choice, (ii) single versus plural number, (iii) preposition, or (iv) grammatical nuance selected by Congress is lost—the plain meaning of the provision is clear. The provision unambiguously requires that state plans establish standards of performance reflecting the degree of emission limitation achievable through the application of the BSER to and at an individual existing source—i.e., any building or facility subject to regulation. It also requires that EPA must allow States to take into consideration each and every particular source's remaining useful life and other factors. The CPP is contrary to this provision.

First, it is not Section 7411(a) ("Definitions") that grants the agency authority to act. Unlike Section 7411(d), which is the provision actually authorizing EPA's existing-source regulations, both the content and the heading of Section 7411(a) clearly show that the provision is definitional and subsidiary to Section 7411's actual regulatory

programs. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (holding section is instructive on provision's meaning).

"Standard of performance" is a defined term. 42 U.S.C. § 7411(a)(1). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *UARG*, 573 U.S. at 320 (quotation marks omitted). Attempting to start with and read a definitional provision like Section 7411(a)(1) in a vacuum, as if that "Definition" is freestanding regulatory authority separate from the provisions in which it is inserted, violates this fundamental canon. It is putting the cart before the horse.

Tellingly, not one Petitioner advocating that the CPP was improperly repealed—throughout some 160 pages of briefing—ever completely quotes Section 7411(d) for this Court. They frequently jump to and block quote Section 7411(a), as if that Section were Congress's grant of authority and total expression of relevant limitations. But they relegate the language of Section 7411(d)(1)—again, the provision under which the CPP was actually issued—to snippets. These are frequently reordered, paired, paraphrased, or mixed with words Congress didn't

use, which obscures Congress's plain meaning. *See, e.g.*, State and Municipal Pets. Br. (State Pets. Br.) at 6-7, 37-38, 43, 46; Con. Ed. Br. at 12, 26.

Second, Section 7411(d) unambiguously requires EPA to permit state plans to consider individualized factors—including remaining useful life—at "*any* particular" existing source. 42 U.S.C. § 7411(d)(1)(B) (emphasis added). The phrase "any existing source" is in the singular, demonstrating a focus on each *individual* existing source. Moreover, "existing source" means "any stationary source other than a new source." *Id.* § 7411(a)(6). In relevant part, a "stationary source" is limited to a "building, structure, facility, or installation." *Id.* § 7411(a)(3). Applying these definitions—an exercise in statutory interpretation so fundamental and mandatory that it barely qualifies as "interpretation" at all—unambiguously confirms that the focus of Section 7411(d)(1) is on establishing "standards of performance for any [building, structure, facility, or installation]." *Id.* § 7411(d)(1).

The focus on the singular "existing source" is pervasive in Section 7411(d)(1). Congress commands EPA "shall permit the state in applying a standard of performance" to consider "*the* remaining useful life" of "*the*

existing source" (again, all singular) for "*any* particular source" to which such standard applies. *Id.* (emphases added); *see also* ACE Rule, 84 Fed. Reg. at 32,524/2; *id.* at 32,526/3 (the CPP, for the first time, required measures "wholly outside a particular source"); *id.* at 32,532/2 ("Congress spoke directly in *Chevron* step one terms to the question of whether the BSER may contain measures other than those that can be put into operation at a particular source: It may not.").

Third, in considering whether a system is valid, the "Definition" of "Standard of performance" in Section 7411(a) must also be considered in the context in which Congress used that term: Section 7411(d)(1). A "standard of performance" is to reflect the degree of emission limitation "*achievable* through the *application* of the best system of emission reduction." 42 U.S.C. § 7411(a)(1) (emphasis added). The relevant context obviously must include Congress's definition of "existing source," which incorporates the meaning of the term "stationary source." *Id.* § 7411(a)(2), (3) & (6). Reading the definitions into their full and proper context of Section 7411(d)(1) confirms that States must be empowered to apply and tailor a standard for each particular building, structure, facility or installation:

> the Administrator … shall permit the State in applying a standard [which reflects the degree of emission limitation achievable through the application of the best system of emission reduction] to any particular [building, structure, facility, or installation] … to take into consideration, among other factors, the remaining useful life of the [[building, structure, facility, or installation]] . . . .

Id. § 7411(d)(1).

Read in context and not unmoored from it, Congress directs that the standard of performance derived from "the best system of emission reduction" is to be "for any existing source," *singular*—at the individual rather than source category level. *Id.*; *see also* ACE Rule, 84 Fed. Reg. at 32,524/2. By extension, the planned standard is for "any particular [building, structure, facility, or installation]." *Id.* EPA must also allow States to account for "the remaining useful life of the [building, structure, facility, or installation]." 42 U.S.C. § 7411(d)(1). And as the state plan is designed to establish standards that "reflect[ ] the degree of emission limitation achievable through the application of the [BSER]" "for" an individual source (singular), the natural reading is that the methods planned would be "for" and act at the level of the singular, individual source. *See also infra* at 64-65, 128-29 (further explaining significance of preposition "for").

Notably, the very next subsection stands in contrast to Section 7411(d)(1). There, Congress uses the plural form when referring to "sources in the *category* of sources," should EPA be called upon to set such standards because a "State fails." 42 U.S.C. § 7411(d)(2) (emphasis added). "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015); *Russello v. United States*, 464 U.S. 16, 23 (1983).

To be clear, EPA cannot depart from source-specific BSER when designing a federal plan under Section 7411(d)(2), any more than it could when setting new-source standards under Section 7411(b). But Congress's use of repeated source-specific language in Section 7411(d)(1) places additional emphasis on the limitations of the scope of EPA's authority to determine BSER.

Fourth, the text of Section 7411(d)(1) can only plausibly be read to reflect that States have authority to fully take into account "*the* remaining useful life of *the existing source*" on an individualized basis. 42 U.S.C. § 7411(d)(1) (emphases added). And Congress meant for a State's authority "in applying *a* standard of performance to *any*

particular source" to include the authority to consider "*the* remaining useful life" of each and every building, structure, facility, or installation so regulated. *Id.* (emphases added). The centrality of the "remaining useful life" provision to the structure and purpose of Section 7411(d) is reflected in that provision's title: "Standards of performance for existing sources; remaining useful life of source." This clause is not a suggestion or an afterthought. Congress deemed a State's authority to avoid the stranding of capital investment and ensure the continued productivity of such legacy investments to be integral to the way the existing-source program should work.

Fifth, in contrast with EPA's direct regulation of new "sources," plural, under Section 7411(b), Congress did not authorize EPA to directly establish nationwide standards of performance for existing sources in Section 7411(d)(1). EPA's role as to existing sources is to "prescribe regulations" for state planning. *Id.* Then, "each State shall submit . . . a plan which (A) establishes standards of performance for any existing source," singular. *Id.* Thus, Section 7411(d)(1) is describing the content of each State's "plan." That's why Congress uses the preposition "for" in Section 7411(d)(1)(A)—it is describing the contents

"for" the state "plan" that is to "establish standards of performance for any existing source." And this reinforces that EPA rules governing State existing-source planning are limited to measures that can be applied to and achieved at and by particular sources.

2. Section 7411(a)(1), when read in the context of Section 7411(d), confirms that the BSER for an existing source is restricted to systems that can be applied to a particular source.

Petitioners attempt to divert the Court's attention to anywhere but Section 7411(d). They point instead to a litany of terms in Section 7411(a)(1), which they divorce from their statutory context. In doing so, they stake out extreme positions. They say that Section 7411(a)(1) (the definitional section) and Section 7411(d)(1) (the grant of authority in which the definition is used) serve "distinct functions," and that it is improper for EPA to read them together. *See* Con. Ed. Br. at 12-13; *cf.* State Pets. Br. at 46 ("different phases of the regulatory process"). This is a remarkable species of argument, contrary to basic principles learned in statutory interpretation 101. It ignores the very purpose of Congress when it sets out definitions: that these definitions be read into the relevant provisions. When read in context with EPA's authority to

regulate in Section 7411(d)(1), the words and phrases of Section 7411(a)(1) further confirm that the "best system of emission reduction" must be applied to and achievable by a particular "building, structure, facility, or installation." 42 U.S.C. § 7411(a)(3).

A "standard of performance" is defined to "reflect[] the degree of emission limitation achievable through the *application* of the [BSER]." *Id.* § 7411(a)(1) (emphasis added). This reinforces that, when designing regulations under Section 7411(d)(1), EPA is allowed to impose requirements based *only* on those systems that can be *applied* to the particular "existing source" itself.

In the absence of a legislative definition of "application," the ordinary meaning of the term controls. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). The ordinary meaning of "application" refers to the "act of applying" or "act of putting to use" and "requires both a direct object and an indirect object." ACE Rule, 84 Fed. Reg. at 32,524/1-2 & n.35 ("In other words, someone must apply *something* to

something else (e.g., the application of general rules to particular cases).").[18]

Several different dictionaries confirm this usage. The Oxford English Dictionary defines "application" as "[t]he action of bringing something to bear *upon another* with practical results; the action of causing something *to affect another*; an instance of this." *Application*, Oxford English Dictionary (3d ed. 2020) <https://www.oed.com/view/Entry/9705> (emphasis added). The version of the Oxford English Dictionary extant when Section 7411(a)(1) was last amended is in accord. ACE Rule, 84 Fed. Reg. at 32,524/1 n.35 (providing further examples).[19]

The CAA reinforces that Congress uses "application" and "apply" consistent with this ordinary use. Section 7411(d) twice uses "apply" in conjunction with a particular "source" as its indirect object. *See* 42

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[18] An indirect object "indicates the person or thing that receives what is being given or done." *See* <https://www.merriam-webster.com/dictionary/indirect%20object>.

[19] *See also Apply*, Black's Law Dictionary, 124 (11th ed. 2019) ("2. To employ for a limited purpose <apply payments to a reduction in interest>. 3. To put to use with a particular subject matter <apply the law to the facts> <apply the law only to transactions in interstate commerce>.").

U.S.C. § 7411(d)(1) ("[T]he State in applying a standard of performance to any particular source . . . ."); *id.* § 7411(d)(2) ("[S]ources to which such standard applies."). So too, with Section 7411(h)(2)(B): "the application of measurement methodology to a particular class of sources." *Id.* § 7411(h)(2)(B). Similar examples abound in other sections of the CAA. *See, e.g.*, *id.* §§ 7412(d)(2), 7412(h)(2)(B), 7403(f)(2)(B)(ii).

As discussed above, Section 7411(a)(1) cannot be understood in isolation from the context of the provision in which the definition is used: Section 7411(d). Because Sections 7411(b) and (d) regulate different facilities (respectively, new and existing sources), each of them supplies a different indirect object and other terms and limitations—*i.e.*, different context—for the generic definition in Section 7411(a)(1). Section 7411(d)(1) provides that the indirect object for Section 7411(a)(1) is a particular "existing source" by specifying that "each State shall submit to the Administrator a plan which (A) establishes standards of performance for *any existing source*," singular. *Id.* § 7411(d)(1) (emphasis added); *id.* ("particular source"; "the existing source"); *see* ACE Rule, 84 Fed. Reg. at 32,524/1-2.

To the extent it is relevant, the history of Section 7411(a)(1) confirms that Congress intended that EPA implement Section 7411 through rules based on systems consisting of those control technologies and techniques that can be applied to an individual source. *See* 84 Fed. Reg. at 32,525/2-26/2 (citing House and Senate reports that describe the draft versions of what became Section 7411 as regulation for how sources are "designed and equipped" (House Conference report) or "designed, built, equipped, operated, and maintained" (Senate report)). As discussed in the ACE Rule, for Section 7411(d), both the House and Senate were entirely focused on steps that can be taken at and by individual sources to reduce emissions. There is no suggestion that Congress intended to confer on EPA the breathtaking authority the agency later assumed for itself for a short period of time prior to the unprecedented stay entered by the Supreme Court.

By contrast, the CAA does not authorize EPA to "select as the BSER a system that is premised on application to the source category as a whole or to entities entirely outside the regulated source category." *Id.* at 32,524/2 (noting also that Congress specified that "standards of performance" are established not for source categories, but rather for

"any existing source"—singular—and "new sources *within* such category" (citing 42 U.S.C. §§ 7411(b)(1)(B), (d)(1)(A)); *id.* at 32,523/1-24/2. Thus, in determining the BSER, EPA is limited to those systems that can be "appli[ed]" to a "building, structure, facility, or installation." *Id.* at 32,524/2 (including add-on controls and inherently lower-emitting process/practices/designs).

Integrating the definition of "standard of performance" in Section 7411(a)(1) into the authority of Section 7411(d)(1) confirms the straightforward and rational constraints that Congress placed on EPA's authority. It precludes EPA from wandering far afield from emission control mechanisms as EPA historically conceived them. For purposes of Section 7411(d), the BSER must be add-on devices and other controls and measures that are applied to particular existing sources themselves.

3. The CPP's selection of a system of emission reduction operating at the level of generation-shifting across the electrical grid contravenes the statutory limits on EPA's authority.

The CPP's novel system of generation shifting did not comply with these statutory limits. The system self-consciously sought to overhaul

the economics of the American electricity industry and rework its costs of production *as such*. *See* CPP, 80 Fed. Reg. at 64,797/3 (explaining that higher-emitting units will need to achieve greater emission reductions relative to lower-emitting units "which will, in turn, tend to raise steam unit costs compared to [gas-fired] units"). Emissions reductions for the Nation as a whole were to come from "shifting dispatch from steam generators to existing [gas-fired] units, and from both steam generators and [gas-fired] units to renewable generators." *Id.* at 64,776/3. The system did not apply to an individual plant, facility, or unit such that it could achieve the emissions limitations as such. Instead, implementation would "as a practical matter" have equated a "source" with its "owner or operator," with compliance based on "actions taken by the owners or operators of the sources." *Id.* at 64,720/2. The CPP also denied States their full authority, expressly provided by Congress, to assess the remaining useful life and other considerations of *every* particular facility. The CPP thus rendered that authority illusory. EPA correctly repealed it.

First, Section 7411(d) does not authorize EPA to "select as the BSER a system that is premised on *application* to the source category

as a whole or to entities entirely outside the regulated source category." ACE Rule, 84 Fed. Reg. at 32,524/2 (emphasis added); *see also id.* 32,521/1-24/2. Yet the CPP ignored this limitation. And by doing so, it abandoned EPA's unbroken practice across some seventy Section 7411 rules over nearly forty-five years that EPA's options in selecting the BSER were "restrict[ed to] consideration [of] measures integrated into each individual affected source's design or operation." CPP, 80 Fed. Reg. at 64,769/2. The CPP was "the first time the EPA interpreted the BSER to authorize measures wholly outside a particular source." ACE Rule, 84 Fed. Reg. at 32,526/3.[20]

When the definition of BSER is no longer divorced from the authority in Section 7411(d), the CPP's disregard of Congress's clear intent in Section 7411(a)(1) becomes even more apparent. Specifically,

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[20] The Clean Air Mercury Rule, which, in any event, was vacated in *New Jersey* v. *EPA,* 517 F.3d 574 (D.C. Cir. 2008), is not analogous to the CPP. That rule's BSER there relied on a combination of a cap-and-trade mechanism and control technology that could be applied to a source—i.e., the "technology needed to achieve the chosen cap level." ACE Rule, 84 Fed. Reg. at 32,526/3 n.65 (quoting the Clean Air Mercury Rule, 70 Fed. Reg. 28,606, 28,620 (May 18, 2005)). To the extent that the Clean Air Mercury Rule relied on application of the BSER to the source category, rather than individual sources, EPA has since properly concluded that this was beyond its power under Section 7411. ACE Rule, 84 Fed. Reg. at 32,526/3 n.65.

the CPP disregarded the word "apply," by treating it as synonymous with "implement." CPP Legal Memo at 84 n.175, JAXXXX (reading, in full, "[i]n this context, the terms 'implement' and 'apply' are used interchangeably"); CPP, 80 Fed. Reg. at 64,720/2 ("the system must be limited to measures that can be implemented—"app[ied]"); *see also* ACE Rule, 84 Fed. Reg. at 32,527/1-3.

By self-consciously swapping a new word into the statute, *see* 80 Fed. Reg. at 64,720/2, the CPP implicitly acknowledged that generation shifting is not a system subject to "application" at any particular source, *see* 42 U.S.C. § 7411(d)(1); 84 Fed. Reg. 32,524/1. Unlike "apply," the word "implement" does not require an indirect object. *See, e.g.*, ACE Rule, 84 Fed. Reg. at 32,527/1-3.[21] The action is simply taken by someone. And so with generation shifting. That system is instead "implemented" by the "owners or operators," requiring concerted action

[21] This additional breadth is significant. Once a BSER is selected that can be *applied* at a source, it generally makes sense to speak of *implementing* that system to reduce emissions. The converse is not true. There may be any number of actions that could be *implemented* elsewhere than at a particular source, but they are not necessarily *applied* to that source. *See id.* at 32,527/2-3.

across the grid, including non-regulated owners or grid operators, *see*, *e.g.*, CPP, 80 Fed. Reg. at 64,795/2.

Underscoring Congress's clear intent by choosing this verb, Congress *has* used "implement" (rather than "apply") in numerous other provisions of the CAA distinct from Section 7411(d). *See, e.g.*, 42 U.S.C. §§ 7410(a)(2)(F), 7412(i)(5)(C), 7412(r)(7)(H), 7511a(b)(2); *see also* 42 U.S.C. § 7405(a)(1)(A). Section 7411(d)(1) itself reflects this distinction. *See* 42 U.S.C. § 7411(d)(1); *see also* ACE Rule, 84 Fed. Reg. at 32,527/2. In fact, Congress has used "apply" rather than "implement" in "other source-focused standard-setting provisions" in the CAA. *Id.* at 32,527/2 & n.72 (citing 42 U.S.C. §§ 7412(d), 7479(3)). These provisions confirm that Congress's use of "application" in Section 7411(a), as with "applying" in Section 7411(d), indicates its intent that existing-source regulations be applied to and at particular sources. *See id.*

With the exception of the Renewables Petitioners, no Petitioner disputes that no particular existing source can "appl[y]" generation shifting at the level of an existing source. [22] As conceived by the CPP,

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[22] "Co-firing" at an existing source fundamentally changes the way energy is generated. The CPP and ACE are clear that co-firing is a different from the CPP's "generation shifting."

see, e.g., CPP, 80 Fed. Reg. at 64,776/3, 64795/2-3, generation shifting is between different sources in different locations, conducted at the fleet- or grid-wide level. No "building, structure, facility, or installation" can, on its own, apply generation shifting, and thereby substitute lower emission electricity generation for higher emitting generation. *See* ACE Rule, 84 Fed. Reg. at 32,527/2-3; *id.* at 32,524/1-2. And there is a vast difference between measures that can be applied at a source itself (though it might, for example, be installed there by some third party), and those cannot be so applied because, for example, they require a group of sources to act in the aggregate. Thus, the CPP did not just "consider[] the broader dynamics of the electric gr*id.*" *Id.* Rather than apply environmental controls that are hallmark of EPA authority under Section 7411, the CPP sought to change the economics of the industry as a whole.

Second, the CPP further departed from a permissible interpretation when it simultaneously conflated distinct terms of the statute to answer the question of how an "existing source" could be said to be implementing generation shifting. CPP, 80 Fed. Reg. at 64,720/2. It did so by reinterpreting and improperly expanding the Clean Air

Act's statutory definition of "stationary source" beyond the limits of the statute. 42 U.S.C. § 7411(a)(3). Explaining its new interpretation, EPA wrote:

> EPA interpret[ed] this phrase ["system of emission reduction"] to carry an important limitation: Because the emission guidelines for the existing sources must reflect "the degree of emission limitation achievable *through the application of* the best system of emission reduction … adequately demonstrated," the system must be limited to measures that can be implemented—"appl[ied]"—by the sources themselves, that is as a practical matter, by actions taken by the owners or operators of the sources.

80 Fed. Reg. at 64,720/2 (emphasis in original, underline added). This conflation of an "existing source" with its "owner or operator" is an additional error in interpretation of unambiguous statutory text. *See* ACE Rule, 84 Fed. Reg. at 32,527/3; CPP, 80 Fed. Reg. at 64,720/2, 64,762/3.

Obviously, EPA's need to undertake this textual jujitsu only confirms its prior interpretive errors—including that generation shifting can't be reasonably understood to apply at an existing source. It is only effectuated through actions implemented across an aggregate set of sources by those sources' "owners and operators," as well as by non-owner grid operators. 80 Fed. Reg. at 64,795/2. But this swap is, itself, a

fatal interpretive error. An "existing source" and the term "owner or operator" are separately defined. And Congress's plain-text definition of "stationary source" does not include the source's owners and operators. 42 U.S.C. § 7411(a)(3), (5).

By moving to what can be "implemented" by "owners and operators"—rather than "applied" at a singular "existing source"—EPA rewrote the terms of a "phrase [Congress intended] to carry an important limitation." CPP, 80 Fed. Reg. at 64,720/2. Yet fundamental canons of statutory interpretation require that different words of the statute must be read differently. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). This holds particular force where Congress explicitly defined each term separately. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012) ("We generally seek to respect Congress's decision to use different terms to describe different categories of people or things.").

In an incongruous turn of history, the CPP's expansive reinterpretation of "source" to, as a practical matter, mean "owner or operator" stands in tension with, of all cases, *Chevron* itself. There, environmental respondents argued for a dual definition of "source." 467

U.S. at 859. For the New Source Performance Standards, respondents sought EPA to construe "source" *narrowly* to look at each "component" of a plant individually (i.e., each building, structure, facility, or installation). *Id.* at 859 n.31. EPA had interpreted "source" to permit an aggregated "bubble" of co-located buildings, structures, etc. at the same plant. *Id.* at 859. EPA regulations thus allowed emission increases at a particular component within a facility to be offset by lower emissions at another component of the same facility. *Id.*

Every administrative law student knows that *Chevron* ultimately allowed EPA to interpret "source" to permit this "bubble" around a facility—and so allow increases and offsets of emissions within. *Id.* But that superficial similarity doesn't save the CPP. Because the Supreme Court's analysis confirms that the bubble cannot be expanded further. 467 U.S. at 859-866. So a "source" may not encompass the "owner or operator," to allow netting and offsets across *different* facilities. Indeed, Petitioners misconstrue application of the *Chevron* analysis as a whole.

When *Chevron* asks "the question whether Congress has directly spoken to the precise question at issue" and "unambiguously expressed intent," the exercise isn't to determine if the words of the statute are

sufficiently elastic to plausibly stretch to what an agency wants to do. *Id.* at 842-43. The first step is to ask if the interpretation, regardless, "is not one that Congress would have sanctioned." *Id.* at 845. Step one determines whether "Congress did not actually have an intent" where an agency is interpreting, *see id.*, but an agency is making a "choice *within a gap left open* by Congress." *Cf. id.* at 866 (completing the analysis of step two) (emphasis added).[23]

Chevron further confirms that the CPP was far outside any gap in the term "existing source" (among other terms). The Court sustained the "bubble" around a "facility" because *inter alia* the "ordinary meaning of the term 'facility' is some collection of integrated elements which has been designed and constructed to achieve some purpose." *Id.* at 860. The Court observed that "congressional 'intent'" from such text appeared "to enlarge, rather than to confine" EPA authority at "*particular* sources." *Id.* at 862 (emphasis added).

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[23] *Compare, e.g.*, ACE Rule, 84 Fed. Reg. at 32,528/2 ("EPA's authority [in CPP is] stretched to every aspect of the entire power sector. This cannot have been the intent of the Congress that enacted CAA section 111"), *with id.* at 32,556/3-57/1 (discussing *Chevron* and EPA's determination not to allow "bubbling" in ACE).

But by now interpreting "source" to "as a practical matter" include a source's "owner or operator," 80 Fed. Reg. at 64,720/2, the CPP burst *Chevron*'s bubble. It is a truism that the source does not, by itself, comply with a regulation—its owner does, by application of controls to a particular source. But the CPP slipped out of the textual constraints on "source" that *Chevron* recognized. The CPP's reinterpretation thus stretched the "bubble" to *all* of an owner/operator's "components"—no matter the "facility" where installed. *See Chevron*, 467 U.S. at 859. It then allowed for the "increase in emissions" by one component to be "offset by reductions elsewhere in the" owner/operators *aggregated*, *statewide fleet*. *Cf. id.* 857 & 854-58 (explaining the history and application of intrasource emissions offsets). One doubts the *Chevron* Court could have conceived that EPA would one day invoke its decision as authority to go so far.

Third, the CPP's BSER fundamentally, and inappropriately, altered how a BSER is "achievable." 42 U.S.C. § 7411(a)(1). For decades, EPA confined such inquiries to examining the on-site controls employed by other sources using similar technology in a category. The point of comparison for the CPP instead became the emission performance of

the entire electric power industry (excluding nuclear power). The CPP even included the performance of renewable sources. Those are not even part of any regulated source category under Section 7411.

Then "the CPP set standards that could only be achieved by a shift in the energy generation mix at the grid level, requiring a shift from one type of fossil fuel-fired generation to another, and from fossil fuel-fired generation as a whole towards renewable sources of energy." ACE Rule, 84 Fed. Reg. at 32,523/2. The CPP anticipated that "sources would largely rely on generation-shifting measures to comply with [the CPP's] standards." *Id.* at 32,530/3 (citing CPP, 80 Fed. Reg. at 64,927). The emission rates for coal-fired units, in particular, were not practically achievable by coal-fired units, as such. *See id.*; *see also id.* at 32,523/1-2; CPP at 64,727/3-28/1.

The CPP's point of comparison for what is "achievable" thus abandoned EPA's historical, proper focus on the emissions performance of a particular "existing source." Contrary to the statute, this denied state plans for existing sources the ability to "establish[ ] standards of performance" which "reflect[ ] the degree of emission limitation *achievable*" by each individual source. 42 U.S.C. § 7411(a)(1), (d)(1)

(emphasis added). The aggregate emissions limitations that the CPP placed on each State's power-plant fleet were not "achievable" through the use of at-the-source controls. *See* ACE Rule, 84 Fed. Reg. at 32,523/2); *see supra* at 33-34.

Fourth, the CPP unlawfully failed to "permit the State in applying a standard of performance *to any particular source*" to fully take into account "*the* remaining useful *life* of *the existing source*." 42 U.S.C. § 7411(d)(1) (emphasis added); *see also, e.g.*, ACE Rule, 84 Fed. Reg. at 32,523/3, 32,527/3, 32,553/2-55/1, 32,581/1. Section 7411(d) commands the Administrator to "permit the State" plans to consider factors relevant to the stranded costs invested in a legacy, existing source. The CPP claimed to do this. But it converted a State's inquiry—which Congress said is supposed to allow consideration of the remaining useful life of "any" particular source—into a balancing act contingent on standards placed on *other* sources in the category. *See* CPP, 80 Fed. Reg. at 64,827/1, 64,874/1-2. The CPP imposed statewide "goals" (i.e., budgets or caps) on the electric generating fleets as a whole. *See supra* at 35-37 (discussing the CPP's rate- and mass-based approaches).

Under the CPP's approach, a reduced standard at one facility would result in increased compliance obligations elsewhere. This interpretation of Section 7411(d) makes it harder (and potentially infeasible or even impossible) for other sources to meet these standards. So a State did not have the full statutory authority Congress granted those independent governments to account for "the" remaining useful life of "any particular" facility—notwithstanding the importance of this issue to Congress, evident from Congress expressly identifying it "among other factors." 42 U.S.C. § 7411(d)(1).

4. Other provisions of the CAA, and its structure, confirm that the BSER must be applied to the existing source itself.

Other features of the CAA—particularly the interplay between Section 7411 and Section 7475—independently demonstrate that BSER must be limited to those systems that can be applied to an individual source. *See UARG*, 573 U.S. at 321; *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Statutes should be interpreted as a symmetrical and coherent regulatory scheme." (quotation marks omitted)). This structural connection between the two provisions confirms what is already apparent from the face of Section 7411(d)(1)'s focus on "any

existing source," "a particular source," and "the existing source." 42 U.S.C. § 7411(d)(1).

Under the CAA's Prevention of Significant Deterioration program, no source that would emit substantial quantities of a regulated pollutant "may be constructed or modified unless a permit prescribing emission limitations has been issued for the facility." *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 472 (2004); *see* 42 U.S.C. §§ 7475(a)(1), 7479(1), (2)(C). A preconstruction permit must require, *inter alia*, BACT. *Id.* § 7475(a)(4).

