

BEFORE THE HONORABLE ANDREW WHEELER, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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IN RE PETITION FOR RECONSIDERATION)
OF THE 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))
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Submitted by:

The States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the District of Columbia; the City and County of Denver (CO); the County of Broward (FL); and the Cities of Boulder (CO), Chicago (IL), Los Angeles (CA), New York (NY), Philadelphia (PA), and South Miami (FL).

On July 8, 2019, the U.S. Environmental Protection Agency (“EPA”) published the final rule repealing its 2015 greenhouse gas emission guidelines for existing power plants (the “Clean Power Plan” or “CPP”) and adopting in their place the “Affordable Clean Energy” rule (“ACE”). At the same time, EPA also revised implementing regulations for section 111(d) of the Clean Air Act. 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) (“Final Rule”). In the CPP, EPA identified a combination of heat-rate improvements and increased generation from natural gas and renewable energy sources as the “best system of emission reduction” (“BSER”) for fossil-fuel power plants under section 111(d) of the Clean Air Act. In ACE, EPA instead limits the BSER to heat-rate improvements at coal-fired power plants. Several petitioners have challenged the Final Rule in the U.S. Court of Appeals for the D.C. Circuit, including the undersigned states and cities.

Pursuant to 42 U.S.C. § 7607(d)(7)(B), and for the reasons set forth below, the states of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey,¹ New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin; the commonwealths of Massachusetts, Pennsylvania, and Virginia; the District of Columbia; the city and county of Denver, Colorado; the county of Broward (FL);² and the cities of Boulder, Colorado; Chicago, Illinois; Los Angeles, California; New York, New York; Philadelphia, Pennsylvania; and South Miami, Florida (collectively the “States and Cities”) hereby petition EPA for reconsideration of the Final Rule.

¹ The State of New Jersey takes no position on Part I of the Legal Argument, *infra*.

² Broward County joins the Petition for Reconsideration only as to Part I of the Legal Argument, *infra*.

Reconsideration is warranted here on four grounds, on which the States and Cities had no adequate opportunity to provide comment, and which are of central relevance to the Final Rule’s adoption. First, the Final Rule relies on two new, flawed interpretations of Clean Air Act sections 302(l) and 105 to justify the CPP repeal and the BSER determination. Second, the Final Rule significantly alters the BSER’s cost-benefit balance by removing previously proposed revisions to New Source Review (“NSR”) regulations; but EPA did not reopen the Final Rule for further comment or reevaluate its BSER determination given the change. Third, the Final Rule prohibits state plans whose compliance measures do not align with EPA’s flawed or even unstated statutory interpretations, and gives EPA the unprecedented prerogative to disapprove state plans that are more stringent than required under the Final Rule. Fourth, the Final Rule disguises its true costs to human health, welfare, and the environment by using an improper “no-CPP” base case in its regulatory impact analysis, such that EPA premised its BSER determination on a distorted cost-benefit analysis.

Because the grounds for these objections arose after the public comment period, and are of central relevance to EPA’s adoption of the Final Rule, it is incumbent upon EPA to reopen public comment and reconsider the Final Rule. 42 U.S.C. § 7607(d)(7)(B).

PROCEDURAL HISTORY

I. PROPOSED REPEAL OF THE CLEAN POWER PLAN

EPA promulgated the Clean Power Plan to control greenhouse gas emissions from existing fossil-fueled power plants under section 111(d) of the Clean Air Act.³ Carbon Pollution

³ On the same day, EPA released a Legal Memorandum Accompanying Clean Power Plan for Certain Issues (“CPP Legal Mem.”), available at <https://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf>; *see also* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (standards of performance for new and modified fossil-fuel power plants under section 111(b)).

Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015). Previously, EPA had found greenhouse gases (“GHGs”), including carbon dioxide, endanger public health and welfare by causing more intense, frequent, and long-lasting heat waves; worse smog in cities; longer, more severe droughts; more intense storms, hurricanes, and floods; the spread of disease; and a dramatic rise in sea levels, among other consequences. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497, 66,524-25, 66,532-33 (Dec. 15, 2009).