BACT is defined in terms of measures that can be applied at a particular facility. It is the degree of control that the permitting agency "determines is achievable for such [major emitting] facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques." *Id.* § 7479(3); 40 C.F.R. § 52.21(b)(12). The relevant emission limitations must be achievable "through application of" methods qualifying as BACT to "such [major emitting] facility." 42 U.S.C. § 7479(3). BACT encompasses "all 'available' control options . . . that have the potential for practical

application to the emissions unit and the regulated pollutant under evaluation." EPA, PSD and Title V Permitting Guidance for Greenhouse Gases at 24 (Mar. 2011) (emphasis added), JAXXXX; *see also id.* at 18, 22-23, JAXXXX-JAXXXX; ACE Rule, 84 Fed. Reg. at 32,524/3-25/1. Petitioners do not dispute that BACT is limited to those measures applicable to a particular source. *See* State Pets. Br. at 49-51.

"In no event shall application of [BACT] result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to Section 7411 or 7412 of this title." 42 U.S.C. § 7479(3); *see also New York v. EPA*, 413 F.3d 3, 13 (D.C. Cir. 2005) ("At a minimum, . . . BACT [is] as restrictive as NSPS"); 80 Fed. Reg. 64,510, 64,631 (Oct. 23, 2015); PSD Permitting Guidance at 25 & n.64, JAXXXX. This interrelationship between the two types of standards, New Source Performance Standards (based on BSER) and BACT, is only intelligible if the standards are *in pari materia*—denominated in the same currency, so to speak. BACT's source-specific nature confirms that BSER is likewise source-specific under Section 7411(d).

New source performance standards under Section 7411(b) usually serve as this "floor" for setting BACT, because Section 7411(b) typically imposes more stringent limitations on emissions than Section 7411(d). *See supra* at 23-24. But the definition of BACT, 42 U.S.C. § 7479(3), refers to "Section 7411" without limitation, *contra* State Pets. Br. at 49-50, such that standards under Section 7411(d) may also serve as such a floor (or to at least inform such a floor). *See also* ACE Rule, 84 Fed. Reg. at 32,525/1 n.50 (discussing the history of Sections 7411(b) and (d)).

Because Section 7411 operates as a floor to BACT, Section 7411 "cannot be interpreted to offer a broader set of tools than are available under section [7475]" to determine what can constitute BACT. *Id.* at 32,525/1-2. A contrary reading could require EPA to impose emission limitations based on the "application of [BACT]," 42 U.S.C. § 7479(3), when—due to the stringency of a Section 7411 standard of performance based on outside-the-source controls—there are no measures that qualify as the BACT that could, in fact, achieve the required limitations. *See, e.g.*, *Mellouli*, 135 S. Ct. at 1989; *McNeill v. United States*, 563 U.S. 816, 822 (2011) (statutes are construed to avoid absurd results).

As a simple example, imagine that a Section 7411 standard based on outside-the-source controls (e.g., generation shifting) required that the source achieve an adjusted emissions rate, through obtaining credits from other sources' activities, of no more than 1 ton/gigawatt for a pollutant. Section 7479(3) would thus require that "in no event shall application of [BACT] result in emissions" exceeding this 1 ton/gigawatt standard. 42 U.S.C. § 7479(3). But if the only technologically available at-the-source measures qualifying as BACT could only reduce emissions to 2 tons per gigawatt, this would violate the command that BACT can't exceed an applicable Section 7411 standard. Only a source-specific understanding of BSER eliminates this possibility.

5. The Clean Power Plan adopted an impermissible view of EPA's authority based on the word "system" in the provision defining "standard of performance."

The word "system" in Section 7411(a)(1) was crucial to the CPP's interpretation of EPA's authority, and to Petitioners' defense of the CPP. The broader structure and context of the CAA further reveals how the CPP was based on an impermissible interpretation of the word

"system."[24] The CPP read that word—as found in the term "system of emission reduction" within the "Definition" of "standard of performance" at Section 7411(a)(1), and shorn of broader statutory context—to confer nearly unbounded authority on EPA in terms of the menu of options it could consider in selecting the "best system of emission reduction." This approach was untenable. "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown & Williamson*, 529 U.S. at 132-33. Section 7411 does not confer the dramatic new scope of authority claimed by the CPP. It, too, limits EPA to considering at-the-source controls.

This principled understanding of "system" is compelled by the statutory context. As discussed, Section 7411(d)(1) reflects a uniform focus on an "existing source." "System" says nothing of the electrical grid, nor of emission limitations achievable using non-regulated

[24] *See* CPP, 80 Fed. Reg. at 64,720/2 & n.314 ("The ordinary, everyday meaning of 'system" is a set of things or parts forming a complex whole; a set of principles or procedures according to which something is done; an organized scheme or method; and a group of interacting, interrelated, or interdependent elements. With this definition, the phrase 'system of emission reduction' takes a broad meaning: a set of measures that work together to reduce emissions.") (citing dictionaries).

entities. This, alone, reflects that "system" was read beyond its limited context.

For roughly forty-five years across some seventy regulations, EPA's approach to what may constitute a "system" under Section 7411(a)(1) did not vary. Each BSER issued under Section 7411 relied on at-the-source measures. *See supra* at 37-38; ACE Rule, 84 Fed. Reg. at 32,528/3. This consistent approach reflected a straightforward understanding of the set of measures that could constitute a "system" that can be "appli[ed]" to reduce a source's emissions from a source—add-on controls, operational changes, clean fuel requirements, and the like. *See id.* at 32,528/3-32,529/1; *Brown & Williamson*, 529 U.S. at 132-33.

A "system" to reduce emissions from particular sources cannot reasonably extend to Rube-Goldberg approaches through a chain of causation and actions remote from the source. *See* ACE Rule, 84 Fed. Reg. at 32,528/1 ("System," as used in [Section 7411], cannot be read to encompass *any* "set of measures" that would—through some chain of causation—lead to a reduction in emissions."); *cf. FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 774 (2016) (*EPSA*) (requiring a "common-

sense construction" of FERC's "affecting" jurisdiction to address only rules and practices with direct effects on wholesale rates in order to "prevent the statute from assuming near-infinite breadth").

Section 7411(d) was not a Congressional delegation of its unenumerated power to play the game "This is the house that Jack built," so that an agency can go from textual instructions to regulate a "building, structure, facility, or installation" to rebalancing the entire electricity sector. *See* Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 THE PAPERS OF THOMAS JEFFERSON 547 (B. Oberg ed. 2004) (cautioning that an overly expansive approach to causation analysis does not read government powers sensibly but instead devolves into "play[ing] at 'This is the House that Jack Built.'"). The exercise of building the "system" adopted in the CPP is not much different.

By contrast, a proper understanding of what constitutes a "system" to reduce emissions coheres with Congress's approach in other provisions of the CAA. For instance, where Congress has defined the "measures" EPA can take in issuing emission standards under Section 7412, all of the approaches it authorized could be applied at a particular

source. *See* ACE Rule, 84 Fed. Reg. at 32,528/1 (quoting 42 U.S.C. § 7412(d)(2) and noting that all of these approaches can be applied at a particular source); *cf. also* 42 U.S.C. § 7475(a) (requiring BACT); *supra* at 85. And, as noted, EPA's historical approach to Section 7411 has uniformly kept what may constitute a "system" within these principled bounds. *See Cal. ISO*, 372 F.3d at 402-03. Finally, this interpretation is also consistent with Section 7411's role as a limited gap-filling provision, *see supra* at 24 & n.7.

From the innocuous word "system," *see* CPP, 80 Fed. Reg. at 64,766/3, the CPP struck a new path. It construed "system of emission reduction" as any "set of measures that work together to reduce emissions." *Id.* at 64,720/2. *See also id.* at 64,762/1-3; ACE Rule, 84 Fed. Reg. at 32,526/1. The only hard-and-fast constraints that the CPP identified on what may constitute the BSER were that (i) it must be something that source's owners or operators could implement, (ii) it must "reduce emissions," and (iii) "reduced generation" does not qualify as the BSER. *See* 84 Fed. Reg. at 32,526/1; *id.* at 32,528/1-29/1; CPP, 80 Fed. Reg. 64,720/2-22/2; 64,762/1-3; *infra* at 148-49. But these negligible constraints still left EPA with authority stretching beyond any

principled bounds. *See* ACE Rule, 84 Fed. Reg. at 32,528/1-32,529/1. In fact, Petitioners further confuse and blur the statutory lines and concepts in the string of core conceptual errors running through the CPP. They refer to not just "generation shifting," but the entire electrical grid as an "interconnected system." Con. Ed. Br. at 15; *cf.* 80 Fed. Reg. at 64,665/2 (CPP describing itself as "reflecting the unique interconnected and interdependent system within which [electricity generating units] operate.").

This case is remarkably like *Cal. ISO*, 372 F.3d at 396. There, this Court rejected a comparable agency attempt to endow itself with novel, far-reaching authority—notwithstanding the absence of any textual or historic indication of congressional intent that the federal government regulate so broadly. As the Court emphasized, "lest there be any mistake, FERC ha[d] done nothing less than order a public utility subject to its regulation to replace its governing board." *Id.* at 398. To do so, FERC rested on innocuous statutory text authorizing it to regulate any "practice . . . affecting [a] rate" set by a public utility. *Id.* at 398-99.

Rejecting this argument, this Court reiterated that "ambiguity is a creature not of definitional possibilities but of statutory context." *Id.* at

400 (quotation marks omitted). And with that, "Congress's intent [was] crystal clear, and [the Court] therefore need not reach *Chevron* step two." *Id.* Nothing in the statutory section "suggest[ed] a congressional concern with corporate governance or structure," *id.*, and FERC's breathtaking assertion of authority was a "poor fit" with the apparent meaning of the statute. *Id.* at 401. This conclusion was reinforced by this historical approach to the relevant provision, *id.* at 402-03, and the "staggering" breadth of the authority claimed, *id.* at 403-04; *see also UARG*, 573 U.S. at 318-24; *Am. Bar Ass'n*, 430 F.3d at 468-71 (despite congressional silence on which the agency relied, statute could not be read in context as creating an ambiguity that would allow FTC authority over practice of law).

By the same token, the CPP determined that the best system for reducing emissions was to consciously modify the economics of the Nation's electrical generation industry. The CPP endeavored to "raise steam unit costs compared to [gas-fired] units," 80 Fed. Reg. at 64,797/1, and so "*shift[] dispatch* [in the market] from steam generators to existing [gas-fired] units, and from both steam generators and [gas-fired] units to renewable generators," *id.* at 64,776/3 (emphasis added).

So over time, "[t]his process of reducing generation from a higher-emitting unit will lead to substitution of lower emitting generation." *Id.* at 64,797/3. This is, in fact, a power that not even FERC can claim.

And with the CPP, too, the agency rested on innocuous statutory text—the word "system"—to reach an ahistorical expansive interpretation of its own power. *See Cal. ISO*, 372 F.3d at 402-03. This Court's reasoning in *Cal. ISO* could hardly be more apropos here:

> The issue is not so much whether the word "practice" is, in some abstract sense, ambiguous, but rather whether, read in context and using the traditional tools of statutory construction, the term "practice" encompasses the procedures used to select CAISO's board, that is, in the words of *Chevron*, "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S. Ct. at 2781. On this point, Congress's intent is crystal clear, and we therefore need not reach *Chevron* step two."

Id. at 400.

Here, for "practice," read "system." For "the procedures used to select CAISO's board," read "state policy choices as to the proper mix of coal-, gas-, and renewable-fueled electricity." Here, too, "Congress's intent is crystal clear." *Id.* The word "system" does not authorize EPA to consider "any set of measures" that owners or operators could implement to reduce emissions through some causal chain. Nothing in

Section 7411 suggests that Congress contemplated that EPA could reconfigure the mix of electricity generation as an emission control measure. *See id.* at 403-04. And, as previously explained, many aspects of the plain text of Section 7411(d) bar this overreach.

Moreover, although the CPP is on its own terms a stark overreach, it cannot be viewed in isolation. Under the theory of authority that supported the CPP, if EPA found it warranted in its discretion, EPA could go further. EPA might effectively shut down the fossil-fuel fired portion of the electricity-generating industry entirely in favor of production elsewhere. *See* ACE Rule, 84 Fed. Reg. at 32,529/2-3. For no concrete principle appears to limit EPA's claimed authority to regulate the mix of electricity generation within that sector. *See id.* ("[T]he Agency could empower itself to order the wholesale restructuring of any industrial sector . . . ."). EPA might potentially intervene in any industry putatively subject to Section 7411(d) to reconfigure the mix of sources operating therein. *See id.*

In fact, the CPP's interpretation extends beyond "generation shifting." It claimed that EPA's menu of potential options for the BSER extends to almost "*any* set of measures" that an owner or operator could

implement to reduce emissions through some causal chain. *See id.* (noting that, taken to its logical end, a "system" to reduce emissions could include minimum wage requirements or production caps). This is inconsistent with the statute. As in *Cal. ISO*, 377 F.3d at 399, nothing in the statutory text or context suggests that "system" means any "set of measures" owners or operators could implement to reduce emissions. CPP, 80 Fed. Reg. at 64,720/2.

Petitioners' regurgitation of the putative limiting principles in the CPP to restrain overreach ring hollow. *See* Con. Ed. Br. at 18-20 (citing CPP, 80 Fed. Reg. at 64,720, 64,762). Some are simply recitations of the statutory criteria in Section 7411(a)(1) (that a BSER take into account cost, for instance). It was cold comfort for many when the CPP accommodated concerns about "cost" by merely imposing significant, competitive disadvantage, rather than immediate obsolescence. Petitioners also argue that the CPP required that (1) BSER reduce emissions from affected sources and that (2) BSER be measures that a source's owner or operate can itself take or control. *See id.* Even assuming that the CPP itself actually observed these principles, they

are not significant constraints, as discussed below. *See* ACE Rule, 84 Fed. Reg. at 32,529/2-3; *infra* at 148-49.

6. Congress does not delegate vast powers to agencies without a clear statement.

EPA's Section 7411 authority is not only limited by the statute's plain text and structure. Federalism and respect for a traditional areas of state regulation must also be observed unless statutory language "compels the intrusion." *Am. Bar Ass'n*, 430 F.3d at 471. Upon reconsideration in the ACE Rule, EPA concluded that nothing in Section 7411(d) reflects a "clear statement" that the Agency may base emission limits on reconfiguring the economics and market dispatch of the grids in the power sector. ACE Rule, 84 Fed. Reg. at 32,529/1-3.[25] Rather, the text of Sections 7411(d)(1) and (a)(1) preclude that approach.

In *UARG*, the Supreme Court did not allow EPA to require stationary sources to obtain Prevention of Significant Deterioration and

[25] EPA made clear that it did not rely on the major-questions doctrine to reach its conclusion that the CPP was unlawful and therefore must be repealed, although "EPA believes that that doctrine should apply here and that its application confirms the unambiguously expressed intent of CAA section 111." 84 Fed. Reg. at 32,529/2.

Title V permits based solely on the amount of their greenhouse gas emissions. 573 U.S. at 307, 310-12, 315-28. The Agency's approach in the rule challenged there was incompatible with these regulatory schemes. *Id.* at 321-23. "EPA's interpretation [wa]s also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* at 324. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Id.* (internal citation and quotation marks omitted). Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* (quotation marks omitted). With these words, the Supreme Court might have been describing the CPP itself.

UARG followed a long history of Supreme Court precedent. *See U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, No. 18-1584, Slip. Op. at 14-16 (rejecting that, "without a word from Congress, the [agency] has the power to vastly expand the scope of the [agency] jurisdiction . . . [with] striking implications for federalism and private

property rights"); *Gonzales v. Oregon*, 546 U.S. 243, 262, 267 (2006) (holding it would be anomalous for Congress to give the Attorney General, "just by implication, authority to declare [physician assisted suicide] outside the course of professional practice"); *Brown & Williamson*, 529 U.S. at 160 (holding agency regulation of tobacco unlawful because "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 230-32 (1994) (holding it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.").[26] Considered in this light, there can be no question that EPA's authority to impose "generation shifting" raises a major question of agency power.

First, when repealing the CPP, EPA recognized its infringement of the States' "traditional responsibility in the field of regulating electrical

[26] Then-Judge Kavanaugh summarized a number of relevant factors from these cases in *U.S. Telecomms. Ass'n v. FCC*, 855 F.3d 381, 422-23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

utilities for determining questions of need, reliability, cost, and other related state concerns." ACE Rule, 84 Fed. Reg. at 32,530/1 (quoting *PG&E*, 461 U.S. at 205). The CPP set emission standards that would primarily be achieved by changing the mix of electricity generation units in the Nation, including by economically disadvantaging some existing sources to the benefit of others. *See, e.g.*, 80 Fed. Reg. at 64,728/1, 64,723/2-24/1, 64,769/1-2 (describing measures the CPP concluded could be used to comply with its standards).

Though competition has entered the electricity sector to varying degrees the last few decades, States retain legal authority to "determin[e] questions of need, reliability, cost, and other related state concerns," including "the need for additional generating capacity [and] the type of generating facilities to be licensed." ACE Rule, 84 Fed. Reg. at 32,530/1. Electric utilities historically "operated as state regulated monopolies, supplying end-use customers with generation, distribution, and transmission service." CPP, 80 Fed. Reg. at 64,691/2.

Yet, under the Federal Power Act, Congress assigned to FERC exclusive authority to regulate "transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in

interstate commerce," including facilities for "transmission or sale of electric energy." 16 U.S.C. § 824(b)(1); *see Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1291-92 (2016). And Congress carefully preserved traditional stateauthority over other regulation of electrical generation. Federal regulation extends "only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a); *see also* ACE Rule, 84 Fed. Reg. at 32,529/3-30/1. So FERC's jurisdiction does not—except as specifically provided—extend to "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292 (noting this as an area of "[t]he States' reserved authority").

Second, the CPP raised serious questions of how an agency decision may differentially impact the several States. The CPP recognized that vertically-integrated utilities continue to provide electricity to many "states with cost-of-service regulation." 80 Fed. Reg. at 64,693/2; ACE Rule, 84 Fed. Reg. at 32,530.[27] These States typically allow an owner or operator to "recover [their] costs and a reasonable rate of return." *See Entergy La., Inc. v. La. Pub. Serv. Corp.*, 539 U.S.

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[27] These States are primarily in the Southeast, Northwest, and Southwest. *See* <https://www.ferc.gov/market-assessments/mkt-electric/overview.asp>.

39, 42 (2003). Yet the CPP, if implemented, would "tend to raise steam unit costs compared to [gas-fired] units. [And a]s a result, the bids that a steam unit provides a market operator will rise relative to [gas-fired] units." CPP, 80 Fed. Reg. at 64,797/1.[28] Thus, many States expressed concern to the Supreme Court that these projected costs of shifting generation would fall disproportionately on their States and citizens. For example, the "geographic distribution of resources makes any 'shift in generation' from coal-fired power to renewable energy particularly 'time consuming and expensive.'" Reply of 29 States Supporting Stay, 15A773, at 22-33 (U.S. Feb. 5, 2016).

The CPP's calculations reflected an uneven distribution of coal-fired, gas-fired, and renewable electric generating capacity across the States. 80 Fed. Reg. at 64,820/1-826/2. This showed, for example, in the materially different statewide, mass-based CO_2 emission performances goals, derived from the States' different "baseline" of existing sources.

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[28] This is because in wholesale markets, bids are accepted from lowest to highest cost. *See EPSA*, 136 S. Ct. at 768-69. Thus, if one is replacing electricity that would ordinarily (absent generation shifting) be purchased on the wholesale market with electricity that would not ordinarily be purchased, generally, the price of the replacement electricity is higher than the electricity replaced.

Id. at 64,825 (Table 13). So owners/operators in some States would likely have needed to purchase credits for (or replace) more existing sources than generators in other States. This raised concerns that under the CPP the citizens of certain States could have to subsidize the electricity generation for citizens of other States.

Third, "[a]t the time the CPP was promulgated, its generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy . . . ." ACE Rule, 84 Fed. Reg. at 32,529/2.[29] EPA's estimated annual incremental compliance costs were up to $8.4 billion if States adopted a rate-based approach and $5.1 billion if they adopted a mass-based approach. CPP RIA, Ch. 3 at 22, JAXXXX.

EPA also predicted that the CPP would dramatically alter the mix of electricity generation. By 2030, generation from coal-fired resources

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[29] The validity of both the CPP and the ACE Rule must be judged on their records at the time of their respective promulgations. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). Just as the Court would not conduct a hindsight inquiry into a rule based on later information, the CPP must be judged in terms of its anticipated impacts, not later developments. *Cf., e.g.*, *UARG*, 573 U.S. at 321-22 (considering anticipated costs). The ACE Rule's selection of the BSER, by contrast, must be judged on its later-created record, which can (and does) permissibly take into account developments subsequent to the promulgation of the CPP.

would be 22-23 percent lower than predicted in the base case without the CPP. *Id.*, Ch. 3 at 27, JAXXXX. Generation from new natural gas facilities would be between 36 and 69 percent lower than generation from those sources predicted in the base case. *Id.*, JAXXXX Depending on whether a rate- or mass-based approach was employed, between 27 and 38 gigawatts of coal-fired capacity—potentially as much as 19 percent of all such capacity—was predicted to be prematurely uneconomical by 2030. *Id.*, Ch. 3. at 30, JAXXXX. Coal production for the electric power sector was expected to similarly decline. *Id.*, Ch. 3 at 33, JAXXXX. These predicted impacts were the direct results of the CPP basing BSER on generation-shifting measures. Indeed, the CPP "would have affected every electricity customer (i.e., all Americans)." ACE Rule, 84 Fed. Reg. at 32,529/2.

Public interest in the CPP itself was enormous, with the rule receiving 4.3 million comments. *See UARG*, 573 U.S. at 324 (recognizing "political significance" as a factor supporting the need for a clear statement). The litigation surrounding the rule was similarly intense. Nearly every State in the Union was involved, ACE Rule, 84 Fed. Reg. at 32,529/2; *see also* Respondent EPA's Final Brief at i-viii, *West*

Virginia v. EPA, No. 15-1363, Doc. 1609995 (D.C. Cir. Apr. 22, 2016), as were numerous local or municipal authorities, *id.* at iii, vi-vii, and private parties and interest groups, *id.* at i-viii. So too did many current and former members of Congress wade into the CPP litigation. *Id.* at iii n.1, viii n.8. All of this culminated in the Supreme Court taking the unprecedented step of staying the CPP before it could take effect. If the validity of the CPP is not a major question, it is difficult to see what would be.

Petitioners quote *UARG* to argue that the major questions doctrine does not apply here. They say EPA merely used the CPP to regulate "sources already subject to its regulation." State Pets. Br. at 53 (quoting 573 U.S. at 332). But the existence of some authority doesn't imply the grant of any authority, no matter how broad.[30] *Cf. Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) ("[N]o legislation pursues its purposes at all costs."). And *AEP* acknowledged that EPA was better

[30] Neither does the fact that the CPP *disqualified* as too expensive an approach that hewed more closely to the traditional, source-specific understanding of Section 7411, carbon capture and storage. *See* State Pets. Br. at 53-54. A rule that rejects a traditional approach in favor of a novel and sweeping one is not thereby somehow less deserving of major-questions scrutiny.

positioned to set emission standards than individual judges administering a patchwork, federal common law approach. *See* 564 U.S. at 427-28. But that does not mean that Congress authorized EPA to select rebalancing of the energy sector as the BSER under Section 7411(d). Indeed, if Petitioners' arguments were correct, it is hard to posit how any rule regulating CO_2 from the power sector could ever raise major questions.

In fact, the *very next sentence* of *UARG* from that cited by Petitioners shows why their distinction does not hold. The Court goes on to uphold the interpretation at issue there because "it is not yet clear that EPA's demands [on regulated sources] will be of a significantly different character from those traditionally associated with" the regulatory program at issue in *UARG*. 573 U.S. at 332. Here, the CPP was "of a significantly different character" than all previous Section 7411 rules. No Petitioner seriously disputes this. And EPA's repeal explained this significant change in character. "Historically, any traditional environmental regulation of the power sector may have incidentally affected these domains without indirectly or directly regulating within them." ACE Rule, 84 Fed. Reg. at 32,530/2. But the

CPP was different because it "could directly shape the generation mix of a complying state." *Id.* at 32,530/33.

There are numerous other reflections of the CPP's "significantly different character." Section 7411(d) is an infrequently used provision. It had become an afterthought in a statutory provision primarily focused on new sources. And, at least facially, it has a number of predicates and exclusions, including a cooperative federalism structure intent on giving States broad discretion to set emissions standards considering "*among other* factors, the remaining useful life." *See supra* at Statement of the Case, A.1 (emphasis added). Moreover, "[g]iven that even FERC would not have such authority in the electric power industry, the only reasonable inference is that Congress did not intend to give the EPA that authority via CAA section [74]11." ACE Rule, 84 Fed. Reg. at 32,530/3. The major questions doctrine is not nullified simply because an agency may have *some* authority to regulate.

Petitioners strain to rebut the "character" of the more than seventy other regulations under Section 7411 over forty-five years by claiming that all rules prior to *Massachusetts v. EPA* and *AEP* are of "minimal interpretive relevance." State Pets. Br. at 54. This argument

has no logical substance. *UARG* came after *Massachusetts v. EPA*. *UARG* reflects that there is no special presumption in favor of regulation of CO_2 under provisions of the Clean Air Act. 573 U.S. at 321-23; *see also Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460-61 (D.C. Cir. 2017). You have to read the statute and see if it fits.

Petitioners also argue that EPA's new source performance standard rule for sulfur dioxide in 1979 reveals that the CPP is not transformative. State Pets. Br. at 54-55. To the contrary. The example underscores the weakness of their attempt to normalize generation shifting. The emission limits in that rule were derived from technological measures applicable to individual sources. *See* 44 Fed. Reg. 33,580, 33,580/2-81/3, 33,592/1 (June 11, 1979). That rule simply recognized the integrated nature of the grid when setting forth "emergency conditions." *See id.* at 33,597/1. Those permitted the bypass of malfunctioning emission controls; they did not expand the universe of permissible approaches to emissions control. *See id.* at 33,597/1.

Petitioners' related claim that the CPP was merely trend-following is similarly off base. State Pets. Br. at 55. First, the cited materials were discussing market trends toward lower-emitting generation, not

any prior agency rule taking an approach similar to the CPP. *See Basis for Denial of Petitions to Reconsider and Petitions to Stay the Clean Power Plan* at 22 (Jan. 17, 2017), AR-26754 Ex. C, Att. 21, JAXXXX; ACE RIA, Ch. 2 at 6-11, EPA-HQ-OAR-2017-0355-26743, JAXXXX-JAXXXX. Second, as detailed above, the CPP was projected to have significant impacts over-and-above the "base case." Notwithstanding any existing market trend toward lower-emitting generation, the CPP's approach was not just "trend-following," it was action-forcing. It set standards, with the force of law. EPA fully projected this would lead to a change in the mix of electricity generation. This was an "enormous and transformative expansion in EPA's regulatory authority," *UARG*, 573 U.S. at 324.

7. The CPP impermissibly encroached on the sovereign regulatory domain of the States.

Separate and apart from the major questions doctrine, when Congress enacted and amended Section 7411, it presumptively did so against the backdrop of existing law. *See Parker Drilling Mgmt. Servs. v. Newton*, 139 S. Ct. 1881, 1890 (2019). And, in fact, when Congress intends to alter the usual constitutional federal-state balance, "it must make its intention to do so unmistakably clear in the language of the

statute." *Will*, 491 U.S. at 65 (quotation marks omitted); *U.S. Forest Serv.*, No. 18-1584, Slip. Op. at 14-16; *ABA*, 430 F.3d at 471-72. This ensures that in such sensitive areas, "*the legislature* has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" and "leaves no room for inferences." *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 981-82 (D.C. Cir. 1990).

Thus, when interpreting EPA's authority under Section 7411(d), the starting premise is that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). There is no suggestion in Section 7411—to say nothing of an "unmistakably clear" directive—that Congress authorized EPA to impose a regulatory scheme that "could directly shape the generation mix of a copying state." ACE Rule, 84 Fed. Reg. at 32,530/3; *see id.* at 32,530/1 (state authority includes "the need for additional generating capacity [and] the type of generating facilities to be licensed." (quoting *PG&E*, 461 U.S. at 212)). That is authority that federal "law placed beyond FERC and leaves to the States alone." *Id.* (quoting *Hughes*, 136 S. Ct. at 1292).