In the CPP, EPA determined the BSER for fossil-fuel power plants consisted of three building blocks: (1) heat-rate improvements (“HRIs”) at coal-fired power plants; (2) substituting natural gas-fired generation for coal-fired generation; and (3) substituting new renewable energy generation (such as solar and wind power) for coal and natural gas-fired generation. 80 Fed. Reg. at 64,667. EPA’s BSER determination reflected the “already clearly emerging growth in clean energy innovation, development and deployment,” the routine operations of the interconnected electric power grid, and successful state programs like the Regional Greenhouse Gas Initiative (“RGGI”), through which a coalition of northeastern states⁴ had reduced carbon emissions from the power sector by 50 percent since 2008. *Id.* at 64,663, 64,725. EPA established emission rates for coal-fired power plants and natural gas combined cycle plants that reflected application of the BSER and would have achieved significant emission reductions from the power sector. *Id.* at 64,707. The CPP gave states significant flexibility in designing their state plans to meet the

⁴ Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont all participated in the first three-year compliance period, after which New Jersey withdrew. On June 17, 2019, New Jersey rejoined RGGI. See RGGI press release, “RGGI States Welcome New Jersey as Its CO2 Regulation Is Finalized” (June 17, 2019), available at https://www.rggi.org/sites/default/files/Uploads/Press-Releases/2019_06_17_NJ_Announcement_Release.pdf.

emissions guidelines, such as through inter- or intrastate trading and averaging between sources; states could impose more stringent plans than those required by federal guidelines, as provided by section 116 of the Clean Air Act. *Id.* at 64,674-75, 64,719, 64,938.

In an about-face, in 2017, EPA published notice of its proposed repeal of the Clean Power Plan. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Proposed Rule, 82 Fed. Reg. 48,035 (Oct. 16, 2017) (“Repeal NPRM”). Specifically, EPA proposed a change in its legal interpretation of Clean Air Act section 111(d) to restrict the BSER to “measures that can be applied to or at the source,” and to assert that measures identified in the CPP could not be applied to or at the source. *Id.* at 48,036-37. Based on this new “source-oriented reading,” EPA claimed the CPP exceeded its regulatory authority, and thus had to be repealed. *Id.* at 48,036, 48,039. In their comments on the Repeal NPRM, the States & Cities challenged EPA’s statutory analysis and noted that the CPP, properly described, still satisfied a “source-oriented” reading of section 111(d).⁵

II. THE 2018 DRAFT AFFORDABLE CLEAN ENERGY RULE

On August 31, 2018, EPA proposed the Affordable Clean Energy rule as a replacement to the Clean Power Plan. Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (“ACE NPRM”). The draft rule was premised on EPA’s legal analysis in the Repeal NPRM, and thus limited itself to “evaluating technologies or systems of emission reduction” that EPA contended were “applicable to, at, and on the premises of the facility for an affected source.” *Id.* at 44,748.

⁵ Comments of the Attorneys General of New York, *et al.* on EPA’s Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources, 82 Fed. Reg. 48,035, 15-38 (April 26, 2018), Docket ID EPA-HQ-OAR-2017-0355-20778 (“States & Cities CPP Repeal Comments”).

The ACE NPRM included three components:

BSER and revised emission guidelines. EPA proposed to determine that the BSER for existing power plants was HRIs applied at the affected plant. *Id.* Rather than set actual emissions limitations based on these HRIs, EPA instead stated the proposed emission guidelines would “inform” the state plans’ establishment of standards of performance and presented six “candidate technologies” that states could choose from in establishing these standards of performance. *Id.* at 44,748, 44,756. EPA asserted states would have “considerable flexibility in determining emissions standards for units,” *id.* at 44,763, and solicited comment on whether section 111(d) authorized states to use averaging or trading to meet the performance standards in their plans, *id.* at 44,767-68. EPA did not, however, solicit comment on the circumstances under which it could disapprove a state plan due to the nature of the emission reduction measures the state chose to employ or the stringency of its standards.

NSR revisions. EPA proposed changing the test to determine whether a physical or operational change at a power plant would trigger NSR permitting requirements. EPA proposed to revise the test from one focusing on whether a facility’s total emissions would increase, to one focusing on whether there would be an increase in maximum hourly emissions. *Id.* at 44,780-82. Under EPA’s proposal, power plants implementing HRIs that would likely result in an increase in emissions on an annual basis, but not in hourly emissions increases, would not be subject to NSR permitting. *Id.* at 44,775.