Petitioners do not identify "unmistakably clear" authorization for EPA to regulate electricity generation. In fact, they do not dispute that EPA lacks authority to so regulate. The response is to claim that the CPP does not "directly regulate" electricity generation. State Pets. Br. at 55-57 (arguing that any effect on electricity generation is incidental and only because electricity and pollution are not hermetically sealed from each other). Petitioners are wrong.

As EPA recognized when repealing the CPP, "[s]ome generation shifting may be an incidental effect of implementing a properly established BSER (e.g., due to higher operation costs), but basing the BSER itself on generation shifting improperly encroaches on FERC and state authorities." *See id.* at 32,530/1-3. The CPP was expressly premised on changing the mix of electricity generation in the United States—notwithstanding existing state regulatory decisions on the optimal form and mix of generation. *Id.* at 32,530/2-31/1. "[T]he EPA in the CPP set standards that could only be achieved by a shift in the energy generation mix at the grid level." *Id.* at 32,523/1-2; *id.* at 32,530/3; *see* CPP, 80 Fed. Reg. at 64,728/1, 64,749/2.

In fact, EPA's RIA found that the CPP *would* substantially alter the amount of electricity generated by different types of sources in the United States. *See supra* at 103-05. One cannot accept Petitioners' argument that the CPP engaged in only incidental regulation of electricity generation. That requires disregard of all these prior analyses of EPA in support of the CPP.

EPSA does not supports Petitioners' position. The FERC regulation at issue addressed the wholesale electricity market. This is the area of FERC's clear statutory authority, even where its actions in that sphere have effects on the retail market. *See EPSA*, 136 S. Ct. at 776. "[A]uthority over the need for additional generating capacity [and] the type of generating facilities" is a traditional responsibility of States. *PG&E*, 461 U.S. at 212. Yet it is the economics that undergird exactly those state decisions that the CPP sought to change. In fact, the Supreme Court in *EPSA* signals that the CPP would fail, notwithstanding the FERC rule was affirmed. The Court deemed it a "far-fetched" scenario that FERC would "compel every consumer to buy a certain amount of electricity on the retail market" in order to effectuate a change in wholesale rates. *EPSA*, 136 S. Ct. at 775

(explaining that this approach would be forbidden). This is a close analogue to what EPA did with the CPP.

At *Chevron* Step 1, courts exhaust their tools of statutory interpretation before determining a statute is ambiguous enough to authorize agency gap-filling. *Cal. ISO*, 372 F.3d at 399 (citing *Chevron*, 467 U.S. at 843 n.9). One such tool requires that to "alter the usual constitutional balance between the States and the Federal Government, [Congress] must make its intention to do so unmistakably clear in the language of the statute." *Cal. State Bd. of Optometry*, 910 F.2d at 980-81 (quotation marks omitted). Another is the major questions doctrine. *UARG*, 573 U.S. at 307; *see supra* at I.A.6. Either way, the language of Section 7411(d), particularly in consideration of the definitions in Section 7411(a), in no way *compels* a reading of Congressional intent supporting the CPP. There is no indication that the Congress of 1970, 1977, or 1990 envisioned such sweeping transformation and intrusion into an area of traditional state regulation through the little-used Section 7411(d). Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). EPA correctly concluded the statutory text did not permit the CPP.

B. The Court Should Reject Petitioners' Litany of Attempts to Revise the Statutory Text and Ignore the Statutory Structure.

Petitioners cannot show any authorization in the CAA, let alone the clear statement required under the major-questions doctrine, that would allow EPA, through the auspices of Section 7411(d), to promulgate the CPP. In fact, not only do their attempts to contradict or bend the statute fall flat, many of them buttress EPA's repeal of the CPP once fully considered. Responses to the more common arguments follow.

1. Petitioners cite no statutory language reflecting Congressional intent to authorize EPA to mandate generation shifting.

Petitioners' rhetoric, which colorfully accuses EPA of "stringing together bits of text," according "talmudic significance" to a "series of words," and engaging in "textual alchemy" (*see, e.g.*, Public Health and Env. Pets. Br. (Env. Br.) at 16; Con. Ed. Br. at 10-11), cannot obscure reality. EPA's interpretation of Section 7411(a), when read in its operative regulatory context, namely Section 7411(d)(1), is straightforward. Indeed, it consists of just two steps: (1) the plain and ordinary use of "application" requires an indirect object to which the

best system will apply; and (2) the only sensible such indirect object for this "Definition" to apply is the "existing source" in EPA's regulatory authority of Section 7411(d).[31] *Supra* at I.A.2.

The statutory text thus unambiguously requires that the BSER be subject to application at the existing source itself. From here, all that is left is to refer to the express statutory definitions governing what constitutes an existing source: "a building, structure, facility or installation." 42 U.S.C. § 7411(a)(3). This is why EPA had to reinterpret "application" to mean "implementation" in the CPP, and why "source" was expanded to encompass the "owner or operator." That was the "textual alchemy." EPA is now merely reading the *actual* statutory terms in the *actual* context in which Congress used them.

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[31] This is corroborated by the additional express text in Section 7411(d)(1) that makes crystal clear that the standard of performance (and hence the BSER on which it is predicated) is applied to a "particular source." *See* ACE Rule, 84 Fed. Reg. at 32,536/3, 32,532/2-3 ("[CPP] was the first time the EPA interpreted the BSER to authorize measures wholly outside a particular source . . . . [B]y making clear that the 'application' of the BSER must be to the source, Congress spoke directly in *Chevron* step one terms to the question of whether the BSER may contain measures other than those that can be put into operation [i.e., applied] at a particular source: It may not.").

a. Petitioners' arguments that the BSER need not be applied *to something* show the opposite.

Petitioners' arguments that "application" does not require an indirect object backfire. *See* State Pets. Br. at 24, 43-44; Con. Ed. Br. at 11. Despite roaming far and wide through purported everyday illustrations, dictionaries, and the U.S. Code, Petitioners didn't actually find a single example in which "apply" is used without an indirect object. At best, they cherry-pick sources that still patently have an implied indirect object. In other words, the examples may be ambiguous about what a thing is being applied to. But Section 7411 is not: Congress unambiguously directs the BSER is applied to an individual source.

For example, even when "referring to reliance on a principle or process to achieve an outcome" (State Pets. Br. at 24), the word "application" requires an indirect object. In State Petitioners' lead example—"a mathematician solving a problem through the application of a formula," *id.*—the indirect object is right there: the "problem." For example, a mathematician will *apply* the familiar quadratic equation (a formula) ***to*** $x^2 + 2x + 1 = 0$ (a problem) to solve for "x."

Even where Petitioners are careful not to include the indirect objects in the text of their examples, one is still readily apparent. When a "lawyer . . . appl[ies] her expertise to make a recommendation to a client," *id.* at 44, that expertise is applied *to something*. It is applied to the matter on which her client needs advice. *Cf.* Con. Ed. Br at 11 (similar example). A scientist cannot "apply the theory of gravitation to predict the orbits of celestial objects" (State Pets. Br. at 44), unless she applies that theory *to data* about those objects, such as their masses, velocities, distances from the Sun, etc. It is also axiomatic that when a "judge . . . appl[ies] precedent to reach a holding in a particular case" (*id.*; *cf.* Con. Ed. Br. at 11 (similar example), she applies that precedent *to the facts of the case*. Were a person to say that they "applied a principle" or "applied a process" (State Pets. Br. at 44), without supporting context making the indirect object apparent, the natural response is to puzzle, "to what?" The act of "application" is incomplete without an indirect object to which the direct object is applied.

Petitioners' recourse to the U.S. Code serves them no better. As discussed above, *see supra* at 67-68. Congress has consistently used "application" in the CAA with an indirect object, even when the indirect

object must be discerned from the broader statutory context. The examples Petitioners provide are in accord. In 42 U.S.C. § 7411(g)(3), it is clear from context that EPA is to "apply the criteria required to be considered under subsection (f)(2)" to the categories of major sources for which EPA may promulgate a new source performance standard. *See id.* § 7411(f)(1)-(2); State Pets. Br. at 44 n.10. Similarly, outside the CAA, "financial and performance metrics" are meaningless unless applied to something; thus, the indirect object in 49 U.S.C. § 24710(b) is Amtrak's financial and operating data. *See* State Pets. Br. at 44 n.11. And in 10 U.S.C. § 14306(c) the indirect object of "application of the running mate system" is "officer." *See id.* §§ 14306(b), (c) ("An officer to whom a running mate system applies . . . .").[32]

Both of the definitions that State Petitioners quote from Merriam-Webster (State Pets. Br. at 43) use examples that require an indirect object. *See Apply*, Merriam-Webster's Online Dictionary <https://www.

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[32] Although *Peter Pan Bus Lines Inc. v. FMCSA* found that the particular statute at issue was ambiguous as to *what* was the indirect object of "the phrase 'applicable regulations of the Secretary,'" that case thereby supports repeal of the CPP. 471 F.3d 1350, 1353-54 (D.C. Cir. 2006) (considering whether the indirect object was "motor carriers" or "Part B of Subtitle IV"). It, too, reflects that "apply" and its related words (applicable) require an indirect object to be sensibly construed.

merriam-webster.com/dictionary/apply> ("[a]pply the brakes [to the car; to the train; to the relationship]"; "apply a law [to facts; to the offender]"). In appealing to the Oxford English Dictionary's *ninth* sub-definition of "apply" in Roman Numeral I (State Pets. Br. at 43), Petitioners ignore the *principal* definition under which this sub-definition falls: "To put a thing into practical contact *with another*." *Apply*, Oxford English Dictionary (3d ed. 2020) (def. I) (emphasis added) <https://www.oed.com/view/Entry/9724>. Consistent with this requirement, a unifying element of the wide array of sub-definitions of "apply" under this heading is that "apply" defines a relationship between an object and something else that the object applies to (an indirect object). *See, e.g., id.* (defs. I.1b-1e, I.2-10). As to the ninth sub-definition, the examples provided reflects an indirect object, even if they are implicit and not expressly stated in the text. *See id.* (def. I.9).

In sum, it is physically possible to write a sentence that doesn't tell a reader the indirect object to which the primary object is applied. Indeed, Section 7411(a) is such an example, since Congress's indirect object is revealed when the Definition is read with the § 7411(d) authority it informs. But Petitioners not only fail to demonstrate that

"application" does not require an indirect object, they succeed in proving that it *does*. And Petitioners also succeed in showing why it is not only appropriate—but necessary—to read Section 7411(a) with Section 7411(d).

But like the CPP, Petitioners are attempting to evade the plain reading of the text. They divest the word "application" of its ordinary meaning in order to justify generation shifting. *See, e.g.*, State Pets. Br. at 45 (ignoring the word "application" in claiming that "[i]t is enough under section 7411(a)(1) that EPA's 'best system' determination inform its assessment of the 'degree of emission limitation achievable' through standards of performance").

Worse still, the final preamble and legal memorandum for the CPP admitted it *had to* make this interpretive swap: replacing "application" (which must have an indirect object to which the object is applied), with "implementation," which might be intelligible without such an indirect object. Otherwise, the CPP did not even superficially—but incorrectly—claim to have satisfied what EPA admitted was "an important limitation" of the statute. CPP, 80 Fed. Reg. at 64,720/2 ("the system must be limited to measures that can be implemented—

'appl[ied]"—by the sources themselves) (alteration in original). This is just one interpretive card, *of many*, that, when removed, causes the CPP's house to fall.

b. "Emissions of air pollutants" is not a coherent indirect object.

Petitioners' first backup argument is that if "application" must take an indirect object (which it must), one can be found in Section 7411(a)(1) in "emissions of air pollutants." State Pets. Br. at 45. The argument fails.

Petitioners' purported indirect object is an excerpt from the statutory phrase "standard for *emissions of air pollutants*." 42 U.S.C. § 7411(a)(1) (emphasis added). The text that follows ("which reflects the degree of emission limitation . . . .") describes how this "standard for emissions of air pollutants" is calculated according to a particular methodology. Thus, the text reflects that "standard for emissions of air pollutants" is a cohesive definitional phrase—one that must be read in the context of Section 7411(d))—not one to be chopped into its component parts. The text does not suggest that "emissions of air pollutants" is an appropriate indirect object to which the BSER shall apply. *See, e.g.*, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S.

Ct. 361, 368-69 (2018) (the Court was required to give effect to the word "habitat" in defined term "critical habitat"); *Gelman v. FEC*, 631 F.2d 939, 942 (D.C. Cir. 1980) (narrow focus on "candidate" in broader phrases "candidates of the same party in a primary election" results in strained and artificial construction).

Contrast this with "standard of performance for any existing source" in 42 U.S.C. § 7411(d)(1). There, "standard of performance" is a defined term on its own, separate and apart from the "existing source." Furthermore, "existing source" is the unambiguous regulatory target of Section 7411(d), and also a defined term. It thus makes perfect linguistic sense to apply the "best system of emission reduction" to an "existing source." *See supra* at 68. Indeed, it is incoherent to do anything else.

Nothing in Section 7411(a)(1) can be sensibly read to make the snippet "emissions of air pollutants" the indirect object of "application." If one did, Petitioners would have "standard of performance" mean: "a standard of emission limitation achievable through the application of the best system of emission reduction [*i.e.*, application of generation shifting] *to emissions of air pollutants*." That doesn't make sense.

Generation shifting isn't "applied" to emissions of air pollutants. Emissions of air pollutants might, instead, be incidentally reduced by changing the economics of the power sector so owners/operators or "the grid" implement generation shifting—just as EPA said in 2015. CPP, 80 Fed. Reg. at 64,720/2.

Once again, Petitioners' theory doesn't actually help them. Their reading would, instead, still limit EPA to the small subset of systems that apply to "emissions of air pollutants" themselves, such as end-of-stack technology. It would not even permit many operating equipment upgrades and processes included in the ACE Rule (or the CPP Building Block 1) BSER, let alone the many such measures employed from time to time among EPA's some seventy previous Section 7411 rules. Generation shifting would thus still unambiguously fail to qualify as a BSER that can be applied. Once again, Petitioners merely prove that the CPP grammatical construction collapses.[33]

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[33] That 40 C.F.R. § 60.21a(e) uses "designated facilities," *see* Env. Br. at 17 (noting that this term is in the plural), merely conveys that the "best system" must be adequately demonstrated for all existing sources. The definition of "designated facility" is clearly in the singular. *Id.* § 60.21a(b). Regardless, to understand Congress's intent, one must look to the *statute* which uses "existing source" as the relevant indirect object, not the *regulatory* term "designated facilities." 42 U.S.C.

c. Ignoring Section 7411(d) when interpreting the definitional provision of Section 7411(a)(1) is irrational and contrary to basic canons of construction.

Any life left in Petitioners' argument is extinguished once the definition of "standard of performance" is considered in context of Section 7411(d)(1). So, in a desperate fallback, Petitioners argue that EPA (and, by extension, the Court) is forbidden from looking to Section 7411(d)(1) in interpreting Section 7411(a)(1). They claim the two provisions "pertain[ ] to . . . different phase[s] of the regulatory process." State Pets. Br. at 46; Con Ed. Br. at 12-13 ("EPA elides the distinct functions of these two sections. . . ."). But again, Section 7411(a) *has no independent function*. It is a "Definition," to be used elsewhere in the subsections of Section 7411 that deploy the term. It provides no independent regulatory authority to EPA—as is easily seen by noting that if Congress enacts a statute in an entirely new area that simply consists of a set of definitions, no one would be commanded to do or avoid doing anything. Petitioners' attempt to make Section 7411(a)(1) a

§ 7411(d)(1); *see also* State Plans for the Control of Existing Facilities, 39 Fed. Reg. 36,102 (Oct. 7, 1974) (adopting this term for "ease of discussion").

freestanding provision, divorced from the rest of the statute, is not consistent with either logic or canons of statutory construction.

Section 7411(d) provides authority for EPA to oversee a program in which States submit plans that "establish[ ] standards of performance for any existing source." 42 U.S.C. § 7411(d)(1). Section 7411(a)(1) provides the definition of the term "standard of performance." *Id.* § 7411(a)(1). Thus, far from being freestanding from Section 7411(d), Section 7411(d) is integral to giving meaning to Section 7411(a)(1). In particular, the inquiry—addressing to what the "best system of emission reduction" is applied to—necessarily turns on what, in particular, is the target of regulation under Section 7411(d)(1): the "existing source." This is particularly true given that "standard of performance" is a defined term used in both Section 7411(b) and Section 7411(d). These subsections have different regulatory targets and provide different indirect objects to the application of a "standard of performance" (new and existing sources, respectively).

Moreover, this approach ensures that when a state plan establishes a standard of performance "for" any existing source, it will be based on the degree of emission limitation achievable from

"applying" the BSER to the individual source. By contrast, as just explained, Petitioners identify no sensible indirect object within Section 7411(a)(1).

Petitioners offer no support for their position that EPA and this Court must not consider how a defined term is used with the relevant statutory provision. Again, a "fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *UARG*, 573 U.S. at 320 (internal quotation marks omitted). The self-evident "context" in an "overall statutory scheme" for a definitional term includes the operational provisions in which they are used. Reading such terms contextually is the only proper method of statutory construction. *See Graham Cty. Soil & Water Conservation Dist.* v. *United States*, 559 U.S. 280, 290 (2010) ("Courts have a duty to construe statutes, not isolated provisions."); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568, 571 (1995) (statutory section in which the defined term "prospectus" was used was an "important guide to the correct resolution of the case," particularly the meaning of "prospectus").

Congress linked the terms of Section 7411(a) with Section 7411(d) through one of the most basic modes of statutory drafting: a section of definitions for reading into operative terms. Petitioners' last-ditch attempt to claim these provisions have "distinct language and purposes" cannot save the CPP or render the ACE Rule arbitrary. Petitioners' argument founders on the very language that kicks off the "Definitions" section they attempt to read myopically.

d. Section 7411(d)(1) in general and also the term "application" require that the BSER must apply to the existing source.

Petitioners charge that EPA's interpretation now substitutes the words "at" or "to" in for the word "for" in Section 7411(d)(1). *See* Con. Ed. Br. at 13, State Pets. Br. at 47-49, Env. Br. at 17-18. EPA's current reading is, of course, the same natural reading of Section 7411 that EPA had for four decades prior to the CPP. Regardless, this allegation is incorrect.

First, Petitioners lose sight that the primary object of the first sentence of 42 U.S.C. § 7411(d)(1) are the state *plans*, including what EPA's regulations for those plans must require and permit. With the proper focus, it is grammatically correct for Congress to have spoken in

terms of each state's "*plan . . . for* any existing source," 42 U.S.C. § 7411(d) (emphasis added), while also mandating that the BSER must be applied to or at an individual building, structure, facility or installation.

Second, if a standard of performance is to "reflect[ ] the degree of emission limitation achievable through the application of the [BSER]" "for" an individual source, the plain meaning is that the technologies or methods selected as the BSER are applied at the individual source. This interpretation is fully consistent with—and supported by—the requirement that "application" be used with an indirect object (here, "any existing source."). Like so many of their (and the CPP's) other arguments, Petitioners are trying to read the word "for" out of its context in Section 7411(d)(1) in which Congress wrote the preposition—just as they try to evade Section 7411(d)'s ubiquitous focus on the "particular," singular, "existing source."

Third, while use of "for" in the first sentence is consistent with EPA's repeal of the CPP, Congress expressly uses the word "to" in the second sentence. "Regulations of the Administrator under the paragraph shall permit the State in *applying* a standard of performance

[which reflects the degree of emission limitation achievable through *application* of the BSER] *to* any particular source under a plan submitted . . . ." *Id.* at § 7411(d)(1) (emphasis added, incorporating pertinent part of Section 7411(a)(1)). Again, it would make no sense for Congress to refer to the Administrator "permit[ting] the State in applying [generation shifting] to any particular source . . . . ." As the CPP acknowledged, generation shifting is instead something that is "implemented." And it is not implemented at an existing source itself, but collectively and "as a practical matter, by actions taken by the owners or operators of the sources." CPP, 80 Fed. Reg. at 64,720/2. The CPP's generation shifting scheme by definition cannot apply "to" particular sources. It is a "process[] of shifting dispatch" onto the grid, impacting them in the aggregate. *Id.* at 64,776/3.[34]

Petitioners lead the Court down an interpretive blind alley. Their approach hearkens back to the CPP's failure to recognize that, irrespective of whether owners or operators can "implement" generation

[34] Petitioners' own papers make this abundantly clear. *E.g.*, Con. Ed. Br. at 8-9 ("shifting generation to lower- and non-emitting sources . . . . increasing the operation of low- and zero-emitting generation sources and reducing the operation of higher-emitting sources").

shifting, such a system cannot be applied to a particular existing source. *See* ACE Rule, 84 Fed. Reg. at 32,527/1-3; *supra* at 72-74 (discussing "implement" versus "apply" and explaining that generation shifting requires measures wholly outside the existing source). Focusing only on whether generation shifting is a system "for" existing sources to reduce their emissions (*see* State Pets. Br. at 48) ignores statutory text in just the same way.

2. The statutory structure compels the conclusion that the BSER must apply to the existing source itself.

As discussed above, the interplay between Section 7411 and the BACT requirement set forth in Section 7475 requires that the BSER be limited to those systems that can be applied to an individual source. Petitioners have no persuasive response. *See supra* at I.A.4.

First, Petitioners ask the Court to judicially amend—i.e., simply ignore—the text of 42 U.S.C. § 7479(3) (defining BACT). They argue that because Section 7475 of the CAA applies to "new and modified" sources, "[t]he standard from section 7411 that would generally be 'applicable' to such sources is thus a new-source standard under section 7411(b), not a standard under section 7411(d)." State Pets. Br. at 49-50.

Of course, this is not what Congress said in Section 7479(3). Congress cross-referenced "Section 7411" (which includes all its paragraphs), not just Section 7411(b). Moreover, just because a source has been modified for purposes of Section 7475 to require BACT does not necessarily mean that the same source must have been modified for purposes of Section 7411. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 568-69, 573-76, 581 & n.8 (2007) (identical statutory definitions did not require that EPA treat "modification" in these two provisions identically). Thus, Section 7411(d) existing-source standards may indeed be "applicable" under Section 7479(3) notwithstanding that Section 7475 applies to new and modified sources within the meaning of that program. Petitioners' argument to evade the unambiguous meaning of Section 7411(d) would lead to an incongruous result whereby a Section 7411(b) "best system" is limited to measures applicable to a source, but Section 7411(d) systems are not, even though the term "standard of performance" for both is defined by Section 7411(a)(1).

Second, Petitioners argue that EPA should not have considered Section 7411(d) as a floor for BACT because "section [7475] permits are issued on 'a case-by-case' basis," but regulation under Section 7411(d) is

on a source-category basis. State Pets. Br. at 50. Petitioners are wrong. They are once again ignoring what Section 7411(d) actually says. As discussed at length above, Section 7411(d) provides for regulation on the level of each individual, "particular" source.[35]

Third, Petitioners paint an incomplete picture when claiming that "Congress enacted section [7475] as part of the New Source Review program in 1977—seven years after enacting section [7411]." State Pets. Br. at 50; *see also id.* at 25. The 1977 CAA amendments also included replacing the term "emission standard" in Section 7411(d) with "standard of performance," the same term used in Section 7411(b), and revising the definition of "standard of performance." ACE Rule, 84 Fed. Reg. at 32,525/1 & n.50. Thus, at the same time it was enacting the BACT requirement, Congress also made substantive revisions to Section 7411.

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[35] Even to the extent that Petitioners argue that regulation under Section 7411(d) is on a source-category basis, Petitioners offer no explanation of why this distinction-without-a-difference should matter. Notably, Petitioners agree that, at a minimum, Section 7411(b) standards are "applicable" for purposes of Section 7479(3). *See* State Pets. Br. at 49-50. But Section 7411(b) (direct federal regulation of new sources) is far more focused on the "source category" than Section 7411(d), which repeatedly emphasizes the singular existing source. *See* 42 U.S.C. § 7411(b).

At bottom, Petitioners do not and cannot dispute that BACT is limited to those controls applicable at a source. *See* State Pets. Br. at 49-51. Section 7479 is unambiguous that "application of [BACT]" may not result in emissions in excess of the limits set by Section 7411. 42 U.S.C. § 7479(3); *see also supra* at 85-86 (BACT must be at least as stringent as the Section 7411 standard). Petitioners are thus wrong to suggest that their reading of Section 7411 poses no conflict with Section 7475. State Pets. Br. at 50-51. If the BSER under Section 7411 can be selected from a broader menu of options (including, for example, "generation shifting") than can constitute BACT, then Section 7411 may set a floor that cannot be achieved even by "application of [BACT]." Part of "ensur[ing] that neither section [7411 or 7475] would undermine the other" (State Pets. Br. at 50) is construing these provisions not to authorize different types of controls.

C. Petitioners' Belief That Generation Shifting Is Good Policy Can Be Presented to Congress—It Cannot Override the Text of the Statute.

The principal recurring theme in Petitioners' briefs is their position that EPA erred in repealing the CPP because generation

shifting is good policy.[36] Putative beneficiaries of the CPP's scheme of transfer credits, interstate subsidies, and government-engineered competitive advantages—including many Petitioners—unsurprisingly think so. So working backwards from this starting point, they cast about for a statutory basis for their preferred approach. Petitioners urge that generation shifting is a "system," that it is the "best" system, and that in enacting Section 7411, Congress cared more about practical results than the plain meaning of the text it enacted. *See* State Pets. Br. at 31 ("prioritization of practical results over technical formalities"); *id.* at 33-41. They point to other contexts in which some amount of generation shifting or credits has been allowed, paying no attention to the different statutory text applicable to those contexts. *See* Con. Ed. Br. at 16-17; State Pets. at 8-9. Petitioners' policy arguments fail.

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[36] Petitioners' view that generation shifting under the CPP is the best policy approach and meets the other requirements of Section 7411(a)(1) is by no means the settled consensus. These issues were hotly disputed in the litigation over the CPP and never resolved. *See, e.g.*, Pet. Opening Br. on Record Issues, *West Virginia v. EPA*, No. 15-1363, Doc. 1610031 (D.C. Cir. Apr. 22, 2016); Pet. Opening Br. on Core Legal Issues, *id.*, Doc. 1610010 (D.C. Cir. Apr. 22, 2016).

1. Petitioners' approach to statutory interpretation is backwards.

"It is [a court's] function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010). A "court's task is to apply the text [of the statute], not to improve upon it." *EPA v. EME Homer City Generation L.P.*, 572 U.S. 489, 508-09 (2014) (internal quotation marks and citation omitted). This is true no matter whether Petitioners (or the Court) believe that a particular policy approach would be best or whether Congress has authorized that approach in other contexts. *See UARG*, 573 U.S. at 327; *EME Homer*, 572 U.S. at 508. This black-letter law applies with full force to judicial review of regulations addressing climate change. *UARG*, 573 U.S. at 325-26; *Mexichem*, 866 F.3d at 460-61.

Accordingly, Petitioners' constant refrain about the desirability of generation shifting and its use in other contexts is beside the point. These alleged virtues do not render it lawful under Section 7411. EPA did not deny that if "generation shifting" were within its authority, it "might be a workable policy." ACE Rule, 84 Fed. Reg. at 32,532/2. "But

what is not legal cannot be workable." *Id.*[37] Petitioners' reliance on generation shifting as a component of rules under other CAA authorities is immaterial for similar reasons.

First, Petitioners' efforts to normalize the CPP's novel new approach by pointing to other rules and programs (State Pets. Br. at 8-9; Con. Ed. Br. at 16-17) fail. Those other rules were authorized by other CAA provisions with distinct text, structure, and purposes; they do not support the position that *Section 7411* authorizes the CPP.