New implementing regulations. EPA proposed significant revisions to regulations governing how EPA implements section 111(d). *Id.* at 44,748. Among the changes were provisions allowing an emission guideline to supersede the implementing regulations, if the guideline explicitly identified the regulation to be superseded, 40 C.F.R. § 60a(a)(1); revised

timing requirements for state plan submissions and EPA actions under section 111(d); and new definitions of key terms. *See id.* at 44,770.

The Regulatory Impact Analysis accompanying the ACE NPRM (“Proposed ACE RIA”) included four illustrative scenarios: three modeling the draft rule’s emission guidelines based on HRIs against a baseline incorporating the CPP, and one modeling full repeal of the CPP. *Id.* at 44,783. The illustrative models incorporating a CPP baseline assumed that the CPP’s compliance deadlines would phase in as scheduled beginning in 2022. *Id.* This analysis did not include any modeling of EPA’s new BSER against a “no-CPP” baseline.

In their comments on the ACE NPRM, the States and Cities reiterated their objections to EPA’s statutory analysis and criticized the proposed emission guidelines for failing to curb GHG pollution meaningfully. The States and Cities identified several flaws in the Proposed ACE RIA that caused it to understate the CPP’s value relative to the draft ACE rule, but observed that the analysis still showed the CPP delivering net benefits substantially greater than the ACE NPRM’s emission guidelines.⁶

III. THE FINAL CLEAN POWER PLAN REPEAL AND AFFORDABLE CLEAN ENERGY RULE

The Final Rule contains three components: the repeal of the Clean Power Plan, revised GHG emission guidelines for coal-fired plants, and revised implementing regulations for section 111(d). Far from promoting clean energy, as its name implies, the Final Rule encourages coal-fired generation and fails to meaningfully address the harmful GHG emissions that endanger

⁶ *See* Comments of the Attorneys General of New York, *et al.* on EPA’s Proposed Emission Guidelines for GHG Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 127-140 (Oct. 31, 2018), Docket ID EPA-HQ-OAR-2017-0355-24817 (“States & Cities ACE Comments”).

public health and welfare and accelerate the threat of climate change. By EPA’s own estimate, by 2030 the Final Rule will not have reduced annual GHG emissions by even one percent.⁷

The Final Rule differs in several respects from the two NPRMs. First, EPA cites two provisions of the Clean Air Act never mentioned in the Repeal NPRM or ACE NPRM—namely, sections 302(l) and 105—to support its legal position that the CPP contravened section 111. 84 Fed. Reg. at 32,527, 35,531-32. Second, in what EPA acknowledges is a significant shift from the ACE NPRM, the Final Rule indefinitely defers proposed changes to the NSR program, substantially reducing the modeled effectiveness of the selected BSER and increasing costs. *Id.* at 32,555. Third, EPA reinterprets its authority to approve state plans that include certain non-BSER measures or set standards more stringent than those derived from the Final Rule. *Id.* at 32,559-560. EPA states it will not determine what type or degree of emission control is allowed in a state plan until states have submitted their individual plans. *Id.* Fourth, EPA’s Final RIA uses a base case that does not include the Clean Power Plan. As discussed below, EPA relies on four arguments supporting its reliance on the “no-CPP” baseline, none of which were included in the NPRMs or Proposed ACE RIA. *See generally* Final RIA, Ch. 2.

STANDARD FOR RECONSIDERATION

EPA must convene a reconsideration proceeding if a person raising an objection shows: (1) it was “impracticable” to raise the objection during the public comment period, or grounds for the objection arose after the public comment period; and (2) the objection “is of central relevance to the outcome of the rule.” 42 U.S.C. § 7607(d)(7)(B).

⁷ Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, at 3-11, Table 3-3 (“Final RIA”).

Impracticability turns on whether the notice of proposed rulemaking provided “adequate notice of the final rule.” *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2018). Parties are considered to have had adequate notice where the final rule is a “logical outgrowth” of the notice of proposed rulemaking, *id.*, such that “interested parties should have anticipated that the change [from the proposed to final rule] was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period,” *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009).

An objection is “of central relevance” if it provides “substantial support for the argument that the regulation should be revised.” *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 125 (D.C. Cir. 2012); *see also* EPA’s Denial of Pets. to Reconsider the Endangerment and Cause or Contribute Findings for GHGs, 75 Fed. Reg. 49,556, 49,561 (Aug. 13, 2010). The petitioner must show “the errors identified 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 if such errors had not been made.” *Union Oil Co. of Calif. v. EPA*, 821 F.2d 678, 683 (D.C. Cir. 1987).

LEGAL ARGUMENT

I. EPA INTRODUCED TWO NEW AND INCORRECT STATUTORY ARGUMENTS TO SUPPORT ITS REPEAL OF THE CLEAN POWER PLAN.

A. Without notice or opportunity to comment, EPA incorrectly reinterpreted section 302(l)’s definition of “standard of performance” to preclude consideration of reduced utilization under section 111.

As the States and Cities observed in their CPP Repeal Comments, the Clean Power Plan is consistent with EPA’s new statutory interpretation restricting the BSER to “measures that can be applied to or at the source,” because generation-shifting is similarly source-specific: a higher-emitting plant reduces electricity generation by the amount dispatched from renewable or lower-

emitting sources. States & Cities CPP Repeal Comments at 17-18. Indeed, EPA previously found that whatever it chose as the BSER, the power sector would likely use generation-shifting to comply with the resulting standards of performance, by reducing operations at higher-emitting power plants. 80 Fed. Reg. at 64,728. In this sense, any meaningful emission limit of dangerous pollutants leads to some generation-shifting, as higher-emitting plants become less economical to dispatch. In the Final Rule, EPA finds a new reason to rule out generation-shifting that responds to this economic reality, claiming that “reduced utilization” of a power plant cannot be the basis of the BSER, or the means by which states implement and enforce emission limits⁸—based on a flawed statutory view EPA has never accepted before now.

In the Final Rule, EPA contends for the first time that to construe reduced utilization as a system of emission reduction (or even a state implementation measure) would conflict with the definition of “standard of performance” as a “requirement of continuous emission reduction” in section 302(l). 42 U.S.C. § 7602(l); 84 Fed. Reg. at 32,531, 32,556. In doing so, EPA retracted its prior positions that (1) section 111(a)(1)’s definition of “standard of performance” controls as the more specific provision; and (2) a standard that “applies continuously” also satisfies section 302(l)’s definition. *Compare* 84 Fed. Reg. at 32,531 & n.126 *with* 80 Fed. Reg. at 64,841. EPA now further argues reduced utilization would contravene the plain meaning of “performance” in “standard of performance.” 84 Fed. Reg. at 32,532. EPA did not provide notice or opportunity to comment on its change in position, did not provide a reasoned explanation for changing its previous legal interpretation, and misinterpreted section 302(l).

⁸ Indeed, the Final Rule suggests that states cannot even make “reduced utilization” *available* to the power sector as a means by which power plants comply with standards of performance. 84 Fed. Reg. at 32,556 (a state “cannot make [reduced utilization] the means of meeting compliance obligations”).

1. *Until the Final Rule, EPA had always interpreted sections 111 and 302(l) to allow reduced output as a component of the BSER.*

Prior to the Final Rule, EPA's formal legal position was that the definition of "standard of performance" in section 111(a)(1) controlled over the definition in section 302(l), as the more specific provision; and in any case, the definition in section 302(l) was compatible with a section 111(d) emission guideline providing for a "continuously applied" emission limit. For instance, EPA's 2005 Clean Air Mercury Rule established a cap-and-trade system for control of mercury emissions under section 111(d) based on statewide emissions budgets for mercury. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) ("CAMR"). Without conceding that section 302(l) applied to a section 111 "standard of performance," EPA explained the CAMR cap-and-trade system did comport with section 302(l), in that it was "a requirement of 'continuous' emissions reductions because all of a source's emissions must be covered by allowances sufficient to cover those emissions. That is, there is never a time when sources may emit without needing allowances to cover those emissions." *Id.* at 28,617. EPA found "[t]his interpretation of the term 'continuous' is consistent with the legislative history of that term." *Id.* at 28,617 n.3.