Petitioners point to rules under the CAA's Good Neighbor Provision, as well as the acid rain program in Title IV of the CAA. None of these examples involve rules that were promulgated under Section 7411, or even any analogous statutory text. In fact, all involve provisions making unambiguously broader grants of authority. The

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[37] Power Company Petitioners suggest that power plants are in a "unique and inextricable production relationship." Con Ed. Br. at 14. Section 7411, however, contains no exceptions granting different authority in regulating power plants as compared to other sources. That a power plant's situation is unusual cuts *against* the idea that Congress intended Section 7411(a)(1), a generic provision, to authorize generation shifting—an approach that they argue may apply to them alone. Tellingly, Congress in the 1990 CAA Amendments created an *entirely new title* in the Act to address power plants through a cap-and-trade scheme, 42 U.S.C. §§ 7651–7561o. Section 7411 did not contain such authority then and it does not contain it now.

acid-rain program in Title IV of the CAA facially establishes an allowance-trading program for sulfur dioxide. *See, e.g.*, *See Indianapolis Power & Light Co. v. EPA*, 58 F.3d 643, 644 (D.C. Cir. 1995) (summarizing the relevant provisions). Rules under the CAA's Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), rely on a different set of statutory objectives (attaining and maintaining the NAAQS) and express authorities identified under Section 7410. *See, e.g.*, 42 U.S.C. § 7410(a)(2)(A) (implementation plans shall "include enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of this chapter"; such techniques include "economic incentives" such as "marketable permits").[38]

Indeed, Petitioners' examples actually confirm the numerous other textual demonstrations that the CPP's trading scheme is not authorized under Section 7411. Both of these grants of authority for trading

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[38] That some *state* programs have relied on the interconnectedness of the grid in regulating CO_2 emissions, *see, e.g.*, State Pets. Br. at 8-9, is immaterial to the proper interpretation of *Congress's* delegation of authority to EPA under Section 7411. Just as perceived Congressional inaction does not give EPA authority, *Mexichem*, 866 F.3d at 460, neither does state legislative action.

programs in Section 7410 and Title IV were made in the 1990 Amendments to the CAA. But Congress did not similarly amend Section 7411 to expressly allow for trading or the use of economic incentives such as marketable permits at this time. *Cf.* CPP Repeal RTC, Ch. 3 at 17-18, EPA-HQ-OAR-2013-0602-37106, JAXXXX (noting that the express authorization for an allowance trading scheme in the acid rain program cuts against the idea that EPA has authority for similar measures under Section 7411). "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Russello*, 464 U.S. at 23. Once again, Petitioners are undermining their own arguments.

Second, those other programs are not precedent for the CPP even if one assumes they reflect (which they do not) that some sort of trading scheme is permissible in Section 7411(d). Neither EPA's trading programs addressing interstate pollution in the NAAQS program under 42 U.S.C. § 110(a)(2)(D)(i)(I), such as the Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), nor the Title IV acid rain program, 42 U.S.C. §§ 7651–7651o, took an approach parallel to the CPP.

The emission budgets in the 2011 Cross-State Air Pollution Rule were not based on "generation shifting" as the core regulatory approach, as in the CPP. Rather, the sulfur dioxide emission budget relied on setting a $500/ton cost threshold that was principally derived from controls applied at a source—operation of existing controls and some switching to low-sulfur coal. *See* 76 Fed. Reg. at 48,251-53, 48,279-80. The rule simply then modeled and captured a certain amount of generation shifting as an incidental *result*. This primarily occurred among fossil-fuel fired generators, with limited effects on the overall emission budgets. *See id.* at 48,279-80.

The 2016 Cross-State Air Pollution Update is similar. EPA developed the emission reduction requirements using a $1,400 cost-threshold based primarily on a strategy of operating existing controls and installation of low-NOx burners. The modeling used to establish budgets again also captured a small degree of generation shifting, which EPA constrained to occur only among sources in each State. *See* 81 Fed. Reg. 74,504, 74,543-47 (Oct. 26, 2016); CSAPR Update NOx Mitigation Strategies TSD at 11-13, EPA-HQ-OAR-2015-0500-0554,

JAXXXX. This rule, too, did not require "shifting" as its core regulatory approach, as with the CPP.

The acid-rain program under Title IV likewise cannot be analogized to the approach adopted in the CPP. There, Congress directly set the "cap" on sulfur dioxide emissions by statute. *See Indianapolis Power*, 58 F.3d at 644. EPA did not impose its judgment of the level of emission reductions that could be achieved by shifting generation from one category of sources to another—with the attendant economic consequences selected by EPA rather than by elected representatives.

Third, Petitioners argue that the Court should consider the aspects of Section 7411 that require at-the-source controls mere "technical formalities" that may be superseded by a "results-oriented" approach. State Pets. Br. at 30-31. But the Supreme Court teaches that appeals to results cannot supersede statutory text. *Morrison*, 561 U.S. at 270. Nor can appeals to practicality.

Massachusetts v. EPA does not support Petitioners' argument either. *See* State Pets. Br. at 30-31. That case relied on the plain text of 42 U.S.C. § 7521(a) and the "sweeping definition of 'air pollutant.'"

Massachusetts, 549 U.S. at 528-29. That Congress broadly drafted that provision, which establishes a general definition of that term across the Act. The case does not hold that every provision of the CAA has such capacious meaning. In fact, the Supreme Court later held exactly the contrary in *UARG*. 573 U.S. at 320-21 (explaining that despite the Act-wide definition of "air pollutant" read broadly in *Massachusetts*, the same term must be given a "reasonable, context-appropriate meaning" where it appears in particular statutory provisions). Nor does *UARG* hold that Congress took a *laissez-faire* attitude toward the means by which EPA regulates air pollutants in Section 7411. "EPA's well-intentioned policy objectives with respect to climate change do not on their own authorize the agency to regulate." *Mexichem Fluor*, 866 F.3d at 460-61; *see also UARG*, 573 U.S. at 325-26 (similar).

Massachusetts v. EPA also does not suggest, as Petitioners urge, that the Court may read "system" without reasonable limitation in the name of "forestall[ing] obsolescence." *See* Con. Ed. Br. at 22. Though the Supreme Court in that case held Congress intentionally used "broad language" in a single, specific, statutorily defined term ("air pollutant"), 549 U.S. at 532, the decision does not represent a generalized holding

that agencies and courts can play fast and loose with implementing text in particular regulatory programs to reach a preferred policy result regarding climate change. Indeed, *UARG* addressed the very same term "air pollutant." Yet despite the Act-wide definition of this term, the Supreme Court held it must be given a "reasonable, context-appropriate meaning" where it appears in particular statutory provisions. *See UARG*, 573 U.S. at 316-19.

Fourth, Petitioners are wrong in suggesting that because the unambiguous text of Section 7411 precludes their preferred approach, it is unworkably narrow and so should not be followed. This approach to the law has been soundly rejected. *See Morrison*, 561 U.S.at 270 ("[G]ive the statute the effect its language suggests, however modest that may be . . . ."). The long history of Section 7411 in which EPA has determined that at-the-source controls were the BSER also conclusively rebuts this argument. EPA is not generally starved for at-the-source control mechanisms.[39] Even in this case, Petitioners argue that there

[39] Notably, this Court has held that, in some instances, the constraints imposed by Section 7411 may mean there simply is not an effective BSER applicable to a source. *See Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 439 (D.C. Cir. 1973).

were several other BSER options that could be applied at an individual source. *See, e.g.*, State Pets. Br. at 13, 18; Env. Br. at 31. That EPA determined, in designing the ACE Rule, that these options were not appropriate for other reasons, such as exceedingly high cost, is a complaint about EPA's exercise of its discretion or other requirements in the CAA. Congress set entirely sensible bounds on that discretion by unambiguous requiring that controls under Section 7411(d) be applicable at the source. Petitioners may not seek to have this court second-guess Congress's clearly intended limits.

2. Petitioners' arguments that Section 7411 confers discretion to ignore the statutory requirements are substantively wrong.

Petitioners also argue that broad words like "best," "system," and the concept of "cooperative federalism" allow for practicality. They suggest these terms express that practicality should be prioritized over faithfulness to the statutory text. This is wrong. Whatever discretion EPA has under Section 7411 to identify the "best system" of emission reduction cannot override the Act's unambiguous limits.

a. "Best" is a guide to EPA's discretion to balance various factors in selecting the BSER from the permissible menu of adequately demonstrated systems, not an invitation to ignore other statutory terms that cabin such discretion.

Petitioners erroneously suggest that the word "best" in Section 7411(a)(1) demonstrates that EPA's sole task is to "determine the [system] that is 'best' at 'emission reduction.'" State Pets. Br. at 35-36 (suggesting that this means that EPA should "think expansively, not narrowly, in considering systems to reduce emissions"). That is incorrect. Instead, the word "best" guides EPA's discretion to select what provides the most benefits after balancing various enumerated factors. *See* 42 U.S.C. § 7411(a)(1). In determining which "system" it will ultimately select as "best," EPA looks to the menu of permissible options after considering all statutory factors and limitations. The word "best" does not expand the options that are otherwise permissible, nor authorize EPA to select whichever option it deems most practical. *See Sierra Club v. Costle*, 657 F.2d 298, 325-26 (D.C. Cir. 1981) (EPA's task was "balancing the relevant factors" in determining what level of emission reduction was "practicable"); *see also Lignite Energy Council v.*

EPA, 198 F.3d 930, 932-33 (D.C. Cir. 1999) (discussing this balancing inquiry in determining the "best" system).[40]

b. "System" cannot bear the weight Petitioners place on it.

As did the CPP, Petitioners point to dictionary definitions of "system," urging that EPA should have observed a meaning that provides nearly no constraints on its authority. *See* State Pets. Br. at 33-34; Con. Ed. Br. at 18. But even if "system" is read broadly, it cannot function as an end-run around other aspects of Section 7411. That context precludes EPA from selecting generation shifting as the BSER. Moreover, Petitioners are wrong in suggesting that "system" throws open the doors of the CAA to include consideration of "all measures by which sources may in practice reduce their emissions." State Pets. Br. at 33-34. As previously explained, this Court and the Supreme Court reject agency attempts to claim vast new powers through unassuming words. *See Cal. ISO*, 372 F.3d at 400; *see also UARG*, 573 U.S. at 320-21 (holding that while the CAA's general definition of "air pollutant" had sweeping breadth, that *same term* could not be construed to include

[40] For similar reasons, Petitioners' reliance on the words "adequately demonstrated" and "achievable" (State Pets. Br. at 36) is also misplaced.

greenhouse gases in other CAA programs); *EPSA*, 136 S. Ct. at 774 (adopting "common sense" limiting construction "to prevent the [FERC] statute from assuming near-infinite breadth"); *Am. Bar. Ass'n*, 430 F.3d at 468-71.

The CPP's transformative interpretation of "system" effected just such a gross expansion of authority. On the CPP's view, EPA could adopt nearly any regulatory approach, so long as it can make a non-arbitrary showing that the other elements of Section 7411(a)(1) are met. *See supra* at 96-97; *infra* at 148-49. As to generation shifting in particular, "[t]aken to its logical end . . . any action affecting a generator's operating costs could impact its order of dispatch and lead to generation shifting." ACE Rule, 84 Fed. Reg. at 32,529/1.[41]

Petitioners are thus wrong to claim that EPA has ignored the definition of "system." The statute itself contains no such definition. And even the definitions of "system" that Petitioners cite reflect that this term involves a reasonable means-end fit. *See, e.g.*, State Pets. Br.

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[41] *Cf. Cal. ISO*, 372 F.3d at 404 ("The very act attempted by FERC in this case is quite enough to reveal the drastic implications of its overreaching. The same statutory terms that apply to FERC's regulation of CAISO apply to its regulation of all other jurisdictional utilities.").

at 33-34 (citing definitions: "a set of principles or procedures *according to which something is done*"; "a complex unity formed of many often diverse parts subject to a common plan or serving a common *purpose*" (quotation marks and citations omitted; emphases added)).

Thus, EPA appropriately construed this word. It looked at the statutory context of Section 7411(d). *See* ACE Rule, 84 Fed. Reg. at 32,528/1-3. And the plain text of that provision provides that the state plans it governs are to establish standards for particular existing sources that account for source-specific characteristics—the opposite of the CPP's grid-wide, fuel-balance-shifting approach.

The CPP did not, as Petitioners suggest, identify principled bounds on the universe of options for what might constitute a "system." Merely repeating the words of the statute—without explaining how they allow for the CPP, yet theoretically limit some other plausible but plainly unacceptable overreach—does nothing to illustrate any principled limit to EPA's authority. *See supra* at 96-97. Under Petitioners' broad legal theory, EPA is not even disqualified from imposing a "system" of minimum wage requirements or production caps

as a BSER. Petitioners offer no dispute that, in their view, these measures would qualify as a "system" to reduce emissions.

Instead, Petitioners merely suppose that EPA, in the exercise of its broad *discretion*, could not *reasonably* find that those measures are the "best" or "adequately demonstrated" approaches. *See* Con. Ed. Br. at 20-21; *see also* State Pets. Br. at 51-52. But this doesn't show a *statutory* limit. These arguments only confirm the unreasonable breadth of authority the CPP assigned to EPA by way of an unreasonable and implausible reading of Section 7411. In fact, Petitioners argue that the use of "best" in Section 7411(a)(1) is an indication that EPA's authority sweeps "expansively" (State Pets. Br. at 35) to include the systems that EPA—in its broad discretion—deems most effective at reducing emissions, as a results-oriented matter. Again, this Court's decision in *Cal. ISO* illustrates the folly of relying on commonplace words to claim broad new powers. 372 F.3d at 399 (citing 16 U.S.C. § 824e(a), which contains several other predicate requirements before FERC can regulate a "practice").

Citing to provisions in which Congress referred to "best available retrofit technology" or "technological system of continuous emission

reduction," Petitioners attack a strawman. Con. Ed. Br. at 21-22; State Pets. Br. at 35. They wrongly accuse EPA of limiting Section 7411(a)(1) to "technology" applicable at an individual facility, though that word is not in Section 7411(a). But EPA does not claim there is such a limitation, nor is that why the CPP went too far. EPA's current, longstanding (except for the CPP), and principled construction of "system" does not limit that word to "physical modification of sources" (State Pets. Br. at 35) or "narrow [terms] out of existence" (Con. Ed. Br. at 21-22). As EPA's ACE rule itself now establishes for BSER, an at-the-source "system" may include controls such as improved procedural methods that are not retrofits, technology, or physical modifications. *See* ACE Rule, 84 Fed. Reg. at 32,526/2 & n.62; *id.* at 32,540/2-3.

There is thus no tension between EPA's correct construction of the limitations on "system" and these other provisions. It is of no matter that Congress did not similarly curtail EPA's regulatory options to requiring "retrofit" or "technology" controls. EPA in the CPP repeal and ACE Rule did not read its authority that narrowly. And the absence of those particular limitations certainly does not demonstrate that the word "system" authorizes EPA to consider any means that achieves

emission reductions. To the contrary, the statute's use of "system" in other provisions that usually call for technological control on individual sources, *see* 42 U.S.C. § 7411(a)(7), if anything, corroborates that Congress generally conceives of a "system" as one applied in this manner.

c. "Cooperative federalism" cuts *against* a broad reading of EPA power.

Perversely, Petitioners argue that Section 7411's cooperative-federalism structure "supports a broad interpretation of EPA's authority." State Pets. Br. at 37. As with Petitioners' other arguments, nothing here can supersede the limits placed on EPA's authority under the plain text of Section 7411. Furthermore, Petitioners offer a twisted view of cooperative federalism. Ordinarily, that term denotes a preference for state autonomy and control, subject to federal oversight. It is not usually associated with federal mandates supplanting state sovereignty. *See, e.g.*, *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 303 (2015).

Petitioners baldly assert that EPA should consider state "measures involving more than one source," because "EPA issues its emission guidelines before source-specific standards are set." State

Pets. Br. at 38. This is a *non sequitur*. It ignores Section 7411(d)'s focus on the individual existing source. Section 7411(d)(1) reflects the opposite: States set source-specific standards in their plans. So the systems underlying those standards should likewise be constrained to those applicable to the individual source.

Likewise, allowing a State to set source-specific standards or to allow sources discretion in how they meet standards of performance (State Pets. Br. at 38-39) means just that: state discretion. Nothing in the doctrine of cooperative federalism supports reverse-engineering state discretion to conclude that federal authority is expansive. For similar reasons, States' use of generation shifting in other contexts is irrelevant. A major flaw of the CPP was that it forced States into a system of generation shifting without allowing them to make their own, fully individualized judgments about the appropriate standard of performance and "remaining useful life" of past investments. *See supra* at 64, 82-83. Nor is EPA's attempt to "shift" the mix of electricity generation, in a disregard of past state siting and construction approvals in their traditional area of

responsibility—areas where even FERC, the federal energy regulator, cannot tread—a hallmark of cooperative federalism.

D. "Reduced Utilization" or "Reduced Generation" Cannot Constitute the BSER.

1. The CAA does not authorize, let alone clearly authorize, reduced utilization as the BSER.

Petitioners urge that, short of requiring generation shifting, EPA should have considered "reduced utilization" (also termed "reduced generation") as a potential option for the BSER. EPA's historical practice, the statutory text, and other considerations all uniformly show that reduced utilization is not a lawful BSER. There are many reasons.

First, reduced generation cannot be the BSER because it contravenes the plain meaning of "standard of *performance*." *See* ACE Rule, 84 Fed. Reg. at 32,532/1 & n.136. Reduced generation is based on *non*performance. It does not achieve emissions improvements to the source's actual performance. *Id.*; *see Weyerhaeuser* 139 S. Ct. at 368-69 (the Court was required to give effect to the word "habitat" in defined term "critical habitat").

Petitioners also try to insert the word "emissions" into "standard of performance." Env. Br. at 40. They then, in effect, read the word

"performance" out of it. In their view, all that matters is that the source "reduce [its] emissions" to a lower level. *Id.* Under this view, there is no reason for Congress to have used the term "standards of performance." It could have simply required a "standard for emissions," 42 U.S.C. § 7411(a)(1), without using the word "performance" at all. *See, e.g.*, *id.* § 7412(d) ("Emission standards"); *see Weyerhaeuser*, 139 S. Ct. at 368-69. A source's "performance"—or even its "emissions performance"—must be conceptually distinct from its "emissions," or else the word "performance" would do no work at all.[42] Here, Congress's use of "performance" reflects its intention that the BSER improve the source's emission rate in terms of its performance (here, producing electricity), not to mandate nonperformance.

Second, even the CPP rejected reduced utilization as a lawful option for the BSER. *See* ACE Rule, 84 Fed. Reg. at 32,531/1; CPP, 80 Fed. Reg. at 64,780/1 (reduced utilization "by itself does not fit within

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[42] Consider two sources, the first of which produces one ton of CO_2 per unit of electricity and the second of which produces ten tons of CO_2 per unit of electricity. If the first plant produces twenty units of electricity and the second produces only one, the total "emissions" of the second plant would be half that of the first. But the "emission *performance*" of the first is ten times better than the second.

[EPA's] historical and current interpretation of the BSER"). *Reduced* generation differs from generation *shifting* because mere reduction does not consider increased substitute generation. The CPP itself said, "the focus for the BSER has been on how to most cleanly produce a good, not on limiting how much of the good can be produced." 80 Fed. Reg. at 64,777/3-78/2 (discussing consistent past practice); *see also id.* at 64,780/1.

Environmental Petitioners assert that the CPP rejected only those measures that would reduce "overall" generation of electricity, such as end-use efficiency programs. *See* Env. Br. at 38-39. That is wrong. The CPP specifically declined to finalize "reduced generation," although it was explored in the proposed rule as a potential BSER for the source category. *See* CPP, 80 Fed. Reg. at 64,779/3-80/1; CPP Proposed Rule, 79 Fed. Reg. 34,830, 34,889/1-90/2 (June 18, 2014). That proposal did not conceive of reduced generation as necessarily causing a decrease in total electricity generation (that is, electricity from fossil fuel and all other sources of generation). *See* 79 Fed. Reg. at 34,889/1-90/2. Similarly, the CPP's rationale for rejecting this approach, discussed immediately above, applies broadly to all forms of reduced generation—

irrespective of whether they cause a decrease in total electricity generation.[43]

Petitioners try to claim that one provision of the ACE rule is akin to authorizing reduced utilization as a compliance option. Env. Br. at 39-40. They misunderstand 40 C.F.R. § 60.5780a(a)(2), which provides that designated facilities subject to the Rule do not include "[a] steam generating unit that is subject to a federally enforceable permit limiting annual net-electric sales to one-third or less of its potential electric output, or 219,000 MWh or less." Petitioners fail to grasp the difference between, on the one hand, using "reduced generation" as the "best system" to derive emission limits and, on the other hand, EPA exercising its discretion—as it commonly does, *see, e.g.*, 40 C.F.R. §§ 60.40Da, 60.4305—to exclude small sources as a matter of the rule's

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[43] Petitioners incorrectly suggest that the CPP found that reduced generation, divorced from increased substitute generation, could be "part of the best system." Env. Br. at 39. The CPP is to the contrary. *See, e.g.*, CPP, 80 Fed. Reg. at 64,723/3 ("[T]he two actions are halves of a single balanced endeavor."); *see also id.* 64,782/2 (explaining that generation shifting "entail[s] substitution of lower- or zero-emitting generation for higher emitting generation" and that while reduced utilization may be a way to "implement that substitution" the CPP "does not 'rely primarily' on reduced utilization in and of itself"); *id.* at 64,780/1.

applicability. The preamble is clear that reduced generation is not a lawful option for the best system of emission reduction or as a compliance option. *See* ACE Rule, 84 Fed. Reg. at 32,531/1-32/2, 32,556/1.

Third, Section 7602(*l*) provides that "standard of performance" means "a requirement *of continuous emission reduction*, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." 42 U.S.C. § 7602(*l*) (emphasis added); *see* ACE Rule, 84 Fed. Reg. at 32,531/2-32/1. Reduced utilization does not qualify as a "continuous emission reduction" system. This is not "continuous," as regulated sources could lower their generation during some periods, but produce at full capacity (and, therefore, full emissions) at others.[44]

Petitioners do not argue that reduced utilization qualifies as a "requirement of continuous emission reduction" under the statutory text as written. Instead, they impermissibly attempt to supplant the text with legislative history. *See* Env. Br. at 39-40. "Congress's authoritative

[44] In fact, even generation shifting does not meet the requirement of "continuous emission reduction," for similar reasons.

statement is the statutory text, not the legislative history." *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quotation marks omitted). Even if pollution dispersion had been Congress's principal concern, the text of Section 7602(*l*) sweeps broadly. Moreover, Petitioners' argument depends on demonstrating that—notwithstanding the statutory text—Congress's *only* reason for requiring "continuous emission reduction" was concerns over pollutant dispersion. It was not. *See, e.g.*, H.R. Rep. No. 95-294, at 82, 86, 88 (1977) (other concerns including that intermittent controls lead to "substantial reductions in productivity;" would undermine "the development of new, more efficient, less costly pollution control systems;" and are difficult to enforce).

Regardless, a putative "system" of reduced generation would still reflect an EPA attempt to address CO_2 emissions from fossil fuel-fired sources through the reconfiguration of the power sector in the United States. It would still have far-reaching impacts—and may even be a greater disregard of traditional state authority in this area. Reduced generation calls for the nonproduction of a good (electricity) that the States are specifically regulating to ensure is always available. Absent a

clear authorizing statement from Congress in the statutory text (and none exists), "reduced generation" is no more lawful than "generation shifting." *Id.*

2. Renewable Petitioners cannot repackage generation shifting as "reduced utilization."

Renewables Petitioners try to defend generation shifting and reduced generation by noting they would meet various other criteria set forth in Section 7411(a)(1). *See* Renewable Pets. Br. at 5-8, 10-14. These arguments are irrelevant. Just because these "systems" might meet some statutory limitations, doesn't excuse the failure to meet all the statutory limitations.

Moreover, to the extent Renewables Petitioners advance a view of reduced generation that involves other sources substituting increased generation (*id.* at 10 n.2, 13), they are advocating for unlawful generation shifting in a thin disguise.

E. EPA Lawfully Repealed the Guidelines Governing Gas-Fired and Oil-Fired Power Plants.

EPA properly repealed the entirety of the CPP. This necessarily required repeal of the CPP guidelines governing gas-fired and oil-fired power plants, as well.

Petitioners nevertheless contend that EPA erred in failing to adopt—at the same time as the ACE Rule—new Section 7411(d) regulations for gas-fired and oil-fired power plants. Env. Br. at 40-45; State Pets. Br. at 69-71. But there is no requirement that EPA promulgate a new regulation at the same time as repealing an old one. And EPA made clear in the ACE Proposal that it had not identified a BSER for gas- and oil-fired plants. 82 Fed. Reg. at 44,761. It instead sought information so that it could do so in the future. *Id.*

EPA maintained its position in the final rule. EPA explained that it "currently does not have adequate information to determine a BSER for these EGUs and, if appropriate, the EPA will address greenhouse gas emissions from these [power plants] in a future rulemaking." 84 Fed. Reg. at 32,533/3. *See also* ACE RTC, Ch. 2 at 9-11, EPA-HQ-OAR-2017-0355-26741, JAXXXX-JAXXXX (explaining that the Agency is still evaluating the data for natural gas power plants).

This rationale—that additional data is necessary to determine the BSER—is an entirely permissible basis to defer regulation. Petitioners recognize as much in their reference to *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 193-94 (D.C. Cir. 2011). *See* Env. Br. at 45 n.68. There, as

here, EPA declined to adopt new standards to regulate greenhouse gasses on the grounds that the Agency first needed to collect additional information. 665 F.3d at 193-94. The Court held that the Agency's decision not to act was unreviewable under 42 U.S.C. § 7607. There is "nothing 'final' in EPA's decision to collect additional information before proposing greenhouse emissions standards." *Id.* The same is true of EPA's decision in the ACE Rule. EPA needed to collect additional information before addressing CO_2 emissions from natural gas power plants. *See id.*

Petitioners look to 42 U.S.C. § 7411(d) to impose a purported "mandatory duty" for EPA to promulgate regulations for "any existing source" to which "a standard would apply 'if such existing source were a new source.'" Env. Br. at 40-41; *see* State Pets. Br. at 69. Section 7411(d) does not impose a mandatory duty. And it certainly does not require EPA to take action by a "date certain" deadline. *See Valero Energy Corp. v. EPA*, 927 F.3d 532, 535 (D.C. Cir. 2019) (noting date-

certain requirement for mandatory duty suit); *Sierra Club v. Jackson*, 724 F. Supp. 2d 33, 39 (D.D.C. 2010) (same).[45]

And, even assuming that Section 7411(d) does impose a mandatory duty (which it does not), Petitioners' remedy would to bring a mandatory duty claim under Section 7604(a)(2) in the district court after providing EPA the required jurisdictional notice. § 7604(b)(1)(A). Any such claim cannot be raised in this proceeding.

II. Section 7411 Provides EPA with the Authority to Promulgate the ACE Rule.

Section 7411 provides EPA with authority to regulate CO_2 emissions from existing coal-fired power plants. Contrary to Coal Industry Petitioners' arguments, the ACE Rule lawfully regulates these existing sources based on EPA's 2015 New Source Rule. Section 7412, which provides for regulation of hazardous air pollutants, does not bar regulation of coal-fired power plants under Section 7411(d). And, contrary to Robinson Petitioners' arguments, nothing in Section 7410

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[45] This case is distinguishable from *U.S. Sugar Corp.*, 830 F.3d at 644. *U.S. Sugar* involved EPA's obligation to regulate a subset of sources under 42 U.S.C. § 7412, which expressly requires the Agency to promulgate regulations for the sources at issue by a date-certain deadline, and provided EPA with authority to obtain the relevant information in that strict timeframe. 830 F.3d at 644.

bars regulation under Section 7411(d), because EPA has not regulated CO_2 under the NAAQS program.

A. The Rule Lawfully Regulates Existing Sources Based on EPA's 2015 New Source Rule.

Coal Industry Petitioners claim that the Rule is unlawful because EPA did not make an "endangerment finding" determining that CO_2 emissions from power plants "cause or contribute significantly" to air pollution that "may reasonably be anticipated to endanger public health or welfare."[46] *See* 42 U.S.C. § 7411(b)(1)(A); Westmoreland Mining Holdings Br. (Coal Pets. Br.) at 7-19.

This argument has no basis in the statute or the facts. Regulation of *existing* sources under Section 7411(d) does not require an endangerment finding. It requires instead that EPA have promulgated corresponding standards for *new* sources under Section 7411(b). A challenge to that is time-barred, and not properly in this proceeding. Regardless, EPA earlier made an appropriate endangerment finding.

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[46] For simplicity, we refer to the "cause-or-contribute significantly" and "endangers public health or welfare" prongs collectively as the "endangerment finding." *See* Coal Pets. Br. at 3 n.1 (adopting same convention).