EPA presented the same position to the D.C. Circuit and asserted its interpretation of "continuous" in section 302(l) was also consistent with how section 302(k) used that term. EPA told the court Congress's choice to remove the word "continuous" from section 111(a)(1) in the 1990 Clean Air Act Amendments was "at least to some extent deliberate," and argued the more specific definition in section 111(a)(1) (which does not include the word "continuous") controlled over the more general definition in section 302(l).⁹

⁹ Compare Pub. L. 101-549, title IV, § 403(a) (Nov. 15, 1990), 104 Stat. 2631 (amending section 111 to add the present section 111(a)(1)), with 42 U.S.C. § 7411(a)(1) (1988) ("... through application of the best technological system of continuous emission reduction which ... the Administrator determines has been adequately demonstrated

In the CPP rulemaking, ten years after promulgating the Clean Air Mercury Rule, EPA continued to adhere to the same interpretation of section 302(l). EPA explained the continuity requirement in section 302(l) did not constrain its analysis of the BSER because Congress had removed the requirement from section 111(a)(1): “In the 1990 CAA Amendments, Congress restored the 1970s vintage definition of a standard of performance as applied to both new and existing sources. With respect to existing sources, this had the effect of no longer requiring that the BSER be ‘continuous.’” 80 Fed. Reg. at 64,765. EPA further concluded that, regardless of whether section 302(l) continued to apply over the more specific definition in section 111(a)(1), because state plans under the CPP were to impose a “continuously applied” emissions limit, the CPP provided for a “continuous emission reduction” under section 302(l)’s definition. *Id.* at 64,841.

In the Final Rule, however, EPA reversed its interpretation of section 302(l). EPA did not provide notice or opportunity to comment on its changed interpretation of section 302(l); indeed, section 302(l) is never mentioned in either the Repeal or ACE NPRMs. As explained below, EPA fails to provide the “reasoned explanation” required for such a change in position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

2. *EPA’s analysis of section 302(l)’s applicability fails to adequately address contrary evidence in the statutory text and history.*

EPA’s new arguments for section 302(l)’s relevance, in spite of its previous position, omit important contrary authority and evidence that supports that previous position. First, EPA’s assertion that supplanting language (*e.g.*, “except as otherwise specifically provided”) would be

...”) (emphasis added); Brief of Respondent EPA, at 127-31, *New Jersey v. EPA*, No. 05-1097 (D.C. Cir. May 4, 2007). CAMR was vacated for unrelated reasons in *New Jersey v. EPA*, 517 F.3d 574, 583-84 (D.C. Cir. 2008) (holding that EPA lacked authority to remove coal- and oil-fired power plants from the list of sources regulated under section 112 without following the Clean Air Act’s delisting provisions).

necessary in section 302(l) for section 111(a)(1) to control contradicts *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (“*UARG*”). In *UARG*, the Supreme Court read the operative uses of “air pollutant” more narrowly than the Act-wide definition in section 302(g), which, like section 302(l), has no supplanting clause. 573 U.S. at 316-20.

EPA also fails to address section 111(a)(1)’s legislative history. In promulgating both CAMR and the CPP, EPA found Congress’s deletion of the continuity requirement from section 111(a)(1) was a crucial reason for section 111(a)(1)’s more specific definition to control over the 302(l) definition. EPA offers no explanation for why it can now ignore its previous position that Congress deliberately relaxed the continuity requirement in section 111. Having failed to even acknowledge it is changing its view of section 111’s legislative history, EPA has not provided “a reasoned explanation ... for disregarding [the] facts and circumstances” supporting its previous view. *Fox Television*, 556 U.S. at 515-16. EPA’s analysis of section 302(l) is thus incomplete and arbitrary.

3. *A standard of performance is “continuous” if it applies continuously, not if it is based on continually operating technology.*

Even assuming that section 302(l) is relevant to interpreting section 111, EPA’s notion of “continuity” is nevertheless plainly wrong.

As several courts have found, Congress added the term “continuous” to sections 302(k) and 302(l) to preclude “intermittent” control strategies, whereby a source could temporarily restrict emissions during certain conditions, but otherwise emit pollutants unrestrictedly. *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008); *Kamp v. Hernandez*, 752 F.2d 1444, 1452-53 (9th Cir. 1985); *see also Kennecott Copper Corp. v. Train*, 526 F.2d 1149, 1155 (9th Cir. 1975); *Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16, 29 (6th Cir. 1975). As *Kennecott Copper* explained, intermittent controls are another form of dispersion technique: just as tall stacks

disperse pollution in space, intermittent controls disperse pollution in time, without necessarily reducing overall amounts of pollutants emitted. 526 F.2d at 1155. Instead, the Clean Air Act requires that “some ... standard apply continuously.” *Sierra Club*, 551 F.3d at 1028.¹⁰

Without discussing the above cases, the Final Rule purports to contrast section 302(l)’s requirement of “continuous emission reduction” with section 302(k)’s definition of “emission limitation” and “emission standard,” *i.e.*:

a requirement ... which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction

42 U.S.C. § 7602(k). According to EPA’s new understanding, “continuous emission reduction” is thus “included” as a form of emission limitation under section 302(k), but mandatory under section 302(l). From this purported difference, EPA reasons that, while section 302(k) defines a standard that applies on a continuous basis, section 302(l) must define something stricter. 84 Fed. Reg. at 32,531.