1. EPA was not obligated to make a new endangerment finding, so Coal Petitioners' arguments are an untimely collateral attack.

Petitioners claim that the Rule is unlawful because EPA failed to make an endangerment finding. However, Section 7411(d) does not require EPA to make an endangerment finding when regulating existing sources. An endangerment finding is only required when EPA seeks to regulate *new* sources under Section 7411(b). *See* 42 U.S.C. § 7411(b)(1)(A). Once EPA promulgates standards of performance for new sources in the source category, those standards alone provide the necessary and sufficient predicate for regulating *existing* sources under Section 7411(d). Section 7411(d) provides, in pertinent part, that an existing source may be regulated whenever "a standard of performance under this section would apply if such existing source were a new source." 42 U.S.C. § 7411(d)(1)(A)(ii).

The necessary predicate for regulation thus exists here. EPA promulgated a "new source" standard for this pollutant from this source category in 2015. *See* 80 Fed. Reg. 64,510. That standard remains in effect today. Therefore, the Act empowers EPA to regulate existing

power plants in this Rule. *See* ACE Rule, 84 Fed. Reg. at 32,533; ACE Rule RTC Ch. 1, at 3, JAXXXX.

Without actually disputing that this is how Section 7411 operates, Petitioners take issue with EPA's findings under and interpretation of Section 7411(b) in the 2015 New Source Rule. But Section 7411(b) is not at issue in this challenge to a Section 7411(d), existing-source rulemaking. Coal Pets. Br. at 8-15. In this proceeding, this Court cannot entertain Petitioners' untimely and collateral attempt to invalidate EPA's prior action under Section 7411(b).

Petitioners had an opportunity to challenge the predicate New Source Rule when that rule was promulgated in 2015. *See* 42 U.S.C. § 7607(b)(1) (requiring petitions for review to be filed within 60 days of rule publication). But neither Coal Petitioner chose to do so. *See State of North Dakota, et al., v. EPA, et al.*, D.C. Cir. No. 15-1381 (filed Oct. 23, 2015). They do not get a second bite at the apple simply because EPA's exercise of authority here would be unavailable without that predicate rulemaking. *See, e.g.*, *Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995) ("Permitting any affected rule to be reopened for purposes of judicial review by a rulemaking that does not

directly concern that rule would stretch the notion of 'final agency action' beyond recognition"); *Envtl. Def. v. EPA*, 467 F.3d 1329, 1333-34 (D.C. Cir. 2006).

Petitioners claim that their untimely challenge is allowed because the Rule is "premised on EPA's renewed determination" of its authority under Section 7411 and so "'necessarily raises the issue of whether' that interpretation is val*id.*" Coal Pets. Br. at 8 n.2 (quoting *Envtl. Def. Fund v. EPA*, 852 F.2d 1316, 1324-25 (D.C. Cir 1988) (*EDF*)). But the sole D.C. Circuit case they cite addressed an entirely different, and much narrower, circumstance. In *EDF*, EPA had issued what it called a "temporary" interpretation of a new Congressional amendment to the Resource Conservation and Recovery Act. EPA said it would reconsider that interpretation after further study. 852 F.2d at 1320-21. Years later, EPA proposed a reinterpretation based on its conclusion that the "temporary" interpretation was "incorrect." *Id.* at 1321-22. EPA then changed course again, withdrawing the proposed reinterpretation and reinstating its original, "temporary" interpretation. *Id.* at 1323.

Upon judicial review, this Court rejected EPA's claim that the challenge to the "temporary" interpretation was untimely. *Id.* at 1325.

The Court explained that the recent "reiterat[ion]" of EPA's original interpretation "transform[ed] its 'temporary' 1980 interpretation into a final decision and subject[ed] that interpretation to judicial review." *Id.*

The circumstances here are not analogous. EPA's 2015 New Source Rule was not temporary. Nor has it been "reinstated" or "finalized" by the ACE Rule. Indeed, the ACE Rule does not purport to take any action at all with respect to the pre-existing New Source Rule or the interpretations underlying it. *See* ACE Rule, 84 Fed. Reg. at 32,533. Thus, *EDF* provides no authority for the proposition that a late petitioner may use a subsequent rulemaking under a different provision of law to attack the conclusions of an earlier rule.

The two district court cases cited by Petitioners are similarly inapposite. Neither involved the application of a provision analogous to Section 7607(b)(1). In *Tripoli Rocketry Ass'n, Inc. v. U.S. Bureau of Alcohol, Tobacco & Firearms*, the court allowed an APA challenge to an agency action because the agency's application of an old regulation into a new area constituted a new "direct, final agency action . . . involving the plaintiff" that triggered a new period for judicial review. No. 00CV0273, 2002 WL 33253171, at *4-5 (D.D.C. June 24, 2002). The

district court's decision in *Styrene Information & Research Center, Inc. v. Sebelius* similarly allowed an APA challenge to existing listing criteria for certain carcinogens on the basis that the criteria were applied to a new chemical, and thus to new plaintiffs who had newly accrued standing. 944 F. Supp. 2d 71, 78-79 (D.D.C. 2013). Here, Petitioners' claims ripened when EPA promulgated the 2015 New Source Rule, and should have been brought in a timely Section 7607 challenge to *that* rule. *See Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 27-28 (D.C. Cir. 2016).

Petitioners here have not been newly subjected to regulation under Section 7411(b), the provision whose interpretation they challenge here. Nor have they accrued standing to challenge EPA's interpretation of Section 7411(b) for the first time here. Numerous coal mine operators and other coal industry interests challenged EPA's interpretation of Section 7411(b) in the New Source Rule litigation in 2015. Petitioners make no claim that they are in some manner affected by existing-source regulation, but not new-source regulation.

Petitioners' arguments are irrelevant and untimely. EPA's exercise of authority in the existing-source context under Section

7411(d) did not require a new endangerment finding. And any challenge to the predicate New Source Rule under Section 7411(b) is time-barred.

2. EPA made an endangerment finding in its 2015 New Source Rule.

EPA made an endangerment finding in the 2015 New Source Rule. This was specific to CO_2 emissions from power plants.[47] *See* New Source Rule, 80 Fed. Reg. at 64,530-31; *see also* ACE Rule, 84 Fed. Reg. 32,533 & n.41.

Consequently, the Court need not address Petitioners' legal argument that EPA is required to make an endangerment finding for each pollutant that it wishes to regulate under Section 7411. *See, e.g.*, Coal Pets. Br. at 8-15. Petitioners refer to a pending EPA regulatory proposal soliciting comment on whether Section 7411(b) requires EPA to make an endangerment finding for each new pollutant it seeks to regulate. Coal Pets. Br. at 4-5, 10, 12-14, 17 (citing 84 Fed. Reg. 50,244 (Sept. 24, 2019) (proposal to amend Section 7411(b) rule regulating crude oil and natural gas facilities)). But the court should not reach this

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[47] As noted above, the ACE Rule and the New Source Rule routinely refer to the pollutant as CO_2 (as did the CPP), but the regulated pollutant in both rules is the group of greenhouse gases. *See supra* 44 n.17.

question. EPA made a pollutant-specific endangerment finding in the 2015 New Source Rule, even though it believed it was not required to do so. And any final action that EPA may take on that pending proposal is not yet ripe for review.

Petitioners' sole challenge to the 2015 finding *itself* is equally unsuccessful. Petitioners assert that EPA's determination was a "conclusory" and "insufficient" "reference to 'facts'" and so did not "address what it means to make a 'significant' contribution to atmospheric concentrations of CO_2." Coal Pets. Br. at 16-17. This is not correct.

EPA made an endangerment finding in the 2015 New Source Rule that hinged largely on the fact that power plants are far and away the largest stationary-category source of greenhouse gases. EPA found that the factual record established that power plants' contributions to CO_2 pollution—dwarfing other categories—met the test of "significant" contribution. *See* 80 Fed. Reg. at 64,531; *see also* 83 Fed. Reg. at 65,432/1 (proposing revisions to the New Source Rule and explaining that EPA's 2015 New Source Rule record provided the required basis for an endangerment finding). This obviated the need to define a more

specific threshold. EPA "articulated a rational connection between the facts found and the choice made." *ADX Commc'ns of Pensacola v. FCC*, 794 F.3d 74, 79 (D.C. Cir. 2015) (internal quotation marks and citation omitted).

EPA explained that "[f]ossil fuel-fired [power plants] are by far the largest emitters of [greenhouse gases] among stationary sources in the U.S.," 80 Fed. Reg. at 64,522, contributing "almost one-third of all U.S. [greenhouse gas] emissions," *id.* at 64,531, with emissions "nearly three times as large as the total reported [greenhouse gas] emissions from the next ten largest emitting industrial sectors . . . combined," *id.* at 64,523. Coal-fired units were responsible for the vast majority of these emissions. *See id.* 64,522 ("[C]oal-fired units are by far the largest emitters.") & 64,523, Table 4 (coal-fired units account for nearly 80 percent of power plant CO_2 emissions).[48]

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[48] Notably, the pending EPA proposal that Petitioners cite, Coal Pets. Br. at 4-5, 10, 12-14, 17, addresses methane emissions from the oil and gas sector. Emissions from that source category are 0.5 percent of global greenhouse gas emissions. 84 Fed. Reg. at 50,267 n.80. EPA has reasonably solicited comment in that rulemaking on factors that might inform its future determinations whether emissions from that or other source categories are significant, although EPA stated it intended for those comments to inform future rulemakings, not any final action it might take on that proposal. *Id.* at 50,267/2. *A fortiori*, that proposal's

Petitioners point to EPA's endangerment finding for greenhouse gas emissions from aircraft, where the statute does not require that emission contributions be "significant." In that rulemaking, EPA stated that the category could be regulated notwithstanding the fact that "the air pollution problem results from a wide variety of sources." Coal Pets. Br. at 18 (citing 81 Fed. Reg. 54,422 (Aug. 15, 2016)).

Petitioners claim this "admit[s]" that "large domestic categories may *not* qualify as 'significant' on the global scale.'" Coal Pets. Br. at 18 (emphasis in original). But nothing in the aircraft rule undermines EPA's 2015 determination that power plant emissions *are* significant. For example, aircraft emissions constituted about *three percent* of domestic CO_2 emissions in 2014. 81 Fed. Reg. at 54,466. In that same year, emissions from power plants constituted more than *30 percent* of domestic CO_2 emissions.[49]

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solicitation of comment on that issue is not relevant to the instant challenge.

[49] U.S. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2014 at 2-22–2-24 & Table 2-11, *available at*: https://www.epa.gov/sites/production/files/2017-04/documents/us-ghg-inventory-2016-main-text.pdf, JAXXXX-JAXXXX.

B. Regulation of Hazardous Air Pollutant Emissions Under CAA Section 7412 Does Not Bar Regulation of CO_2 Emissions Under Section 7411(d).

The Supreme Court held in *AEP* that Section 7411 "speaks directly" to the emission of CO_2 from existing power plants. 564 U.S. at 424. Consistent with this decision, EPA has authority to regulate such plants' CO_2 emissions under that provision. Coal Industry Petitioners argue that in 1990 Congress eviscerated EPA's authority under Section 7411(d). They assert that the 1990 amendments to the CAA barred EPA from using Section 7411(d) to regulate any pollutant emitted by any category of sources that is also regulated under Section 7412. Coal Pets. Br. at 20-33. In their view, this is true even with regard to pollutants that are not regulated under Section 7412. But EPA's regulation of different pollutants under a different statutory program does not nullify its authority under Section 7411(d). Further, regulation of these pollutants under Section 7411(d) is consistent with the Act's purpose, statutory context, and legislative history.[50]

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[50] In the ACE Rule, EPA retained the position with respect to the relationship between Sections 7411(d) and 7412 that EPA articulated in the CPP. *E.g.*, ACE RTC, Ch.1 at 11, JAXXXX.

1. The clause in the codified version of Section 7411(d) addressing Section 7412 was never enacted as positive law.

The clause in the codified version of Section 7411(d) that addresses Section 7411(d)'s relationship with Section 7412 reflects the House-drafted amendment to Section 7411(d). The codified version of Section 7411(d) was never enacted as positive law.[51] Before 1990, Section 7411(d) undisputedly directed EPA to regulate existing sources' emissions of a pollutant regulated under Section 7411(b) where that pollutant was not a criteria or hazardous pollutant. Congress accomplished this by cross-referencing the listing provisions of the criteria and hazardous pollutant programs, Sections 7408(a) and 7412(b)(1)(A) respectively:

> The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or *which is not*

[51] The term "positive law" conveys that the provision has the force of law and is controlling. A codified provision will not always control where a conflicting provision was enacted in the Statutes at Large and so remains "on the books." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

> *included on a list published under section 7408(a) or 7412(b)(1)(A)* of this title . . . .

42 U.S.C. § 7411(d)(1)(A) (1988) (emphasis added).

In 1990, Congress amended the CAA to, among other things, accelerate EPA's regulation of hazardous pollutants under Section 7412. This amendment compelled EPA to regulate more hazardous pollutants more quickly. *See* CPP, 80 Fed. Reg. at 64,711; S. Rep. No. 101-228, at 133. To accomplish this goal, Congress eliminated Section 7412(b)(1)(A) (which provided a *process* for EPA to identify hazardous pollutants) and replaced it with a *list* of 189 hazardous pollutants that EPA must regulate. *See* 42 U.S.C. § 7412(b).

To adjust Section 7411(d) in light of that change to Section 7412, Congress enacted two amendments to Section 7411(d) that replaced the prior cross-reference to the now-eliminated Section 7412(b)(1)(A). But the two amendments did this in different ways. Section 108(g), drafted by the House (and referred herein to as the House amendment), replaced the obsolete cross-reference with the phrase "emitted from a source category which is regulated under section 7412." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). Section 302(a), drafted by the Senate (and referred to as the Senate amendment), replaced the old

cross-reference with a cross-reference to the new version of Section 7412(b). *See* 104 Stat. at 2574.

Although both amendments were enacted by Congress and signed into law by the President, when the 1990 Amendments were codified, the Law Revision Counsel updated 42 U.S.C. § 7411(d) by incorporating into the United States Code the House amendment, but not the Senate amendment. Both provisions are reflected in the Statutes at Large, and Congress has never enacted the codified version of Section 7411(d) as positive law.

2. Both the House and Senate amendments to Section 7411(d) allow CO_2 regulation of coal-fired power plants.

In any event, both the House and Senate amendments to Section 7411(d) give EPA authority to regulate CO_2 from existing sources. Thus, EPA reasonably interpreted Section 7411(d) to allow for regulation here.

The House amendment, which is reflected in the U.S. Code, allows for regulation of emissions not regulated under Section 7412. As set forth in the U.S. Code, the House-amended text of Section 7411(d) reads:

> 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 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 under this section would apply if such existing source were a new source . . . .

42 U.S.C. § 7411(d)(1) (emphasis added).

Here, the "what" that is "regulated under section 7412" is power plants' emission of specific pollutants—that is, hazardous pollutants listed under Section 7412. The natural reading of this provision is that the phrase "any air pollutant . . . emitted from a source category which is regulated under section 7412" identifies, and thus excludes from regulation under Section 7411(d), only a source category's emissions of *hazardous pollutants regulated under Section 7412*. In sum, the phrase "emitted from a source category regulated under section 7412" logically modifies "any air pollutant." 42 U.S.C. § 7411(d). The phrase is not read in isolation.

This reading is consistent with traditional tools of statutory construction. When construing that term in a particular statutory context, one must ask not only "who" is regulated under Section 7412 (i.e., source categories including power plants), but also "what" EPA regulates when it regulates them. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2002).

This interpretation is also consistent with the Supreme Court's decision in *UARG*. In that case, the Supreme Court instructed that term "any air pollutant" must be given a "reasonable, context-appropriate meaning." *UARG*, 573 U.S. at 317. Here, read in context, the phrase "any air pollutant" "emitted from a source category which is regulated under section 7412" means *hazardous* pollutants, because only source categories' hazardous pollutant emissions—and nothing else— are "regulated under section 7412."

The Senate-drafted amendment likewise plainly permits regulation of power plants' emissions of CO_2 under Section 7411(d). Section 302(a) in that amendment is straightforward. It substitutes "section 7412(b)" for the prior cross-reference to "section 7412(b)(1)(A)." Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574. So amended, Section

7411(d) provides that EPA require States to establish standards "for any existing source for any air pollutant . . . which is not included on a list published under section 7408(a) or section 7412(b)." *See id.* CO_2 is not listed as a criteria pollutant under Section 7408(a), nor as a hazardous pollutant under Section 7412(b). Thus, as amended by the Senate, Section 7411(d) allows EPA to regulate CO_2 emissions from power plants.

3. EPA properly considered the language of both amendments in interpreting Section 7411(d).

EPA took both enacted amendments into account in discerning the meaning of Section 7411(d). It is black-letter law that "the [U.S.] Code cannot prevail over the Statutes at Large when the two are inconsistent." *Stephan v. United States*, 319 U.S. 423, 426 (1943); *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1440 (D.C. Cir. 1988) ("[W]here the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls."). Thus, EPA properly took into account both the House-drafted amendment

(§ 108(g)) and the Senate-drafted amendment (§ 302(a)) when interpreting Section 7411(d).

This Court has opined that where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference," "it was the greater wisdom for [EPA] to devise a middle course." *Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979). That is exactly what EPA did here: it gave meaning to both the House-drafted amendment (§ 108(g)) and the Senate-drafted amendment (§ 302(a)) of the 1990 Amendments. EPA's reading that the regulation here is permissible is the natural construction of both provisions. It excludes a substantial set of emissions from the scope of Section 7411(d)—hazardous emissions already regulated under Section 7412—but leaves Section 7411(d) with a meaningful role in the statutory scheme (which would not be the case if that Section could not be used to regulate *any* pollutant emitted from *any* source category whose *hazardous* pollutant emissions are regulated under Section 7412, as Petitioners urge).

4. The House amendment does not foreclose regulation of CO_2 under Section 7411(d).

Petitioners argue that once a source category's emissions of hazardous pollutants have been regulated under Section 7412 (as coal-fired power plants are),[52] that source category cannot be regulated under Section 7411(d), even with regard to a pollutant not listed as hazardous. Coal Pets. Br. at 20-24. Petitioners' interpretation of Section 7411(d) would strip that provision of nearly all remaining effect. This interpretation is not reasonable, let alone mandatory.

Petitioners assert—with only passing reference to the statutory text—that the House-drafted amendment (§ 108(g)) has a plain meaning. Coal Pets. Br. at 23. They further argue that, as a consequence, Congress intended to bar regulation of all emissions—whether otherwise regulated or not—from most major industrial sources under Section 7411(d). Coal Pets. Br. at 23-24, 33. But for the reasons described above, the House-drafted amendment can naturally be read to allow for regulation where the pollutant at issue is not regulated under Section 7412. *See supra* at 175-77. It does not have a

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[52] EPA regulated power plants' emissions of certain hazardous pollutants in 2012. 77 Fed. Reg. 9,304 (Mercury and Air Toxics Rule).

single plain meaning that forecloses regulation. Moreover, Petitioners' interpretation of the House amendment would practically nullify the Section 7411(d) program, and is inconsistent with the CAA's purpose and legislative history.

EPA has regulated over 140 source categories under Section 7412. Petitioners' interpretation would preclude Section 7411(d) regulation of *any* of those source categories—even in regard to pollutants not regulated under Section 7412. The idea that Congress intended to disable EPA from regulating pollution from this broad swath of industrial source categories cannot be squared with the Act's scheme. *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (internal quotation marks and citation omitted).

Furthermore, where the Court is "charged with understanding the relationship between two different provisions within the same statute," it "must analyze the language of each to make sense of the whole." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

Petitioners have not identified a single contemporaneous statement indicating that, in 1990, Congress sought to restrict EPA's authority under Section 7411(d). "It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993). It is particularly unreasonable to think that Congress did so when simply replacing an obsolete cross-reference. *See Whitman*, 531 U.S. at 468 ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.").

Petitioners point to a Senate Managers' "Statement" noting that the Senate "recede[d]" to the House regarding Section 108 of the 1990 Amendments. Coal Pets. Br. at 24 (citing 136 CONG. REC. 36,067 (Oct. 27, 1990)). But "recedes" means simply that a chamber is withdrawing an objection, and that term was used here only in regard to Section 108, and thus tells us nothing about Congress's intent for Section 302 (containing the Senate's amendment). Regardless, this Statement was "not reviewed or approved by all of the conferees," 136 CONG. REC.

36,067, and "cannot undermine the statute's language." *Envtl. Def. Fund v. EPA*, 82 F.3d 451, 460 n.11 (D.C. Cir. 1996).

Rather, the only rational conclusion is that, like the Senate, the House intended only to update Section 7411(d) to reflect the structural changes made to Section 7412 and not dramatically change its scope.

5. The Senate-drafted amendment is not a mere scriveners' error.

Petitioners' theory that the House amendment (Section 108(g)) reflects Congress's intent to bar most Section 7411(d) regulation ignores "the most telling evidence of congressional intent." The contemporaneous Senate amendment (Section 302(a)) plainly indicates Congressional intent to preserve the preexisting scope of Section 7411(d). *CBS v. FCC*, 453 U.S. 367, 381 (1981).

Petitioners argue at length that the Senate-drafted amendment is a "scrivener's error" with no significance. Coal Pets. Br. 25-29. They contend that the Office of Law Revision Counsel (the Office) properly disregarded it as "conforming" in favor of the "substantive" House-drafted amendment. Coal Pets. Br. at 26-27. This argument fails.

To begin with, a decision "made by a codifier without the approval of Congress . . . should be given no weight." *United States v. Welden*,

377 U.S. 95, 98 n.4 (1964). The Office's handling of the amendments does not reveal Congress's intent about their comparative import or meaning. EPA does not dispute that there are instances in which an amendment has not been executed in the U.S. Code. *See* Coal Pets. Br. at 26-27. But while most unexecuted amendments are trivial or duplicative, in the rare instances where unexecuted text has substantive import, it must be considered.

Moreover, the idea that the House's amendment is "substantive" while the Senate's amendment is "conforming" and "innocuous" is a fallacy. Coal Pets. Br. at 25. Here, both amendments were necessitated by Congress's substantive change to Section 7412 (the replacement of listing procedures with a list of 189 pollutants to be regulated).

Alternatively, Petitioners argue that, if both amendments have effect, they should be applied cumulatively, excluding from Section 7411(d)'s scope (1) all source categories regulated under Section 7412 (per Petitioners' interpretation of Section 108(g)) *and* (2) all hazardous pollutants (per § 302(a)). Coal Pets. Br. at 31-32. But if the effects of the two amendments are combined, the result would clearly be to authorize regulation where *either* the pollutant is not listed as hazardous, *or* the

source category is not regulated under Section 7412. *See supra* at 175-78.

Section 7411(d) is framed as an affirmative mandate: EPA "shall prescribe regulations" unless a particular restriction applies. 42 U.S.C. § 7411(d)(1). Thus, if both amendments are given full effect, EPA has authority to regulate pursuant to either affirmative grant of authority. Petitioners' approach, in contrast, would render the Senate amendment Section 302(a) a nullity. This is no reasonable "middle course," *Spencer Cty.*, 600 F.2d at 872, and does not "fit[] best with, and make[] [the] most sense of, the statutory scheme," *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 47 (2014).

6. Petitioners' suggestion that CO_2 is best regulated as a hazardous air pollutant neglects the structure of Section 7412 and practical realities.

Lacking legislative history supporting their contrary interpretation of the House amendment (§ 108(g)), Petitioners theorize that Congress intended for Section 7412 to cover all non-criteria pollutants from source categories regulated under that provision. Coal Pets. Br. at 20-24, 33-35. This theory fails. Sections 7412 and 7411 regulate different air pollutants. Section 7412 addresses "hazardous"

air pollutants defined to include the 189 listed pollutants, as well as those EPA adds to the list under Section 7412(b) or 7412(b)(3) based on a determination that they present certain adverse human health or environmental effects. By contrast, Section 7411 regulates "air pollutants" more broadly, which are defined to include "any air pollution agent or combination of such agents . . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g).

The standards that apply to regulation under Section 7412 and Section 7411(d) differ dramatically as well. Under Section 7412(d), Congress enacted very prescriptive provisions. These require that regulated sources must meet standards that are no less stringent than the average emission limitation achieved by the best performing sources." *Id.* § 7412(d)(3)(A) and (B). By contrast, under Section 7411, the standard is far less prescriptive and potentially more lenient. *See infra* at 198-99.

The most critical difference between Section 7412 and Section 7411, however, is that once a pollutant is listed as "hazardous" under Section 7412, EPA is obligated to regulate *all* "major sources" of that

pollutant. And, once a source qualifies as a "major source" of any hazardous air pollutant, EPA must regulate *all* hazardous air pollutants from that source. *Id.* § 7412(c)(2). The term "major source" is defined as a stationary source that emits "10 tons per year or more of any hazardous air pollutant." *Id.* § 7412(a)(1), (c)(2). Many thousands of sources currently unregulated under Section 7412 emit ten tons or more per year of CO_2, including buildings like schools, small apartment complexes, and hospitals. *Cf. UARG*, 573 U.S. at 324. Subjecting these sources to regulation for the first time under Section 7412 not only for CO_2, but for all other hazardous air pollutant emissions as well, would bring about an extraordinary expansion and transformation of the Section 7412 regulatory scheme. And, adding CO_2 as a hazardous air pollutant, would also require EPA to promulgate standards under Section 7412 for all other sources of that pollutant regulated under the program.

Petitioners acknowledge this (Coal Pets. Br. at 33 n.8), but then suggest that the "poor fit" of CO_2 under the hazardous air pollutant regime would be best handled by "interpreting the statute not to obligate EPA to regulate solely on the basis of the annual tonnage

thresholds" specified in § 7412(a)(1). Petitioners point to *UARG* as support.

But *UARG* rejected EPA's effort in the "tailoring rule" to modify the (much higher) tonnage thresholds specified under Sections 7469(1) and 7602 to make the thresholds better align with regulation of greenhouse gasses. 573 U.S. at 325. The Court held that "EPA's rewriting of the statutory thresholds was impermissible" because the "agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* The same follows here. Section 7412's language is unambiguous: once a pollutant is regulated as hazardous, all sources emitting ten tons or more per year of that pollutant must be regulated as major sources. Petitioners' suggestion that EPA ignore the statutory thresholds demonstrates that there is a hole in Petitioner's argument.[53]

[53] Petitioners' confusion appears to rest on *UARG*'s other holding. Greenhouse gases did not qualify as an "air pollutant" for certain CAA programs. Otherwise numerous sources would be subject to burdensome regulation, far beyond what Congress clearly intended. 573 U.S. at 320. Here, there is no such ambiguity to serve as an escape hatch. Once a pollutant is listed as "hazardous," as Petitioners suggest, the rest of Section 7412 follows with it. *See supra* at 185-89.

Under these circumstances, it is perfectly logical and does not "torture the statute" to have different pollutants from the same source addressed by different programs. Coal Pets. Br. at 34. Sources are often subject to multiple CAA programs addressing different pollutants—or even the same pollutants for different purposes—simultaneously. Power plants are subject to at least four different CAA programs (not counting Section 7411(d)). *See* CPP, 80 Fed. Reg. at 64,696-98 (describing the Acid Rain Program, the "Good Neighbor Provision," the hazardous pollutant program, and the Regional Haze Program).

7. EPA's interpretation is consistent with *AEP*.

The holding of *AEP*—that Section 7411 "speaks directly to emissions of [CO_2] from the defendants' [existing power] plants," and therefore leaves "no room" for federal common law claims seeking to limit such emissions, 564 U.S. at 424-25—defeats Petitioners' arguments. A provision that "speaks directly" to power plants' CO_2 emissions cannot be entirely off the table as a tool for addressing them.

Coal Petitioners do not address *AEP* in any respect. To be sure, *AEP* includes a footnote stating that "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated

under the national ambient air quality standard program, §§ 7408-7410, or the 'hazardous air pollutants' program, § 7412." 564 U.S. at 424 n.7. But that does not apply here. The Court's use of the phrase "of the pollutant in question" suggests that it understood the regulatory bar to be pollutant-specific, consistent with EPA's interpretation.