EPA’s conclusion does not follow from its premise. Ordinarily, “identical words used in different parts of the same statute ... have the same meaning,” *UARG*, 573 U.S. at 319, such that “continuous” in section 302(k) requires that *emission limitations* apply on a continuous basis, and “continuous” in section 302(l) requires that *standards of performance* apply on a continuous basis. The provisions’ context and history further confirm this presumption of consistent usage: the 1977 CAA amendments added “continuous” to sections 302(k) and 302(l) at the same time, with the same stated intent of prohibiting “intermittent ... controls or other temporary, periodic, or limited systems of control.” *Sierra Club*, 551 F.3d at 1027 (quoting H.R. Rep. 95-294 (1977)),

¹⁰ See also *Kamp*, 752 F.2d at 1452 (affirming EPA’s “broader definition of ‘continuous’” under which “a [state implementation plan] operates continuously so long as some limitation on emissions, although not necessarily the same limitation, is always imposed on the SO₂ source”).

as reprinted in 1977 U.S.C.C.A.N. 1077, 1170); *Kamp*, 752 F.2d at 1452-53 (same).¹¹ Thus, *Sierra Club* and *Kamp*'s interpretation of "continuous," requiring that "some ... standard apply continuously," applies to 302(k) and 302(l) with equal force.

Neither can EPA rationally take the position that "continuous" carries different meanings in each definition, since several technologies EPA included in the BSER would be impermissibly "intermittent" under such a view. Intelligent sootblowers do not operate continuously, but only in response to specified measurements; air pre-heater seals are installed, economizers replaced, and boiler feed pumps and blade paths upgraded once, or as needed, but not "continuously." See 84 Fed. Reg. at 32,538-40. None of these HRIs "continuously" improve the heat rate, in the sense of an always-decreasing input-to-output ratio: they improve it once, upon implementation, and help maintain the heat rate—until the new equipment eventually degrades as well. See States & Cities ACE Comments at 54-55. The only sense in which these HRIs could be "continuous emission reductions," under EPA's strictest reading of "continuous," is that, once implemented, they keep emissions below a particular level on a continuous basis for some time.¹² But so does generation-shifting under the CPP. A source's reduction in operations can be just as continuous as the HRIs selected in the Final Rule, as long as that source is consistently operated less (as in the course of generation-shifting under the CPP), rather than only when atmospheric conditions require it.¹³

¹¹ For this reason, while the presumption of consistent usage yields where context "warrant[s] the conclusion that [words] were employed in different parts of the act with different intent," *Env'tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007), context here warrants just the opposite conclusion.

¹² Moreover, this is true only when that limit is expressed as an emissions rate (*e.g.*, lbs. CO₂/MWh) versus a mass-based limit, because a coal plant that improves its emissions rate by implementing HRIs can still emit more total GHGs into the atmosphere if it operates at higher frequency and capacity. Even using emission rates, the Final Rule allows states to vary emission standards according to "load, maintenance schedules, and weather," which can cause a plant's emissions rate to exceed standard limits. 84 Fed. Reg. at 32,552. Thus, whatever EPA believes the term "continuous" to require of HRI-based standards of performance, it must be even less than a constant mass- or rate-based emission limit.

¹³ This is the point made in the 1980 article by Professor David Currie that EPA purports to rely on for its new legal interpretation and selectively quotes. 84 Fed. Reg. at 32,531-32. The Final Rule clips the excerpted text to suggest Congress categorically considered *any* reductions in plant output to be "intermittent controls." But the complete text

EPA's strained, ahistorical, and contradictory analysis does not provide the "reasoned explanation" necessary to justify its departure from its longstanding position, under two previous Administrations, that continuously applicable standards satisfy section 302(l)'s continuity requirement. *Fox Television*, 556 U.S. at 516.