C. The CAA Does Not Mandate That EPA Regulate Carbon Dioxide Under the NAAQS Program.

Petitioners Robinson Enterprises et al. contend that EPA has a "mandatory" obligation to regulate CO_2 under the NAAQS program instead of establishing standards for power plants under Section 7411. Robinson Br. at 10. The Court lacks jurisdiction to reach the merits of Robinson Petitioners' argument. On the merits, EPA does not have any obligation to regulate greenhouse gases under the NAAQS program.

1. The Robinson Petitioners lack standing.

To begin with, Robinson Petitioners lack standing. They fail to demonstrate any non-speculative cognizable injury. *See Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002) (petitioner must through competent evidence establish "substantial probability" of actual or imminent injury (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000))).

Petitioner Texas Public Policy Foundation (the Foundation) alleges injury to itself. It claims expenditure of resources on advocacy activities "to combat the current and future effects" of the ACE Rule. Robinson Br. at 4-7. This Court, however, is clear that "the expenditure of resources on advocacy is not a cognizable Article III injury." *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015). The Foundation's purpose is to provide advocacy and counseling in support of a mission to promote free enterprise. Robinson Br. at 4-5. It cannot "convert its ordinary program costs into an injury in fact." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). The fact that it may "redirect" "some of its resources to litigation and legal counseling in response" to the Rule "is insufficient to impart standing upon the organization." *Id.*

Petitioner Competitive Enterprise Institute (the Institute) also fails to demonstrate sufficient injury. The Institute alleges injury based on its use of electricity in its office space and the possibility that the ACE Rule could increase retail electricity prices. Robinson Br. at 7-8; Lassman Decl. ¶¶ 4-6. The Institute cites to one possible compliance scenario modeled in the RIA to buttress this. But the illustrative

scenario cited does not purport to project retail rates in any particular localities, including the area served by the Institute's electricity provider. EPA instead projects a potential, and minimal, increase in the *national average* of retail electricity prices for the 2025 to 2035 period, with that possible increase ranging from 0.0 percent (no increase) to just 0.1%. ACE RIA, Ch. 3 at 27, JAXXXX. EPA further qualified this projection by emphasizing that it is subject to numerous limitations and uncertainties. *See id.* at 28-31, JAXXXX-JAXXXX.

The Institute's alleged injury also depends upon the anticipated reactions to the Rule of numerous third parties not before the court (e.g., electricity generators, electricity providers, public utility commissions, state pollution control agencies, etc.). But the Institute must show that the Rule is "more than only one of many factors whose relative influence may affect the third-parties' behavior." *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987). The evidence cited by the Institute falls well short of demonstrating any "substantial probability" that the Institute will pay higher electricity rates because of the Rule. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015).

2. The Robinson Petitioners' claims constitute an untimely challenge to EPA's 2015 Section 7411 rule.

Robinson Petitioners' claims additionally constitute—like those of Coal Industry Petitioners (*supra* at II.A)—an untimely collateral attack on EPA's 2015 New Source Rule. As discussed above, an endangerment finding was made for greenhouse gases emitted by power plants in connection with the New Source Rule. 80 Fed. Reg. at 64,531. That endangerment finding and the Section 7411(b) standards provide the necessary and sufficient predicate for the present rulemaking under Section 7411(d).Petitioners could have raised their argument that EPA could not regulate CO_2 under the NAAQS program before regulating it under Section 7411 in a timely challenge to the New Source Rule. *See* 42 U.S.C. § 7607(b)(1).

3. The Act does not require EPA to regulate greenhouse gases under the NAAQS program.

Should the Court reach the merits of Robinson Petitioners' claims, those claims are unavailing. Congress armed EPA with multiple statutory tools to address stationary air pollution sources. EPA has appropriately applied those tools. The text of Section 7411(d) controls.

As pertinent here, it provides EPA with authority to regulate CO_2 emissions from existing power plants where (1) the Agency has previously established new source standards for the source category, and (2) CO_2 is not a pollutant for which air quality criteria have been established and which is not included on a list published under Section 7408(a). *See* ACE Rule RTC, Ch. 1 at 20, JAXXXX.

Petitioners apparently prefer that EPA regulate CO_2 under the NAAQS program, but contrary to Petitioners' suggestion, EPA has no "mandatory" obligation to do so.[54] Robinson Br. at 10. This Court has made clear that whether to make Section 7408 findings and treat a particular pollutant as a criteria pollutant is "entrust[ed] to [EPA's] *sole judgment*." *Zook v. EPA*, 611 F. App'x 725, 726 (D.C. Cir. 2015)

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[54] In favoring NAAQS regulation, Petitioners purport to be concerned that regulation under Section 7411 could be followed by additional intrusive category-by-category regulation. Robinson Br. at 18. But if this is their concern, then their argument is incoherent. Listing CO_2 as a criteria pollutant would be far more likely to open the floodgates to economy-wide regulation of the pollutant than proceeding to focus on the highest-emitting categories of stationary sources. A NAAQS would call for assessment of potential control strategies for a broad array of sources, rather than focusing only on emissions from a specified list and trigger a relatively rigid implementation apparatus. Advance Notice of Proposed Rulemaking, 73 Fed. Reg. 44,354, 44,477-44,486 (July 30, 2008).

(emphasis added). *Cf. WildEarth Guardians v. EPA*, 751 F.3d 649 (2014) (upholding denial of petition requesting that EPA make discretionary finding under Section 7411 that coal mine emissions contribute to endangerment). Thus, EPA faces no nondiscretionary duty—either now or in the future—to make Section 7408 findings for CO_2.[55]

Further, the Supreme Court has already determined in *AEP* that EPA has authority to promulgate Section 7411(d) standards for this very pollutant and source category. In *AEP*, the Supreme Court held that the CAA displaces any federal common-law right to seek abatement of CO_2 emissions from fossil fuel-fired power plants. 564 U.S. at 424-29. In so holding, the Supreme Court identified the authority provided to EPA within Section 7411(d), specifically, as providing the requisite grant of regulatory authority to displace any federal common-law right. *Id.* at 424. Contrary to Petitioners' characterization, the

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[55] As set forth in a 2008 advance notice of proposed rulemaking, there are good reasons for believing that regulation of greenhouse gases under the NAAQS program would pose difficulties. *See* 73 Fed. Reg. at 44,367-68, 44,477-44,486. Unlike most pollutants where local and regional air quality can be improved by reducing local emissions, greenhouse gases are globally mixed and dispersed such that there is a relatively uniform atmospheric concentration of greenhouse gases.

Supreme Court's construction of Section 7411(d) was not "dicta." Robinson Br. at 19. The construction was central to the Court's displacement holding.

Ignoring *Zook* and dismissing *AEP*, Robinson Petitioners attempt to rely upon a 44-year old Second Circuit decision, *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976). *Train* is not on point. In that case, the Second Circuit determined that, where EPA has already exercised judgment to determine that the listing criteria in Sections 7408(a)(1)(A) and (B) have been met, Section 7408(a)(1)(C) does not then impose an additional independent requirement necessary to trigger a duty to list. But here, EPA has not exercised discretionary judgment to determine that *any* of the listing criteria in Section 7408 have been met.[56]

Petitioners point to dicta in *Train* where the Second Circuit suggested that emission source control standards should not be regarded as an "alternative" to NAAQS. Robinson Br. at 9 (citing 545 F.2d at 327). That characterization in dicta is incorrect. It cannot be

[56] Whether even the limited holding in *Train* could be properly applied in this Circuit is questionable in light of subsequent authority, but that question need not be reached. *See Zook v. McCarthy*, 52 F. Supp. 3d 69, 74 & n.5 (D.D.C. 2014), aff'd by *Zook*, 611 F. App'x 725 (D.C. Cir. 2015).

reconciled with either the text of the statute or the subsequent authority discussed above. As the Supreme Court explained in *AEP*, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emission from power plants," and Section 7411(d) "speaks directly" to these emissions. 564 U.S. at 424, 426.

EPA also was not bound to apply the available statutory tools before it so as to regulate CO_2 emissions in the particular manner or order preferred by these Petitioners. To the contrary, Congress provided EPA with considerable "discretion to determine the timing and priorities of its regulatory agenda." *WildEarth Guardians*, 751 F.3d at 651.

III. EPA Properly Exercised Its Discretion in Defining the Best System of Emissions Reduction and the Degree of Emission Limitation Achievable.

In a separate action to the repeal of the CPP, EPA promulgated the ACE Rule. In this rule, EPA promulgated emission guidelines for CO_2 emissions from existing coal-fired power plants. The Agency reasonably identified the BSER, and identified the degree of emission limitation that would result from the application of the BSER. And EPA created a framework to guide States in developing their plans under

Section 7411(d)(1). EPA also promulgated revisions to the general regulations implementing Section 7411(d) to govern the ACE Rule, and future rules under this Section. The ACE Rule is consistent with the statute. It should be upheld in its entirety.

A. The ACE Rule Reflects Section 7411(d), Which Provides that States Establish Standards of Performance for Existing Sources, and Confers Discretion on States in Doing So.

Under Section 7411(d), EPA was charged with "prescrib[ing] [implementing] regulations which shall establish a procedure" for the Agency to consider state plans. The CAA further provides that each State "shall submit" its plan "establish[ing] the standards of performance" for the sources in that State. 42 U.S.C. § 7411(d)(1). In reviewing these state plans, EPA evaluates whether the plan is "satisfactory." *Id.* § 7411(d)(2)(A). If not, or if a State declines to submit a plan, EPA can "prescribe a plan for [that] State." *Id.*

EPA's revised regulations implementing Section 7411(d) reflect Congress's intent to grant States the primary role in setting the governing standards for their existing sources. As part of the emission guidelines, EPA has responsibility to determine the BSER—that is, the technology or technologies which considering "the cost of achieving such

reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 40 C.F.R. § 60.22a(b)(5). This BSER, along with the degree of emission limitation achievable from application of the BSER, is conveyed, along with other information, in the form of "[e]mission guidelines." 40 C.F.R. § 60.22a(b). These guidelines "provide information for the development of State plans." *Id.*

Each State then formulates its plan. The regulations provide that, as a general matter, the "standards of performance shall be no less stringent than the corresponding emission guideline(s)." 40 C.F.R. § 60.24a(c). But States may establish for a particular existing source a less stringent standard of performance in light of "the remaining useful life of such source" and "other factors." 42 U.S.C. § 7411(d)(1). Under EPA's implementing regulations, such deviation is permissible where the State "demonstrates," among other things, that the cost of the control would be "unreasonable," physically impossible to install, or "[o]ther factors . . . that make application of a less stringent standard . . . significantly more reasonable." 40 C.F.R. § 60.24a(e)(3).

B. EPA Reasonably Determined the Best System of Emissions Reduction Consistent with the CAA.

In the ACE Rule, EPA determined the BSER for existing coal-fired power plants to be a suite of heat rate improvements, which it refers to as "candidate technologies." *See* 84 Fed. Reg. at 32,535-32,536.

1. The Agency comprehensively reviewed technologies in determining the BSER.

EPA identified BSER for ACE by, first, looking to its authority under CAA Section 7411. The Agency concluded that heat rate improvement technologies and methods meet the statutory requirements. ACE Rule, 84 Fed. Reg. at 32,534/2-3. These are applicable at particular existing sources. *See supra* at 58-64. And, they are "adequately demonstrated" when "taking into account the cost of achieving such reduction" along with other "nonair quality health and environmental impact and energy requirements." 42 U.S.C. § 7411(a)(1); 40 C.F.R. § 60.22a(b)(5).

These criteria are consistent with EPA's historic practice with Section 7411(d) rules and this Court's longstanding precedent. 84 Fed. Reg. at 32,535/2. Specifically, *Essex Chemical Corp*, held that an "adequately demonstrated system" is one that "has been shown to be

reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way." 486 F.2d at 433.

EPA comprehensively reviewed other technologies and methods. But, EPA determined that they did not meet one or more of the statutory requirements. It therefore did not include them as part of the BSER. ACE Rule, 84 Fed. Reg. at 32,543-49. To make its determination, EPA evaluated in detail four sets of measures: carbon capture and storage; natural gas co-firing, refueling, and repowering; biomass co-firing; and heat rate improvements. Each is discussed in turn.

a. Carbon capture and storage.

Carbon capture and storage (also known as "carbon capture and sequestration"; hereinafter, "carbon capture") is a process where CO_2 is separated and captured from the flue gas of a power plant, compressed and transported, and ultimately injected into a geologic space for long term storage. ACE Rule, 84 Fed. Reg. at 32,547/1-2. Carbon capture can reduce a plant's CO_2 emissions up to 90 percent. *Id.* at 32,548/2.

While the CO_2 emission reductions from this technology can be significant, the costs of purchasing, installing, and operating this technology at an existing power plant are very high. Implementing carbon capture to treat all flue gas on an existing coal-fired power plant increases the plant's costs per unit of electricity generated by 75 percent. *See* 84 Fed. Reg. at 32,548/2 n.211; Cost and Performance Baseline for Fossil Energy Plants Supplement (June 22, 2015), DOE/NETL–2015/172, JAXXXX. And even a more limited use of carbon capture—for example, a system that treats only about 20 percent of the flue gas—increases the cost of generating electricity nearly 20 percent. *See id.* EPA identified two facilities that have installed carbon capture at scale (one in Canada, another in Texas). They did so only with "significant governmental subsidies." 84 Fed. Reg. at 32,458/3.

Based on this and other record evidence, EPA determined that carbon capture was not the BSER. Carbon capture has extremely high cost and limited availability. *Id.* at 32,549. Nevertheless, the Agency recognized that carbon capture may be available for a limited number of power plants, particularly if tax credits were enacted. EPA concluded

that "state plans may authorize such projects for compliance with this rule." *Id.* at 32,549/3.

b. Natural gas co-firing, refueling, and repowering.

Natural gas co-firing, refueling, and repowering likewise did not meet the statutory standard. Natural gas co-firing and natural gas refueling are not sufficiently available to constitute the BSER. *Id.* at 32,544/2. As an initial matter, as of 2017, only about a third of coal-fired power plants co-fired with any amount of natural gas. And, for those that did, the data suggest that very few routinely used co-firing for the purpose of generating electricity.

EPA's record showed that some 95 percent of coal-fired power plants that co-fired some amount of natural gas did so at very low levels. The natural gas represented only five percent or less of total heat input. *Id.* at 32,544/2. This infrequent use supported the conclusion that the "vast majority" of natural gas firing was as a "secondary fuel" for purposes of starting up the boiler, or holding it in "warm standby." *Id.* This makes sense. Use of natural gas or other "clean fuels" during

startup is required under the Mercury and Air Toxics Standards Startup/Shutdown Rule, 79 Fed. Reg. 68,777 (Nov. 19, 2014).[57]

EPA further noted that consideration of "energy requirements" in determining the BSER. This requirement of Section 7411(a)(1)(A), guided EPA's determination that gas co-firing and refueling are not the BSER. ACE Rule, 84 Fed. Reg. at 32,544/3 to 32,545/3. "[T]he more efficient use for that increased natural gas would be as fuel for under-utilized [gas] units rather than in less efficient [coal] utility boilers." *Id.* at 32,544/3.[58]

EPA also considered natural gas repowering, but determined that it was not the BSER. This would require redefining the regulated source. Natural gas repowering replaces a coal-fired boiler with a natural-gas fired turbine. *Id.* at 32,543/2-3. EPA reasonably determined

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[57] Notably, the vast majority of the coal-fired power plants use distillate fuel oil—not natural gas—as the startup "clean fuel." *See* 2017 Fuel Usage at Affected Coal-fired EGUs, EPA–HQ–OAR–2017–0355, JAXXXX-JAXXXX.

[58] "A coal-fired utility boiled that is repurposed to burn 100 percent natural gas will see a reduction in efficiency . . . higher hydrogen content in the natural gas fuel will lead to higher moisture losses that will negatively impact the boiler efficiency. Widespread refueling is not a practice that the EPA should be promoting . . . ." 84 Fed. Reg. at 32,545.

that replacing the existing boiler with a new electricity generating system entirely did not constitute a system of emissions reduction for the coal-fired unit. *Id.* Rather, such replacement redefined the source "entirely"—from a coal-fired source, to a gas-fired one subject to a different regulatory regime. *Id.* at 32,543/3.

c. Biomass co-firing.

EPA also evaluated biomass co-firing. EPA concluded that it is not BSER. *Id.* 32,545/2-3. Biomass co-firing is a process where organic matter (like wood or crops) is burned as fuel along with coal. The Agency reasoned that biomass firing at a source "does not reduce emissions of CO_2 from that source." *Id.* at 32,546/2. In fact, it does the opposite. Burning biomass actually "increas[es] CO_2 emissions at the source" compared with burning coal alone. *Id.* This, along with cost and achievability considerations, meant that biomass co-firing could not be part of the BSER, which requires "systems of emissions reductions that are achievable at the source." *Id.* at 32,546-47.

d. Heat rate improvement methods.

Finally, EPA evaluated heat rate improvement methods. Heat rate improvement methods are measures that lower a power plant's

"heat rate," which is the amount of energy required "to generate a unit of electricity." *Id.* at 32,535/2. A power plant's heat rate is correlates with its efficiency. Thus, a plant with a lower heat rate consumes less fuel and therefore creates less CO_2 per unit of electricity generated than a power plant with a higher heat rate. *Id.* at 32,535/2-3.

At the outset, the Agency found that the fleet of coal-fired power plants was diverse in age, design, and location, and so heat rates of units "var[ied] substantially." *Id.* at 32,535/3; *see also* ACE RIA, Table 2-3, JAXXXX. In light of this variation, the Agency concluded "that there is potential for [heat rate improvements to] improve CO_2 emission performance across the existing coal-fired [ ] fleet." ACE Rule, 84 Fed. Reg. at 32,535/3. EPA then evaluated a number of different heat rate improvement methods. *Id.* at 32,537.

2. In light of variations among coal-fired power plants, the BSER is an array of heat rate improvements.

When evaluating candidate technologies for heat rate improvement methods, EPA found significant variations among power plants. This affected which heat rate improvement methods can be applied to a particular existing source. Some power plants "may not be

able to employ certain [heat rate improvement] measures, or may have already done so." *Id.* at 32,535/3. So EPA found no one technology could bring uniform reductions across the fleet. EPA determined that a suite of "candidate technologies" constituted the BSER. *Id.* at 32,536/3. These included: installing a neural network; updating the boiler feed pumps that bring water into the boiler; upgrading the blade path for the steam turbine; and redesigning or replacing the economizer which capture excess heat from the flue gas; along with others. *Id.* at 32,537. *See also supra* at 45 (Table 1).

The Agency determined that its heat rate improvement suite were the "most impactful" heat rate improvement methods "because they can be applied broadly and are expected to provide significant [heat rate improvements] without limitations due to geography, fuel type, etc." *Id.* at 32,536/2. EPA further determined that these technologies "are generally available and appropriate for all types" of coal-fired power plants. *Id.* at 32,536/3. In sum, these methodologies are applied to the source, technically feasible, broadly available, and implementable at reasonable cost. *See* 42 U.S.C. §§ 7411(d); 7411(a)(1).

3. EPA rationally explained its determination that heat rate improvements constitute the BSER.

EPA's determination of the BSER is consistent with the CAA and supported by the record.

a. Generation shifting was properly rejected as the BSER.

The bulk of Environmental, State, and Power Company Petitioners' attacks on the BSER are premised on the assumption that EPA's interpretation of the CAA is incorrect, and that generation shifting is permissible. *See* Env. Br. at 14-19; Con. Ed. Br. at 17-23; State Pets. at 59. Because it is not, *see supra* at I.A-C, these attacks uniformly fail.

b. Carbon capture and storage and co-firing were properly eliminated.

EPA recognized in ACE—as EPA previously concluded when promulgating the CPP—that other technologies can reduce a coal-fired power plant's CO_2 emissions that also are applied to the source. Environmental and State Petitioners argue that, at a minimum, EPA's BSER should have included two of these: carbon capture and natural gas co-firing. But EPA determined in ACE that neither of these

methods satisfied the statutory criteria, *see Essex Chem. Corp.*, 486 F.2d at 434.

First, Petitioners contend that carbon capture is the BSER because the costs of this technology are dropping. Env. Br. at 32-33. EPA considered this. It agreed that in some circumstances the technology could be cost effective. For example, that might be where the plant was "in reasonable proximity to an existing CO_2 pipeline" to carry it offsite, and where tax credits were available. ACE Rule RTC, Ch. 4 at 6, JAXXXX. But, "absent those very specific circumstances, the EPA has concluded that CCS is not cost-reasonable" because the costs remain very high, and "nor is it available across the existing coal fleet." *Id.*

Challenging EPA's finding, Petitioners point to one modeling scenario of several in the ACE Rule RIA. This scenario found that several plants may implement carbon capture projects. *See* Env. Br. at 32. But Petitioners miss a key issue. The model found that these projects would result from a new tax credit, and not market forces more generally. *See* ACE RIA, Ch. 3 at 27-28, JAXXXX-JAXXXX. EPA reasoned it was inappropriate to consider the possibility of such temporary tax credits in setting standards that will be in place

indefinitely. *Id.*, Ch. 4 at 5, JAXXXX; *see also Sierra Club*, 657 F.2d at 330 (emphasizing that Section 7411 standards are a "national standard with long term effects"). Because of the very high cost, carbon capture and storage is not the BSER. ACE Rule, 84 Fed. Reg. at 32,548-49. EPA also rejected carbon capture in the CPP. CPP, 80 Fed. Reg. at 64,727.

Second, EPA rejected natural gas co-firing as the BSER. This technology is not sufficiently available across the fleet. Environmental Petitioners assert that some "thirty-five percent of coal plants co-fired with natural gas to some degree in 2017." Env. Br. at 31. But EPA's record showed that the vast majority of these plants employ only a small amount of natural gas, likely only to start-up their boilers. ACE Rule, 84 Fed. Reg. at 32,544/2-3. The majority of coal-fired power plants use distillate fuel oil—rather than less expensive natural gas—for startup, indicating that these facilities lack access to natural gas altogether. *Id.*

Section 7411(a)(1)'s "energy requirements" further support EPA's conclusion. It concluded that such conversions "can lead to less efficient operation of utility boilers" and "it would not be an environmentally positive outcome for utilities and owner/operators to redirect natural

gas from the more efficient [gas] [boilers]." *Id.* at 32,544/3, 32,545/3. And for plants that do not yet have access to natural gas, the expense of gaining access can be quite costly, about $1 million/mile of pipeline required. *Id.* The record thus does not support Petitioners' contention that natural gas co-firing is sufficiently widely available for application of BSER to generate electricity for sale. The CPP also rejected co-firing as the BSER. *See* CPP, 80 Fed. Reg. at 64,727.

Third, Petitioners say that EPA "provided no persuasive rationale for categorically excluding carbon capture and co-firing while providing for case-by-case evaluation of heat-rate measures." Env. Br. at 36. But EPA did explain its reasoning in detail, concluding that "under CAA section [74]11(d), the BSER is based on what is adequately demonstrated and broadly achievable across the country." ACE Rule, 84 Fed. Reg. at 32,547/3. This, along with EPA's obligation to determine "standards of performance" as defined in Section 7411(a)(1), "indicate that the EPA must make the BSER determination at the national, source-category level." *Id.* Thus, "EPA disagree[d] with the commenters who argue that because the EPA is emphasizing that standard setting will be done on a unit-by-unit (rather than fleetwide) basis, all viable

emission reduction options should be evaluated at the unit level." *Id.* EPA determined that heat rate improvements meet these criteria, but carbon capture and natural gas co-firing did not. *Supra* at III.B.1. Petitioners fail to acknowledge this rationale, let alone refute it.[59]

c. The CAA does not require EPA to subcategorize existing sources.

As a fallback, Environmental Petitioners argue that EPA should have subcategorized coal-fired power plants. They say EPA could have applied different BSER based on the types of emissions reduction technologies they might feasibly implement. Env. Br. at 36-37. Petitioners focus on those plants that could apply co-firing and carbon capture. But EPA had no such obligation.

The decision whether or not to subcategorize a source category is within the Agency's broad discretion. *See Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1159 (D.C. Cir. 2013) (holding EPA has broad discretion under Section 7412 to make this determination). And EPA's decision comported with its implementing regulations. EPA "*may*

[59] Environmental Petitioners' additional argument that EPA should have considered reduced utilization as part of the BSER, or otherwise capped utilization (*see* Env. Br. at 22, 29), is flawed for the reasons stated above at 152-58.

specify different degrees of emission limitation or compliance times or both for different sizes, types, and classes of designated facilities when [listed] factors make subcategorization appropriate." 40 C.F.R. § 60.22a(b)(5) (emphasis added).

Petitioners point to 42 U.S.C. § 7411(b)(2) as creating such an obligation. They say this provision makes clear that the "purpose" of subcategorizing is to "distinguish groups of sources based on their ability to meet different pollution limits." Env. Br. at 37. But in Section 7411(b)(2), the indirect object for application of the BSER is *new* sources, not existing ones.

In addition, nothing in Section 7411(b)(2) discusses a source's ability to meet different pollution limits. The provision simply confers discretion on the Agency. *See* 40 C.F.R. § 60.22a(b)(5) (providing that the Administrator "*may*" subcategorize). Petitioners assert that EPA was "misleading" when it stated in the ACE Rule that EPA had never subcategorized sources "based on potential compliance strategies." Env. Br. at 37. But EPA has not done so—and Petitioners point to no rule that supports its charge.

Regardless, the record supported EPA's decision not subcategorize. Its "evaluation of scientific data within its technical expertise" deserves an "extreme degree of deference." *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 150 (internal quotation marks and citation omitted). Environmental Petitioners say some coal-fired plants co-fire with natural gas. *See* Env. Br. at 36-37. But, as discussed above, EPA reasoned that these facilities appear to fire natural gas for purposes of startup (and compliance with other CAA rules). The record does not show that co-firing for purposes of generating electricity is available at these plants. EPA was not required to create a subcategory for plants that had true natural gas co-firing capability, and reasonably explained its decision not to do so. *See* ACE Rule RTC, Ch. 2 at 4, JAXXXX.

Likewise, EPA reasonably declined to create a subcategory of power plants that could implement carbon capture, for reasons stated above. *See also id*; ACE Rule, 84 Fed. Reg. at 32,547/2. Carbon capture is costly and has only been demonstrated at scale with government subsidization. *Id.* Petitioners have not shown that EPA erred by declining to create subcategories that reflect their policy preferences.

4. Under the Act's framework, the BSER reasonably takes into account climate change.

Petitioners attack the selection of heat rate improvements as the BSER. *See* Env. Br. at 27; State Pets. Br. at 59. They contend that these technologies are insufficient because they bring more limited CO_2 reductions than generation shifting. *Id.* But that's a red herring, since generation shifting is unlawful. EPA's determination of the BSER is consistent with the CAA and supported by the record.

a. A BSER yielding limited reductions is permissible under Section 7411.

Petitioners' arguments against heat rate improvements stem not from the statute, but the preamble to EPA's 1975 regulations implementing Section 7411(d). In Petitioners' view, these regulations require that the BSER achieve "maximum feasible control of pollutants." Env. Br. at 26 (citing 40 Fed. Reg. at 53,342). To be sure, "the amount of air pollution [is] a relevant factor to be weighed" in determining the BSER. *Sierra Club*, 657 F.2d at 326; State Br. at 59. But it is not the *only* factor. The CAA places express constraints on EPA's selection of the BSER. These constraints restricted the measures

that EPA could consider for the BSER, and informed EPA's choice within that limited group. *See supra* at III.B.1.

EPA's selection of heat rate improvements is supported by this Court's decision addressing Section 7411(d) in *Essex Chemical Corp.*, 486 F.2d at 439. There, the Court acknowledged that practical limitations on pollution controls may mean that few—if any—technologies meet the statutory standard and qualify as the BSER. *Id.*

That holding reflects the structure of Section 7411(d). Congress's provision addressing "existing sources" is not—unsurprisingly—the maximum reduction standard Petitioners want. *See supra* at 185-89 (discussing differences between Section 7412 and 7411). Section 7411(d) simply "does not require the '"greatest degree of emission control"' or "mandate that the EPA set standards at the maximum degree of pollution control technologically achievable." ACE Rule, 84 Fed. Reg. at 32,534 n.53 (citing *Sierra Club*, 657 F.2d at 330). *Compare Essex*, 486 F.2d at 439 (describing Section 7411), *with NRDC v. EPA*, 489 F.3d 1364, 1367-69 (D.C. Cir. 2007) (Section 7412 "does not excuse EPA from finding other means to achieve th[e] result" of maximum emissions control as prescribed and defined by that section).

Petitioners note that the CPP concluded the emissions reductions from heat rate improvement methods were "too small" to constitute the BSER. *See* Env. Br. at 27 (citing CPP, 80 Fed. Reg. at 64,727, 64,787). But standing alone, that does not make EPA's choice in ACE of heat rate improvements arbitrary. As described above at I.A, EPA lacked statutory authority to promulgate the CPP. So EPA's earlier discussion of the relative benefits of heat rate improvements in the CPP, compared to a(n unlawful) generation shifting "system" that obtained greater emissions, is of no moment now. There is no *Fox Television* problem, as Petitioners contend, State Br. at 61 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)), because what EPA considered "best" in CPP, was unlawful. In any event, the ACE Rule's discussion of the CPP's flaws constitutes the *Fox Television* explanation for the change in course. *See* 556 U.S. at 515-16.

As a corollary to this argument, Petitioners contend that EPA unlawfully failed to grapple with the impacts of climate change in the ACE Rule. Env. Br. at 7-14; State Pets. Br. at 59-60. This is incorrect. Petitioners ignore that EPA did not promulgate the rule on a blank slate. The ACE Rule was promulgated against the backdrop of EPA's

2015 endangerment finding. *See supra* at II.A. This finding remains in place. EPA did not revise that finding in any respect in the rule here. *Id.*

And it is simply untrue that EPA did not "grapple" with this issue. EPA simply concluded that Section 7411(d)—a narrow, gap-filling provision used sparingly during its forty-five years on the books—simply provides limited options to address climate change's impacts. This is consistent with this Court's decision ininco *Mexichem Fluor*, which observed that the impacts of climate change "do not on their own authorize the agency to regulate." 866 F.3d at 460-61.[60]

Moreover, the claimed "need" to regulate more aggressively is belied by the fact that the emission reductions the CPP projected by 2030 have *already* occurred, simply as a result of market forces. By the end of 2018, CO_2 emissions from the power sector declined 30 percent

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[60] EPA's estimates for the "social cost of carbon" in its benefit-cost analysis, *see* 84 Fed. Reg. 32,562, is not properly before this Court. EPA's benefit-cost analysis, which is included in the Rule's RIA and discussed in the ACE Rule's preamble, was performed to comply with an executive order governing significant regulations. *See* Executive Order 12,866 § 1 (Sept. 30, 1993). EPA did not use that analysis in determining whether the BSER was reasonable, and so it is irrelevant. *See* ACE Rule RTC, Ch. 7 at 18, JAXXXX.

below 2005 levels. ACE RIA, Ch. 2 at 14, JAXXXX. This is nearly on par with the emission reduction projections that EPA expected the CPP to achieve *in total* by 2030—more than a decade from now. *Id.* The assumptions that motivated the CPP, including "expectation of [increasing emissions from] continued generation from coal-fired sources for the foreseeable future," have not held true. *Id.* at 15, JAXXXX. Since 2015, the low cost of natural gas and declining costs for renewable energy caused coal-fired generation to decline, even absent regulation under Section 7411(d). *Id.* at 14-15, JAXXXX-JAXXXX.

The ACE Rule is a return to the clear Congressional intent in Section 7411(d). EPA projects that, as the Rule is implemented, the power sector will reduce emissions by some 37 percent below 2005 levels by 2030. ACE RIA, Ch. 2 at 4, JAXXX. Thus, Petitioners have not shown that this amount is inadequate under Section 7411, or that it obligates EPA to require excessively costly or infeasible measures.

b. EPA reasonably addressed concerns regarding the "rebound effect."

Petitioners say that the potential for a "rebound effect"—that is, an increase in total mass of CO_2 emissions from some power plants that apply the BSER of the ACE Rule—means that the BSER is arbitrary.

Env. Br. at 22, 26-28. Environmental Petitioners' primary argument on this point criticizes EPA's reliance on a "rate" of emissions reduction, as opposed to "overall" mass-based emissions reduction. Env. Br. at 30. But EPA's technical analysis rejected this. EPA was soundly within its statutory and delegated technical discretion to choose heat rate improvements, especially given the "extreme degree of deference" owed to the Agency. *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 150.

The Act defines the term "emission limitation" and "emission standard" to mean "a requirement . . . which limits the quantity, *rate*, or concentration of emissions of air pollutants on a continuous basis." 42 U.S.C. § 7602(k) (emphasis added). The CAA thus expressly permits rate-based emissions limits like the one EPA adopted in the BSER here. This approach is in keeping with the history of regulation under Section 7411(d) regulations, including the CPP. *See* CPP, 80 Fed. Reg. 64,961; *see also* 84 Fed. Reg. at 32,543 & n.185. Thus, there is nothing irrational or incongruous in regulating based on rate instead of mass in a Section 7411(d) rule.

It is undisputed that the ACE Rule will improve sources' emissions performance, in terms of emissions per unit of electricity

generated. And EPA's technical review concluded that total emissions would not "rebound" beyond current levels from its BSER. "[A]ggregate CO_2 emissions . . . are anticipated to decrease (outweighing any potential CO_2 increases related to increased generation by certain units)." *Id.*[61] The ACE Rule thus "results in overall reductions of emissions of CO_2 entering the atmosphere." ACE Rule, 84 Fed. Reg. at 32,543/1. Moreover, generation levels depend on a wide variety of economic and regulatory factors. So it is difficult to predict with accuracy the impacts of any particular emission control. To this end, Petitioners' highlighting of worst case scenarios does not save their argument. EPA's analysis of the effects of the ACE rule in the RIA are explicitly "illustrative" in nature, and subject to analytical limitations. *See* ACE RIA, Ch. 3 at 28, JAXXXX.

Petitioners' concern about a "rebound" effect also fails to account for other tools available to address it. For example, "if a state

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[61] Petitioners assert that "ACE produces even worse outcomes if more-aggressive heat-rate measures are deployed." Env. Br. at 28. This contention is unsupported by EPA's analysis. In the proposed RIA, EPA found the greatest emissions reductions were projected to occur with the most aggressive heat rate improvement measures when greater capital costs for installing such measures were assumed. *See* RIA for ACE Rule Proposal, Ch. 3 at 19, JAXXXX.

determines that the source-specific factors . . . dictate that the rebound effect is an issue" then "that is within the state's discretion to consider in the process of establishing a standard of performance for that existing source." 84 Fed. Reg. at 32,543/1-2. *Id.*

Petitioners also argue that EPA's alleged change in position regarding rebound from the CPP raises a *Fox* problem. State Pets. Br. at 61 n.13; Env. Br. at 28. That is wrong for the reasons discussed above, and unsupported on its own terms. EPA explained at length in the ACE Rule that selection of heat rate improvement methods as the BSER was reasonable. EPA appropriately considered the hypothetical risk of rebound. It sufficiently explained that an overall increase in emissions was unsupported but could be otherwise addressed by States if needed. *See id.*

C. EPA Lawfully and Reasonably Identified the Degree of Emission Limitation Achievable from Application of the BSER As a Range of Reductions.

After determining that BSER for coal-fired plants is a suite of measures to improve an existing source's heat rate, EPA then identified the "degree of emission limitation achievable" associated with each technology. ACE Rule, 84 Fed. Reg. at 32,537; 40 C.F.R. § 60.22a(b).

EPA provided this information in Table 1 of the ACE rule, reproduced below. 40 C.F.R. 60.5740a(a)(2)(i). The degree of emissions reductions varies depending on the measure adopted, as well as the size of the power plant. 84 Fed. Reg. at 32,537. Three different power plant sizes are identified in the heading with the title "MW" for megawatt. *See id.*

TABLE 1—SUMMARY OF MOST IMPACTFUL HRI MEASURES AND RANGE OF THEIR HRI POTENTIAL (%) BY EGU SIZE

HRI Measure	<200 MW		200–500 MW		>500 MW	
	Min	Max	Min	Max	Min	Max
Neural Network/Intelligent Sootblowers	0.5	1.4	0.3	1.0	0.3	0.9
Boiler Feed Pumps	0.2	0.5	0.2	0.5	0.2	0.5
Air Heater & Duct Leakage Control	0.1	0.4	0.1	0.4	0.1	0.4
Variable Frequency Drives	0.2	0.9	0.2	1.0	0.2	1.0
Blade Path Upgrade (Steam Turbine)	0.9	2.7	1.0	2.9	1.0	2.9
Redesign/Replace Economizer	0.5	0.9	0.5	1.0	0.5	1.0
Improved Operating and Maintenance (O&M) Practices	Can range from 0 to >2.0% depending on the unit's historical O&M practices.					

EPA recognized that certain of the technologies may not be available or appropriate for an individual power plant. Each measure may also not achieve the same improvements in the circumstances of a particular source. This may occur, along with other reasons, if the power plant has "already implemented some of the listed [heat rate improvement] technologies, equipment upgrades, and operating and maintenance practices." ACE Rule, 84 Fed. Reg. at 32,536/3. In such circumstances, EPA directs States to consider these factors, along with "other factors when establishing unit-level standards of performance." *Id.* Because of the varied circumstances to which such measures are

applied, EPA defined the degree of emissions reduction achievable as a range of values. This is entirely permissible, and supported by the record.

1. EPA quantified the emission limitations achievable.

The statute does not dictate how EPA shall establish emissions guidelines. Section 7411(d) requires only that EPA "prescribe regulations which shall establish a procedure" under which States submit their plans setting standards of performance. *See supra* at III.A. Section 7411(a)'s definition of the term "standard of performance" is defined as the "standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the [BSER]." This is precisely the kind of technical judgment which Congress routinely leaves to agencies to determine in the first instance. *See Miss. Comm'n*, 790 F.3d at 150.

This Court considered a similar issue in *Sierra Club v. Costle*, 657 F.2d 298. There, the question was whether EPA had authority under Section 7411(b) to establish a variable emissions standard. *Id.* at 317-18. The Court held that "section [7411] of the Act authorizes such a variable standard." *Id.* It reasoned that Section 7411's language, which

did not mandate that EPA promulgate a single set reduction, made it "presumptively reasonable for EPA to set" such a standard. *Id.* at 318. The same is true here. EPA's analysis found material differences among coal plants and the heat rate measures each could employ. These differences made it reasonable to define the emission limitation achievable as a range of values. *See* 84 Fed. Reg. 32,535-32,536. Petitioners do not even acknowledge EPA's reasons for identifying the degree of emission limitation as a range.

This approach is particularly reasonable in the context of BSER for existing sources. Under Section 7411(d), States are expressly permitted to take into account source-specific factors when applying standard of performance to particular existing sources. 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.5740a.

2. States must make a rigorous examination when establishing standards of performance.

Contrary to Petitioners' suggestion (State Br. at 27, 64-65; Enviros. Br. 20-22), the ACE Rule requires States to undertake a rigorous examination of each facility to determine the appropriate level of heat rate improvement. 40 C.F.R. § 60.5740a. States shall "evaluat[e]

each" of the seven heat rate improvements identified in Table 1 in setting the standard of performance for each source. ACE Rule, 84 Fed. Reg. at 32,580. To support the standard of performance selected, the State provides a summary which "include[s] an evaluation of the following degree of emission limitation achievable through application of the heat rate improvements" identified in Table 1. *Id.* at 32,580/3. The summary must also "include a demonstration that each designated facility's standard of performance is quantifiable, permanent, verifiable, and enforceable." *Id.* at 32,580/1-81/1.

Along with this summary, a State provides a variety of information about each power plant. This will allow EPA to assess each State's plan and determine the standards of performance for existing sources are "satisfactory." 42 U.S.C. § 7211(d)(2). The State must provide, as applicable, the plant's "annual generation," "CO_2 emissions," "[f]uel use, fuel price, and carbon content," "operation and maintenance costs," "[h]eat rates," "[e]lectric generating capacity," along with the "timeline for implementation," among others. 84 Fed. Reg. at 32,581/1.

The Agency explained that the purpose of this data is "so that the EPA can adequately and appropriately review the plan to determine

whether it is satisfactory." *Id.* at 32,558/2. EPA makes clear that the plans must "adequately document and demonstrate the methods employed to implement and enforce the standards of performance such that EPA can review and identify measures that assure transparent and verifiable implementation." *Id.* at 32,558/2.

3. Petitioners failed to exhaust arguments regarding the degree of emission limitation achievable.

CAA Section 7607(d)(7)(B) bars litigants from raising issues that were not raised with reasonable specificity during the notice and comment process. This requirement is "mandatory." *EME Homer*, 572 U.S. at 512. The Court may not excuse noncompliance. *See Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019).

Petitioners have not exhausted the argument that EPA failed to adequately define the degree of emission limitation achievable, and so violated the CAA and the relevant regulations. *See* Env. Br. at 19-24; State Br. at 61-65. Specifically, Petitioners did not comment during the notice and comment period that the range of emission limitations identified in Table 1 did not adequately define the degree of emission limitation achievable in order to allow the States to set standards of

performance. Petitioners' comments instead focused on EPA's proposed use of Table 1 as mere "guidance" for States—instead of EPA—to independently determine the degree of emission limitation achievable. Petitioners contended at the time that EPA had a statutory obligation to determine for the States the degree of emission limitation achievable from application of the BSER. *See* Clean Air Task Force Cmts. at 7-8, EPA-HQ-OAR-2017-0355-23806, JAXXXX-XXXX; Cal. Air Resource Bd. Cmts. at 19-21, EPA-HQ-OAR-2017-0355-24806, JAXXXX-XXXX; Jt. Env. Cmts. at 16-18, EPA-HQ-OAR-2017-0355-24260, JAXXXX-XXXX.

But Petitioners never commented that the ranges provided in Table 1 did not adequately identify the degree of emission limitation achievable. Because Petitioners did not argue during the notice and comment period that Table 1's range of values failed to establish the degree of emission limitation achievable, their argument on this point in their briefs here has not been exhausted. It may not be addressed by the Court. *See Wisconsin*, 938 F.3d 303.

Notably, Petitioners' failure to exhaust this issue is not even in dispute. Petitioners conceded in their administrative petitions for reconsideration precisely this—that they had not commented on the

substantive adequacy of Table 1 during the notice and comment process. *See, e.g.*, NGO Recon. Pet. at 35, JAXXXX (stating that they "did not have the opportunity to comment on EPA's "identification" of Table 1 as reflecting the emission limitation achievable through the ACE Rule's BSER"). Thus, the Court cannot reach these arguments.[62]

4. The CAA does not require a single, numeric limit as the degree of emission limitation achievable for all coal-fired power plants.

Environmental and State Petitioners assert that more particularity was needed. They suggest that EPA was required under Section 7411(d) to identify a "specific quantitative emission rate or limit to which standards of performance must adhere" as well as the "substantive . . . criteria" that applies. Env. Br. at 20-21, 24 (citing 40

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[62] Relatedly, nowhere in their comments did Petitioners argue that the actual ranges of reductions specified in Table 1 are inaccurate. As stated above, Petitioners instead argued that EPA's proposal was unlawful because it allowed states to determine for themselves the emissions reduction achievable from application of the BSER. Thus, Petitioners have waived any argument that Table 1 does not in fact reflect emission reductions achievable from application of the different heat reduction improvement methods. *See* 42 U.S.C. § 7607(d)(7)(B). Here, Petitioners do not contest the accuracy of Table 1, or otherwise grapple with EPA's rationale in adopting a range of emission reductions as the guidelines because of the variability among coal-fired power plants.

Fed. Reg. at 53,342-43); *see also* State Pets. Br. at 61-62. But nothing in Section 7411(d) or Section 7411(a) mandates that. These arguments fail.

a. A range of values is consistent with the nature of the existing fleet of coal-fired power plants.

As described above, EPA's technical analysis found that heat rate improvement methods do not produce uniform emission reductions across the fleet of coal-fired plants. ACE Rule, 84 Fed. Reg. at 32,536/3. This means that the degree of emission limitation achievable through application of the BSER, and the corresponding standards of performance, will vary across sources. *Id.* at 32,552.[63] EPA thus reasonably determined that the expected emissions limitation achievable from application of the BSER could be a range of values, as opposed to one set numerical limit. *See supra* at 223-26.

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[63] For other source categories or pollutants, it may be appropriate for EPA to determine a single, numerical degree of emission limitation achievable and for States to apply a corresponding, uniform standard of performance across multiple sources. In fact, the ACE Rule itself recognized that a state may be able to set a uniform standard for a subset of sources so long as the standard reflects application of the BSER for all of the sources within that group. *See* ACE Rule, 84 Fed. Reg. at 32,552 n.230.

Environmental and State Petitioners argue that EPA regulations required EPA to set a "quantitative emission limit." *See* Env. Br. at 21, 24; State Pets. Br. at 62-63. This is unavailing. EPA's regulations provide only that EPA identify the "degree of emission limitation achievable through the application of the best system of emission reduction." 40 C.F.R. § 60.22a(b)(5). EPA did this. It quantified the degree of emission limitation achievable by specifying the range of expected reduction available for each heat rate improvement method identified in Table 1. ACE Rule, 84 Fed. Reg. at 32,537.

Consistent with EPA's regulations, Table 1 provides the degree of emission limitation achievable for States to apply in establishing standards of performance. *See* 40 C.F.R. § 60.22a. In fact, the ACE Rule describes the table as such. 84 Fed. Reg. at 32,537/3. Petitioners are thus wrong that the table is merely "advisory" and "lacks any floor or minimum criteria" under which EPA can evaluate a state plan's adequacy. State Pets. Br. at 64. EPA's approach is also consistent with the cooperative-federalism cast of Section 7411(d), wherein the States design and submit a plan to EPA to establish the on-the-ground emission standards. *See supra* at III.A.

b. The ACE Rule applies rigorous standards to EPA's review of state plans.

Relatedly, Petitioners assert that EPA's selection of a range of values as the degree of emission limitation achievable renders the Agency's review of state plans a "standardless exercise." State Pets. Br. at 27, 63-65, Env. Br. at 20-22. That is not the case. As described above, the range of the degrees of emission limitation achievable that EPA identified in Table 1 provides a standard. *See supra* at 223-25.

Further, the ACE Rule expressly requires States to undertake a rigorous inquiry in formulating the standard of performance for a source. Again, the State must examine whether a source can implement each of the heat rate improvement methods identified in Table 1, and then set a standard based on all such methods. *See supra* at 226-27. EPA admonishes that when determining standards of performance, "the state must describe in its state plan submission such consideration and ensure it has established a standard for every designated facility within the state, even one with an anticipated near- term retirement date." ACE Rule, 84 Fed. Reg. at 32,554/2.

EPA expects States to diligently perform this analysis. It further expects that States will require many power plants to undertake heat rate improvement methods. *See* ACE RIA, Ch. 1 at 11-16, JAXXXX-JAXXXX (describing expected compliance costs based on assumption that heat rate improvements will be imposed).[64] If a State does not undertake the analysis required by the Rule, or arbitrarily decides not to require reductions reflecting the BSER where a plant could reasonably implement such heat rate improvements and achieve reductions, then EPA may reject that plan and impose a federal plan. 42 U.S.C. § 7411(d)(2)(A); 40 C.F.R. § 60.24a(c).

c. The ACE Rule's treatment of the remaining useful life provision is consistent with the CAA.

Petitioners argue that the ACE Rule is arbitrary and capricious because it allows States to adopt standards of performance for some sources "that require only business-as-usual." Env. Br. at 23. To the extent this might theoretically occur, it is a function of the statute. The

[64] The record further supports that states have the ability to undertake the analysis required. *See* ACE Proposal, 82 Fed. Reg. at 61,511-12. States have undertaken similar analysis in the past. EPA's record thus supports that they will be able to accomplish the tasks assigned.

CAA expressly allows States to take into account factors like "remaining useful lives of the sources" in determining standards of performance for particular sources. 42 U.S.C. § 7411(d)(2)(B). Thus, it is conceivable that a State may determine that a particular source may not be able to reasonably improve its heat rate. *See Sierra Club v. Costle*, 657 F.2d at 330 (recognizing that Section 7411 gives EPA the discretion to set standards weighing a balance of "cost, energy, and environmental impacts" on a broad national basis rather than "simply at the plant level in the immediate present.").

The ACE Rule properly reflects Section 7411(d)(2)(B). EPA permits States to deviate from EPA's guidelines where factors such as "unreasonable cost" or "[p]hysical impossibility of installing necessary control equipment" make such deviation reasonable. 40 C.F.R. § 60.24a(e)(2). However, any such determination would need to be adequately justified and documented. *E.g.*, ACE Rule, 84 Fed. Reg. at 32,571/3; ACE Rule RTC, Ch.3 at 18, JAXXXX.

Environmental Petitioners also take issue with the procedure by which states may consider remaining useful life. Env. Br. at 25. The ACE Rule allows States to do so in one of two ways. Under the first, the

State calculates a standard of performance for a particular plant based on all of the heat rate improvements. It then adjusts the standard by taking into account the source's remaining useful life or other factors. 84 Fed. Reg. at 32,550/1-2. Under the second (called the "hybridized") approach, the analysis is streamlined into a single step. The State examines which heat rate improvement methods are applicable to a source by concurrently taking into account a source's remaining useful life and other factors. *Id.* Both approaches consider heat rate improvement methods and permit a State to account for remaining useful life or other factors in applying the standard of performance to a particular source. Both are thus fully consistent with by the statute's structure and text.

Finally, Petitioners mischaracterize an aspect of state discretion in plan development under the ACE Rule. They assert that "[i]nstead of setting uniform standards for the category (or even sub-categories) of similar coal plants, States must adopt individually 'tailored' standards of performance for sources within their jurisdiction." Env. Br. at 23. The reality is different: the ACE Rule does allow States to submit plans with uniform standards, if appropriate. ACE Rule, 84 Fed. Reg. at 32,550/1-

3. "States have discretion to apply the same standard of performance to groups of existing sources within their jurisdiction," but *only* "as long as they provide a sufficient explanation for this choice and a demonstration that this approach will result in standards of performance achievable at the sources." *Id.* at 32,550/3.

EPA's approach is entirely in keeping with the statute and reasonable. EPA allows States to take source-specific characteristics into account through two options. Under either, ACE requires a State to sufficiently document and justify its consideration of the relevant factors. *Id.*

IV. Section 7411(d) Precludes States from Adopting Trading Programs in Lieu of Source Specific Emission Standards.

The ACE Rule imposes two criteria for compliance measures: "The compliance measures must be capable of being applied to and at the source, and they must be measurable at the source using data, emissions monitoring equipment, or other methods to demonstrate compliance, such that they can be easily monitored, reported, and verified at the source." 84 Fed. Reg. at 32,555/3. These criteria were "designed to assure that compliance measures actually reduce the

source's emissions rate." *Id.* EPA, however, rejected comments that States should be allowed to adopt trading programs in lieu of systems applied to or directly at an existing source. This decision was rooted in the statutory text and makes sense.

A. The Plain Language of the CAA Restricts the Compliance Measures Available.

Section 7411(d) unambiguously directs that the BSER must be applicable to the existing source itself. The CAA further defines the term "standard of performance" as an emissions standard "which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a). Section 7411 thus leaves neither a State nor EPA with unfettered discretion when establishing the standards of performance.

Section 7411(d) precludes EPA from adopting generation shifting because it cannot be applied to an individual "building, structure, facility, or installation." *See also id.* § 7411(a)(3). And by this language, Congress likewise constrained state authority to implement trading programs among owners and operators as part of state plans.

Averaging and trading programs are not applied to or at the particular "existing source"—that is, at a coal-fired power plant. Like

generation shifting, such programs are implemented by trading of credits *among* sources. Further, emission reductions from trading programs are measurable in the aggregate across the source category, not at a particular source. EPA thus concluded that "implementation and enforcement of [performance] standards should correspond with the approach used to set the standard in the first place." 84 Fed. Reg. at 32,556/1.

The Power Company Petitioners argue that "EPA's role under section 7411(d) has never been and is not to ensure direct application of the best system at each regulated source; rather it is to ensure that at least equivalent emission reductions are achieved by such *sources*." Con. Ed. Br. at 28 (emphasis added). But Petitioners contort the words of the statute to support this position. Section 7411(d) does not speak of standards of performance for a category of "sources" as a collective group, as Petitioners suggest. The Act speaks in the singular. A State "establishes standards of performance for any existing *source*," 42 U.S.C. § 7411(d)(1) (emphasis added), not "for sources as a category" as Petitioners wish it read.

Moreover, EPA recognized that state emissions trading is inconsistent with Congress's directives because such "standard-setting may result in asymmetrical regulation." *Id.* For example, the State may require "a more or less stringent standard . . . than could otherwise be derived from application of the BSER," wholly apart from consideration of remaining useful life under the statute. ACE Rule, 84 Fed. Reg. at 32,556/1.[65]

EPA's statutory reading is also backstopped by sound practical considerations. CO_2 is a global pollutant with global effects. So there may be few direct and area public health consequences from asymmetrical regulation of CO_2 within a State. In other words, allowing some sources in one location to have higher emissions than a standard while other sources in another location to lower their emissions to achieve overall reductions is not obviously problematic for CO_2. But the

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[65] Petitioners fault EPA for not including the full text of Section 7411(a)(1) in the ACE preamble, and then contend that the standards of performance need only "*reflect* the level of reduction that could be achieved by application of the 'best system'; they need not directly require application of the 'best system' itself." Con. Ed. Br. at 24. But the preamble does reflect the full text of the provision including the words Petitioners think support their position. *See, e.g.*, ACE Rule, 84 Fed. Reg. at 32,523/2, 32,549/3.

Power Company Petitioners' broad interpretation of Section 7411(d)'s required compliance measures would not be limited to CO_2 alone. It would apply to all pollutants regulated under Section 7411(d).

Critically, asymmetrical regulation of many of these pollutants could have significant localized adverse consequences for public health and the environment. For example, fluoride emissions from existing aluminum plants are also regulated under Section 7411(d). *See* Primary Aluminum Plants, 45 Fed. Reg. 26,294 (Apr. 17, 1980). If these sources were regulated asymmetrically—some over-controlled, others under-controlled, with such sources freely trading credits to excuse the under-controlled source's excess emissions—it could cause serious environmental impacts on local communities where pollution was under-controlled, causing localized damage. *Id.*

EPA's Clean Air Mercury Rule did attempt asymmetrical regulation through a different sort of trading program. *See supra* at 72, n.20. But this rule was vacated in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Of particular note, the petitioners challenging that rule made the opposite argument then to the one the Petitioners here advance now. Env. Pets. Reply Br., *New Jersey v. EPA*, No. 05-1097,

2007 WL 2155489, n.11 (July 23, 2007) ("EPA's trading approach allows sources near polluted water bodies to trade emissions with distant sources and exacerbate already harmful local [power plant] mercury disposition.").

EPA's rejection of trading measures for compliance thus comports with the other Section 7411(d) regulations that are presently in effect. No other Section 7411(d) rule on the books expressly allows for asymmetrical regulation. *See* Phosphate Fertilizer Plants, 42 Fed. Reg. 12,022 (Mar. 1, 1977); Sulfuric Acid Mist, 42 Fed. Reg. 55,796 (Oct. 18, 1977); Kraft Pulp Mills; 44 Fed. Reg. 29,828 (May 22, 1979); Aluminum Plants, 45 Fed. Reg. 26,294 (Apr. 17, 1980); Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016).

EPA's decision here is, once again, part of its steady drive down the same basic path trodden by EPA's forty-five years of experience.

B. Section 7416 Does Not Separately Authorize Trading.

State Petitioners and Power Company Petitioners alternatively assert that EPA's interpretation of Section 7411 is inconsistent with Section 7416, the CAA's savings clause. They contend this provision must allow trading. In their view, "if States adopt plans that achieve

emission reductions equal to . . . the minimum required by the EPA emission guideline," then EPA has no lawful basis for plan disapproval." State Pets. Br. at 67-68; Con. Ed. Br. at 29-31. But the CAA's savings clause simply cannot bear the weight the State Petitioners put on it.

First, Section 7416 is not a broad authorization for States to ignore federal requirements and policies so long as some minimum standards are met. It merely preserves state ability "to adopt or enforce" "any standard or limitation respecting emissions of air pollutants" that is more stringent than the emission standards required by federal law. 42 U.S.C § 7416. This provision simply does not speak to the issue here: that a State wants to ignore statutory limitations that Congress and EPA believe appropriate in another section of the CAA.

Second, as previously explained, emissions trading in a Section 7411 program *could* result in a "standard or limitation which is less stringent than the standard or limitation under such plan or section" for certain existing sources. *Id.* § 7416. That renders the savings clause inapplicable regardless of the pollutant at issue. Again, if States can ignore the application of BSER to individual sources for CO_2, States can do likewise for other pollutants regulated under that statute. Such

under-control of certain facilities based on a theory that a statewide average is met could have significant, localized health effects for particular communities. 45 Fed. Reg. 26,294. At a minimum, the statute certainly does not mandate that EPA permit the types of trading and localized reductions putatively "less stringent" than the general standard. 42 U.S.C. § 7416. Moreover, especially in light of the source-specific focus in Section 7411(d), EPA did not err in concluding that Congress had not authorized such compliance measures.

To the extent that Power Company Petitioners also challenge EPA's commentary about the allowable stringency of state plans, untethered to their complaint about trading, that challenge is not reviewable now. EPA made clear in the ACE Rule that it is not "prejudging the approvability of any future plan submission . . . including one that is more stringent than what the BSER requires, on an individual basis through notice-and-comment rulemaking." ACE Rule, 84 Fed. Reg. at 32,599 n.255. .

This passing statement neither reflects the "consummation of the agency's decisionmaking process" nor has "direct and appreciable legal consequences" on the parties. *See Cal. Cmtys. Against Toxics v. EPA*,

934 F.3d 627, 638 (D.C. Cir. 2019) (citing *Bennett v. Spear*, 520 U.S. 154 (1997)). The court therefore lacks jurisdiction to entertain such a challenge because it is not final. *See id.* At the very least, the question is prudentially unripe. *See Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915-17 (D.C. Cir. 1985). As in *Eagle-Picher*, the Court "should stay its hand until agency policy has crystallized" because that new decision will "significantly advance[ ] [the Court's] ability to deal with the legal issue presented." *Id.*

Any action EPA takes to approve or disapprove a state plan under the ACE Rule will be subject to judicial review in circuit court, *see* 42 U.S.C. § 7607(b). That is the time and place to properly raise a challenge to EPA's final action on a state plan. *See Cal. Communities*, 934 F.3d at 638. In fact, EPA recently approved a state Section 7411(d) plan that contains standards of performance which are more stringent than EPA's emission guidelines. 85 Fed. Reg. 1121 (Jan. 9, 2020) (approval of California's state plan establishing standards of performance for municipal solid waste landfills). This confirms that any review of the Power Plant Company Petitioners' concern is speculative and improper at this time.

C. Section 7411 Does Not Allow For Identical Compliance Mechanisms to Those Allowed Under the NAAQS Program.

Power Company Petitioners also contend that Section 7411(d) allows for the full breadth of measures available under the NAAQS program. This is likewise untenable. *See* Con. Ed. Br. at 26-27. As discussed *supra* at III.A, Section 7411(d)(1) provides that EPA "shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 . . . under which each State shall submit to the Administrator a plan" establishing standards of performance. The obvious meaning of this phrase is that EPA must issue rules "establishing a procedure" for States to submit plans that is *similar* to the procedure allowed for by Section 7410. The statute does not dictate that they must be the same.

EPA first established these procedures years ago. *See* 40 Fed. Reg. 53,346 (Nov. 17, 1975). Those regulations provided for, among other things, adoption and submission of a state plan to EPA. *Id.* And these

procedures followed similar procedures to those in Section 7410(a).[66] That is all the cross-reference means.

Petitioners argue that Section 7411(d)'s reference to Section 7410 implies much more. They say it dictates that EPA set up a procedure for submission of state plans (as the plain language of the statute requires). But Petitioners also claim "that [the] section 110 framework" as a whole is "incorporated into section 7411(d)," along with all of "its flexible contours." Con. Ed. Br. at 26. This is breathtaking. If Petitioners are right, and all of Section 7410 is incorporated by the cross-reference in Section 7411(d), that means all of the substantive provisions, including the interstate transport requirements, prevention of significant deterioration, and nonattainment new source review programs are incorporated into Section 7411(d), as well. Nothing in the text of the CAA of structure of Section 7411(d) as gap filler supports this expansive result. And nothing in EPA's forty-five years of experience implementing these provisions suggests this is remotely plausible or

[66] EPA revised and updated these implementing regulations as part of the ACE Rule. 84 Fed. Reg. 32,564.

appropriate under Section 7411. Indeed, the reference to Section 7410 is designed to function as an analogy, not a straitjacket.

Consequently, there is nothing remarkable about EPA allowing for trading under Section 7410—where the text of the statute expressly allows for trading, Section 7410(a)(2)(A) (state plans may include "marketable permits, and auctions of emissions rights")—but prohibiting trading under Section 7411(d)—where it does not.

V. The Clean Air Act Does Not Permit Sources to Comply with the Ace Rule through Biomass Co-Firing.

As with the issue of averaging and trading, the plain language of Section 7411 dictates which measures States may permit for compliance with standards of performance. Biomass co-firing does not meet the ACE rule's criteria for compliance measures. The Coalition asks this Court to impose its policy preference, even where the statute bars that preference. These arguments fail.

A. Biomass Co-firing Is Not a Permissible Compliance Measure Under the Unambiguous Meaning of Section 7411.

1. The ACE Rule correctly excluded biomass co-firing for purposes of compliance.

Consistent with the statute, and the record before the Agency, EPA determined that a regulated source could not rely on biomass co-firing as a means of compliance. ACE Rule, 84 Fed. Reg. at 32558/1-2. It is undisputed that biomass co-firing does not reduce CO_2 emissions at the source. *See* Biogenic CO2 Coalition Br. (Bio. Br.) at 24 ("EPA is correct that biogenic CO_2 at the facility stack itself is not reduced by using low-carbon biomass fuel . . . ."). While EPA has acknowledged that biomass co-firing has the potential to result in net CO_2 emission reductions, any activity that would achieve such reductions is not applied at and is largely outside the control of the existing source. 84 Fed. Reg. at 32,558/1. Recognition of activities not applied to or at the existing source for purposes of compliance is barred by the statute. *See supra* at 237-42.

The Coalition argues that EPA's interpretation is not supported by the statute, creates an unworkable standard, and intrudes on States' discretion. Bio. Br. at 10-23. Each of these theories stems from the same

flawed premise. The Coalition, like other Petitioners, advances a result-oriented theory based on policy. It is that EPA's statutory interpretation *must* be incorrect because biomass is purportedly "low-carbon."[67]

The Coalition—like proponents of generation shifting—has it backwards. EPA must start with the text of Section 7411(d). This determines whether biomass co-firing reduces a source's emission rate in such a manner as to comply with this provision. EPA correctly concluded that it does not.

Notably, the Coalition does not dispute that the CAA requires the BSER to be applicable at the existing source itself. Bio. Br. at 10-11. The Coalition maintains, however, that this statutory limitation applies only when selecting the BSER. It posits that the statute applies no

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[67] The Coalition's description of biogenic CO_2 emissions as "low-carbon" or carbon neutral overstates and mischaracterizes the scientific consensus. *See, e.g.*, Bio. Br. at 5, 27. The Coalition's analysis considers only the narrow emissions and sequestration associated with the growth and use of the biomass. It is not a full lifecycle assessment, which requires consideration of associated emissions such as land use change or emissions from the processing of biomass for energy use. EPA Science Advisory Board, SAB Review of *Framework for Assessing Biogenic CO_2 Emissions from Stationary Sources* at 5, 13 (2014), JAXXXX, JAXXXX (noting that "it is scientifically indefensible to assume all bioenergy has no net carbon dioxide emissions").

limits on consideration of non-BSER technologies or strategies available to sources to meet standards of performance. Bio. Br. at 14. However, as discussed, *supra* at 237-42, the ACE Rule's limitations on compliance options are compelled by Section 7411(d).

The Coalition also contends—based on a misreading of inapplicable CAA provisions—that the ACE Rule's treatment of biomass co-firing conflicts with the CAA's "express[] recogni[tion]" of low-emissions fuels as an appropriate compliance measure. Bio. Br. at 17. This, too, is wrong. This theory relies on Section 7411(a)(7), which defines the term "technological system of continuous emission reductions." Section 7411(b)(5) then applies that term. 42 U.S.C. § 7411(a)(7), (b)(5).

As a threshold matter, the Coalition failed to raise this theory in its comments on the proposed rule and therefore cannot bring its argument here. *See id.* § 7607(d)(7)(B). Regardless, the definition provides that the term "technological system of continuous emission reductions" includes a "technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of

fuels." *Id.* § 7411(a)(7)(B). The definition is put into operation via Section 7411(b)(5), which provides that "nothing in this subsection shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance." *Id.* § 7411(b)(5).

The Coalition suggests that these provisions demonstrate that the statute permits the use of certain emissions-reducing measures "without any limitation on where [those measures] take place." Bio. Br. at 17. This is a serious overstatement. Nowhere in these provisions is there a general—let alone an "express"—recognition that "low-emissions fuels" will necessarily qualify as compliance measures. Bio. Br. at 17. Seeking to infer a requirement that does not exist, the Coalition's arguments plainly misinterpret these provisions for (at least) three reasons.

First, and most significantly, the defined term "technological system of continuous emissions reductions" does not appear in Section 7411(d). Section 7411(b)(5), where it does appear, expressly limits its application to "new or modified sources" and their compliance with a

"new source standard of performance." Bio. Br. at 15. The term is a relic of the 1977 CAA amendments, in which Congress specified that standards of performance for *new* sources must be based on such systems, whereas standards for *existing* sources were to be based on the best system of emission reduction. Congress later amended the CAA to require standards for both new and existing sources to be based on the best system of emission reduction. Pub. L. No. 101-549, 104 Stat. at 2631. But Congress did not alter Section 7411(b)(5)'s limited application to new sources. Thus, neither the restriction in Section 7411(b)(5) nor the definition in Section 7411(a)(7) has relevance here. ACE is an *existing source* rule under Section 7411(d).

Second, even if Section 7411(b)(5) did apply to existing source performance standards, which it does not, it provides only that EPA may not *require* a new source to use a particular "technological system of continuous emission reduction" to comply with an applicable standard of performance. Barring EPA from mandating a specific system does not conversely compel EPA to recognize the appropriateness of any system or measure. And when read together, the provisions still do not state that a system that meets the definition of

Section 7411(a)(7)(B)—including "precombustion cleaning or treatment of fuels"—will necessarily qualify as a compliance measure and must be allowed by EPA.

Third, the Coalition suggests that Section 7411(a)(7) should be read as permitting compliance measures "without any limitation" on geography or timing of their application. Bio. Br. at 17. The Coalition argues that the broad grant of authority it reads in Section 7411(a)(7) is inconsistent with, and thus undermines, EPA's statutory interpretation of Section 7411(d). Again, Section 7411(a)(7) is irrelevant to the regulation of existing sources in Section 7411(d). Regardless, there is no conflict. Section 7411(a)(7) provides only that a "technological system of continuous emission reduction" may include activities that reduce pollution, relative to baseline conditions, at the source. Including measures that actually reduce a source's emissions from the stack is not in tension with limiting permissible compliance measures to those that can be applied to the source. *See* ACE Rule, 84 Fed. Reg. at 32,555. Accordingly, Section 7411(a)(7) does not support the Coalition's interpretation.

The Coalition relies on the same logic when citing EPA's new source performance standards for fossil-fuel-fired electric utility steam generating units, issued in 1979, which covered sulfur dioxide emissions. Bio. Br. at 17-18 (citing 44 Fed. Reg. 33,580, 33,581 (June 11, 1979)). In the preamble to that proposal setting forth the rule's rationale, EPA explained that, under the 1977 CAA's definition of "standards of performance" and "technological system of continuous emission reduction," "credit is to be given for any cleaning of the fuel, or reduction in pollutant characteristic of the fuel, after mining and prior to combustion." 43 Fed. Reg. 42,154, 42,155/1 (Sept. 19, 1978). But, regardless of where the coal pretreatment took place, it would have achieved emissions reductions (relative to burning untreated coal) that were realized *at the stack*. Accordingly, crediting these systems as emissions reducing is entirely consistent with EPA's interpretation of Section 7411(d). This is easily distinguished from biomass co-firing.[68]

[68] The Coalition's reliance on *Sierra Club v. Costle*, 657 F.2d at 357, is misplaced. Bio. Br. at 18. That case does not address, as the Coalition contends, whether EPA must broadly consider air quality effects from different fuels for purposes of compliance. It considers only the meaning of the term BSER. *See* 657 F.2d at 357.

2. The Coalition's arguments that biomass co-firing comports with EPA's statutory interpretation also fail.

The Coalition argues, in the alternative, that the physical use of biomass fuel satisfies EPA's statutory interpretation (assuming it is correct) because it purportedly occurs at the source and is "carbon neutral." Bio. Br. at 24-30. This argument fails for three reasons.

First, the Coalition's arguments are based on "life cycle" considerations. Though those may be relevant to other CAA programs, EPA concluded those are barred for purposes of Section 7411(d). ACE Rule, 84 Fed. Reg. at 32,558/1-2. Even if one assumed overall reductions in greenhouse gas emissions from a source as a result of co-firing biomass, that still does not demonstrate that biomass co-firing satisfies the statutory criteria of Section 7411(d). Instead, the argument offered by the Coalition on carbon neutrality considered impermissible, beyond-the-source activities. *See* Bio. Br. at 24-25; *see* 84 Fed. Reg. at 32,558/1-2 (stating that potential reduction of CO_2 emissions "relies on accounting for activities *not applied at and largely not under the control of that source*" (emphasis added)). The Coalition acknowledges as much. It characterizes biomass fuel as low-carbon due to "its growth in the

farm field," and because carbon "was captured by photosynthesis." Bio. Br. at 25, 26. Such considerations are not cognizable under Section 7411(d).

Second, co-firing of biomass actually "increas[es] the CO_2 emission rate at the source." 84 Fed. Reg. at 32558/1. The only action applied at the source itself is the *firing* of biomass feedstock. Accordingly, it is only this action that EPA may review when determining whether the co-firing of biomass at a fossil-fuel source results in an emissions reduction. As the Coalition admits, it does not. Bio. Br. at 24.

The Coalition argues that EPA's statutory interpretation is irrational because it would require regulation of power plants that exclusively fire biomass as fuel in the same manner as a fossil-fuel source that co-fires biomass. *Id.* at 27. This, it believes, would be inconsistent with "EPA guidance [that] has already stated that such emissions are carbon neutral." *Id.* EPA reached no final conclusions in the cited guidance.[69] And the Coalition's argument elides the many

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[69] The Coalition's reference to EPA's Guidance for Determining BACT for Reducing Carbon Dioxide Emissions from Bioenergy Production, JAXXXX-JAXXXX, is inapplicable here. The Bioenergy BACT Guidance offers no final determinations. In fact, it disclaims EPA's ability to make a general determination regarding the carbon neutrality of

determinations EPA would need to make before setting standards of performance for facilities that exclusively fire biomass. This includes listing a source category that would include these facilities and defining the regulated pollutant. EPA declines to speculate on how various legal, scientific, and policy considerations might inform any future determinations regarding such facilities, which are not within the scope of the ACE Rule.

Third, the Coalition argues that EPA's disqualification of biomass co-firing as a compliance measure for fossil fuel-fired sources is arbitrary. It calls this inconsistent with EPA's treatment of measures purportedly similar to biomass co-firing. Specifically, the Coalition points to EPA's 1979 power plant new source performance standards, which included coal pretreatment as part of the best technological system of continuous emission reduction, as well as EPA's

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biomass used for energy. *See* EPA, Guidance for Determining BACT for Reducing Carbon Dioxide Emissions from Bioenergy Production, at 23-24 (Mar. 2011), *available at* https://www.epa.gov/guidance/guidance-documents-managed-office-air-and-radiation, JAXXXX-JAXXXX

Second, the Bioenergy BACT Guidance pertains to CAA Section 7465(a)(4), 42 U.S.C. § 7475(a)(4), which governs case-by-case control determinations and bioenergy sources (not fossil-fuel fired sources). It describes a different control analysis for a different source category under a different statutory provision. It is inapposite here.

acknowledgment in the ACE Rule that carbon capture may be used for compliance.

As discussed above, *see* V.A.1, these examples are easily distinguished. Crucially, the emissions reductions achieved through coal pretreatment and carbon capture and storage are realized *at the source itself*. For example, though the Coalition argues that pretreatment of coal includes offsite activity—removing of sulfur from the coal—it ignores the fact that the burning of treated coal at the source results in reduced emissions *from the source*.[70]

The same is true for carbon capture and storage. While the captured CO_2 may be sequestered beyond the source, the emissions reductions achieved by the process take place at the source. Indeed, through the application of carbon capture and storage, a source avoids release of emissions through its stack. Biomass burning does not.

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[70] The 1979 power plant rule was promulgated pursuant to the 1977 CAA amendments, under which standards of performance for new fossil fuel-fired sources had to include both emission limitations and percent reductions in emissions relative to "the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion." Pub. L. No. 95-95 § 109(c)(1)(A)(ii), 91 Stat. 685, 700 (1977). Accordingly, the 1979 rule measured the emissions from burning pre-treated coal relative to those from burning untreated coal.

The text of the statute aside, the Coalition further argues that EPA's interpretation impermissibly intrudes upon the states' broad discretion. Bio. Br. at 21-23. The Coalition is correct that Section 7411 affords broad flexibility to States to set standards of performance for designated facilities. *See* ACE Rule, 84 Fed. Reg. at 32,549. But as explained, that discretion is not unbounded. At bottom, Section 7411 is limited to applying measures at or to an individual source. *See supra* IV.A. For the reasons set forth above and below, biomass co-firing does not meet this requirement.

B. The Coalition's Procedural Arguments Are Also Without Merit.

In addition to its litany of other arguments, the Coalition also offers two stray procedural objections to the ACE Rule, both of which fail. The Coalition does not satisfy the CAA's rigorous requirements for a showing of procedural error. Because these objections were not raised in comments on the Proposed Rule, the Coalition is barred from doing so now. *See* 42 U.S.C. § 7607(d)(7)(B). Nor can the Coalition demonstrate that the purported "errors were so serious and related to matters of such central relevance to the rule that there is a substantial

likelihood that the rule would have been significantly changed" absent the error. *Id.* § 7607(d)(8).

The Coalition first contends that the ACE Rule is procedurally flawed due to a failure to explain the requirement that compliance measures be "applied to the source itself." Bio. Br. at 12. But, as stated *supra* at IV.A, EPA appropriately explained its basis for the compliance measure criteria in the ACE Rule. Further, the Coalition did not exhaust this issue before EPA and is thus barred from raising it here. 42 U.S.C. § 7607(d)(7)(B).

The Coalition next contends that EPA failed to "adequately explain" its determination in the ACE Rule that biomass co-firing does not satisfy the compliance measure criteria because the Proposed Rule posited recognition of biomass co-firing as a compliance option. Bio. Br. at 13. This criticism is unfounded. EPA stated in the Proposed Rule that it "believe[d] that biomass co-firing can meet the two criteria" for compliance measures, but expressly solicited comment on the issue. 83 Fed. Reg. at 44,765 n.33 (inviting comment on "whether these two criteria are appropriate or not and why," "whether there may be compliance flexibilities that might meet the two proposed criteria" and

"whether there are certain non-BSER measures that should be disallowed for compliance"); *id.* at 44,766 (soliciting comments on whether to include biomass as a compliance option and "what value to attribute to the biogenic CO_2 emissions associated with non-forest biomass feedstocks"). After receiving comment, EPA concluded otherwise in the ACE Rule.

It is neither problematic nor even remarkable that an agency may change an initial position after a thorough consideration of public comments. That is a core function of the notice-and-comment process. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C. Cir. 2000) ("[A]ny reasonable party should have understood that EPA might reach the opposite conclusion after considering public comments."). Indeed, the Coalition itself submitted comments addressing the issue. This squarely defeats its claim of procedural error. *See* Biogenic CO2 Coalition Cmts., at 5, EPA-HQ-OAR-2017-0355, JA-XXXX. The Coalition got process, was heard, and cannot contend otherwise now. *See Portland Cement*, 665 F.3d at 189 (rejecting claim that the rule was not a logical outgrowth of the proposed rule where petitioner commented on issue). In any event, EPA explained the reason for its

change from the proposal to the final ACE Rule. *See* 84 Fed. Reg. at 32,558/1-2.

C. EPA Made the Necessary Findings in Support of Its Regulation of Biogenic Emissions.

The Coalition claims that EPA has not made a finding that biogenic CO_2 emissions are dangerous emissions, which the Coalition claims is required before regulating such emissions under Section 7411. This is not correct. Regardless, the appropriate forum for these arguments would have been a challenge to EPA's prior, predicate determinations. The Coalition now seeks to use this action to collaterally attack earlier EPA determinations. This effort is untimely and impermissible.

1. EPA has established the basis on which to regulate biogenic CO_2 emissions.

The Coalition claims that EPA "has not previously determined that biogenic emissions (as contrasted with fossil-fuel based emissions) are dangerous emissions." Bio. Br. at 30. Accordingly, the Coalition contends that the ACE Rule constitutes "illegal regulation" of biogenic

CO_2 emissions. *Id.* at 30-33.[71] The record is clear, however, that EPA made the necessary findings to regulate greenhouse gases, including biogenic CO_2.

As set forth in detail, supra, the ACE Rule's regulation of greenhouse gas emissions from existing fossil-fuel-fired power plants is based on the 2015 New Source Rule. That rule, which issued a performance standard for CO_2 emissions from new fossil-fuel-fired power plants under Section 7411(b), provides the necessary basis for EPA's regulation of greenhouse gases from existing fossil-fuel-fired power plants. *Supra* at II.A.

The definition of the regulated air pollutant under both the New Source Rule and the ACE Rule is derived from EPA's 2009 Endangerment Finding.[72] EPA defined the endangering air pollution

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[71] Much of the Coalition's illegal-authority argument simply reiterates its earlier arguments against EPA's statutory interpretation of Section 7411. These arguments are addressed at length above.

[72] The 2009 Endangerment Finding and the accompanying 2009 Cause or Contribute Finding triggered a mandatory duty for EPA to promulgate greenhouse gas emissions standards for "new motor vehicles," under Section 7521. EPA first issued such standards in the 2010 light-duty vehicle rule. *See* 75 Fed. Reg. 25,324 (May 7, 2010).

based largely on physical and atmospheric properties of the component greenhouse gases, not the character of the fuel.[73]

EPA determined that biogenic CO_2 was and is included in the air pollution that endangers the public. EPA declined to differentiate between biogenic and non-biogenic CO_2 because the original source of the CO_2 is not relevant to endangerment. EPA further determined that any differential treatment of biogenic CO_2 would be inconsistent with the primary basis for identifying these six greenhouse gases as a single class. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under CAA Section 202(a) RTC, Vol. 9 at 5-6, EPA-HQ-OAR-2009-0171, JAXXXX-JAXXXX. Biogenic CO_2 shares the same physical and atmospheric characteristics of non-biogenic CO_2—and the other greenhouse gases are included in the definition of the regulated

[73] The Coalition inaccurately states that EPA recognizes that not all greenhouse gases are harmful because EPA defined the air pollutant to include only "excess" levels of greenhouse gases. Bio. Br. at 3. But the Coalition misunderstands the term "elevated" in the 2009 Endangerment Finding. *See, e.g.*, 74 Fed. Reg. at 66,517. There, EPA determined that the harmful air pollution is current greenhouse gas concentrations, which are elevated relative to preindustrial levels as a result of historical biogenic and non-biogenic emissions. *See id.*

air pollution. So EPA saw no basis to exclude biogenic CO_2 from that definition. *Id.*[74]

The determinations made in the 2009 Endangerment Finding have long been in place. This Court upheld that Finding in *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), holding that it was based on substantial scientific evidence, supported by the administrative record, and consistent with the Supreme Court's decision in *Massachusetts v. EPA*. The Supreme Court did not grant certiorari on this issue in *UARG*. The New Source Rule incorporated (and elaborated on) these determinations. 80 Fed. Reg. at 64530/3; *id.* at 64531/1 ("[O]ur approach here . . . is substantially similar to that reflected in the 2009 Endangerment Finding and the 2010 denial of petitions to reconsider."). These provide EPA the legal basis for the ACE Rule's regulation of biogenic CO_2 emissions.

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[74] In 2016, EPA issued another set of endangerment and cause-or-contribute findings for greenhouse gas emissions from aircraft engines under 42 U.S.C. § 7571. Though it pertained to a different statutory provision, the factual record of the 2016 Endangerment Finding reaffirmed and clarified EPA's conclusion on the question of biogenic CO_2 emissions first presented in 2009. *Id.* at 54,446/3-54,447/1; *see also* 2016 Aircraft Greenhouse Gas Endangerment Finding RTC, at 8-9, 34-35 (July 25, 2016), EPA-HQ-OAR-2014-0828, JAXXXX-JAXXXX.

2. EPA has been regulating biogenic CO_2 emissions under the CAA for years.

The Coalition also asserts that any regulation of biogenic CO_2 emissions in ACE would be "the first time that biogenic emissions (as opposed to fossil fuel emissions) are subject to actual control under the Clean Air Act." Bio Br. at 9. This argument is legally irrelevant. Even if true that EPA had never meaningfully regulated biogenic CO_2 emissions before, the Coalition fails to establish why that would invalidate this rule. But for years EPA has regulated biogenic CO_2 emissions, beginning with EPA's standards for motor vehicles under Section 7521. *See* 75 Fed. Reg. 25,324 (applying emissions standards to, among others, vehicles operating on biomass-derived fuels, triggering actual control); *see supra* n.77.

VI. There Is No Basis for the Extraordinary Remedy Petitioners Seek.

If EPA's repeal of the CPP is arbitrary or capricious, then the proper remedy is remand. *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."). Imposing a deadline on top of

remand as Environmental Petitioners demand (Env. Br. at 45-46), is unnecessary and inappropriate.

For one thing, deadlines remedy delayed actions, not arbitrary ones. *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991). And agency delay is not an issue presented for review. For another, the CAA does not authorize courts to direct how and when agencies respond on remand. So absent "substantial justification," courts may not dictate remand's "time dimension." *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544-45 (1978). No such substantial justification exists here.

"[T]he possibility of unreasonable delay in the future," then, "does not justify burdening the [agency] with a court-ordered schedule for managing its docket." *In re Am. Fed'n of Gov't Emps.*, 837 F.2d 503, 507 (D.C. Cir. 1988). Moreover, Petitioners primarily rest their request for a deadline on the purported "dangers to the public" from the absence of regulation under Section 7411(d). Env. Br. at 46. But Petitioners themselves acknowledge that the "trends toward cleaner power generation . . . have reduced emissions faster and deeper than was

expected in 2015." *Id.* at 45. This concession is inconsistent with their request for extraordinary relief.

Moreover, if the Court concludes that the repeal of the Clean Power Plan is lawful, but EPA's replacement rule is not, EPA made clear that the repeal is severable from the replacement rule. The Agency stated "the repeal of the CPP is a distinct final agency action that is not contingent upon the promulgation of ACE or the new implementing regulations." 84 Fed. Reg. 32,532/2. The same is true of EPA "revisions to its regulations implementing section [7411(d)]."

Finally, it is noteworthy that Petitioners barely mention the amendments to the implementing regulations. They have thereby waived any challenge to them. Petitioners do not grapple in any respect with EPA's rationale explaining that States required additional time to formulate their state plans. *Contrast* Env. Br. at 13 (asserting without argument that EPA "arbitrarily failed to consider the public health impacts of these amendments"); *with* ACE Rule, 84 Fed. Reg. 32,567-32,568 (explaining at length that additional time was required to allow for the analysis required by the rule, and that EPA in lengthening the deadlines was responding to the 1990 CAA amendments of Section

7410, which Section 7411(d) cross-references). Any challenge to EPA's rationale for the implementing regulations has thus been waived. *See CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014) (argument forfeited where party made only "oblique" and "conclusory" statements in its opening brief).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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June 16, 2020

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of the Court's order of January 31, 2020 because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) this document contains 52,335 words.

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Dated: June 16, 2020.

/s/ *Meghan E. Greenfield*
MEGHAN E. GREENFIELD

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Appellate Electronic Filing system.

/s/ *Meghan E. Greenfield*
MEGHAN E. GREENFIELD