4. *Generation-shifting can provide the basis of a standard of "performance" under the term's ordinary administrative meaning.*

In arguing, for the first time, that section 302(l) precludes generation-shifting as a BSER component or state plan measure, EPA further asserts "basing the BSER on reduced utilization contravenes the plain meaning of a 'standard of performance,'" because "'performance' ... refers to the source's manufacturing or production of product," and reduced utilization calls for "non-performance." 84 Fed. Reg. at 32,532. However, EPA's construction of "performance" obscures the term's typical usage in administrative standard-setting. The counterpart of a performance standard is not a "non-performance standard," but a design standard. *See* 42 U.S.C. § 7411(h)(1) (authorizing EPA to promulgate design standards, where no standard of performance is feasible). In administrative law, "a design standard specifies precisely how, say, a machine must be built," whereas "[a] performance standard ... states its obligations in terms of ultimate goals that must be achieved. The firm then is free to achieve those goals in any appropriate way." Stephen Breyer,

reads differently: Congress "intended to forbid reliance on intermittent control strategies, such as *temporary* use of low-sulfur fuels or reductions in plant output, which were once put forward *as means of complying with ambient standards during adverse conditions* without the necessity for installing permanent controls." David P. Currie, *Direct Federal Regulation of Stationary Sources Under the Clean Air Act*, 128 U. Pa. L. Rev. 1389, 1431 (1980) (emphasis added). Thus, continuous reductions in operation, in all conditions, would still be consistent with Congress's prohibition on intermittent control strategies.

Moreover, Professor Currie was commenting on the 1977 version of section 111, which at that time included the word "continuous." Even so, the article disputes the importance of that term: "The courts should be expected to hold that the amendments only express a preference for continuous controls whenever they are practicable, but the language was not well chosen." If EPA were truly persuaded by Professor Currie's 1980 analysis, then EPA should have maintained its position that Congress's choice in 1990 to remove the word "continuous" from section 111 altogether eliminates whatever minimal constraint on a BSER determination the word may have had in the 1977 version.

Regulation & Its Reform 105 (1982); see OMB Circular A-4, at 8 (2003) (“Performance standards express requirements in terms of outcomes rather than specifying the means to those ends.”). By requiring standards of performance in section 111(d), the Act expresses a preference for the more flexible, outcome-based standard over the means-based design standard. To assert, as EPA does, that a section 111(a)(1) “standard of performance” requires continuously running power plants is as absurd as claiming vehicle safety performance standards require continuously deploying airbags. Cf. 49 C.F.R. § 571.208, S27 (setting “performance requirement” for airbags’ non-deployment). Rather, EPA sets a “standard of performance” when it specifies the “ultimate goal that must be achieved”—the limits for GHG emissions—while allowing sources to achieve those goals in any appropriate way.

* * *

In sum, section 302(l) requires that “some ... standard apply continuously.” *Sierra Club*, 551 F.3d at 1028. But a continuous standard of performance does not imply a continuously running technology or power plant. Therefore, section 302(l) cannot be a basis for repeal of the CPP.

EPA did not provide the States and Cities notice or opportunity to comment on its changed interpretation of section 302(l) or continuous emission reduction; indeed, section 302(l) is never mentioned in either the Repeal or ACE NPRMs. EPA’s changed interpretation is also wrong under the Act’s plain text, as interpreted by *Sierra Club* and *Kamp*. For the same reason, the Final Rule cannot provide the “reasoned explanation” necessary to ignore the statutory text, history, case law, and practical realities that supported its previous positions. *Fox Television*, 552 U.S. at 516. The section 302 argument’s flaws are “of central relevance,” because EPA premised its repeal of the CPP entirely on statutory interpretation. Although EPA made other statutory

arguments, included in the Repeal NPRM, the introduction of EPA’s new section 302 argument (and its section 105 argument, discussed *infra*) indicates EPA believes its first set of interpretive arguments were insufficient to show that section 111 plainly prohibits the CPP, as it claims.¹⁴ At the very least, the failure of EPA’s new section 302 argument introduces ambiguity into what purports to be a “*Chevron* step one” analysis premised on unambiguity. *See, e.g., Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (“[I]f an agency erroneously contends that Congress’s intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see.”). EPA must reopen public comment and reconsider the CPP repeal.

B. Section 105(a)(1)(A)’s definition of “implementing” “for the purpose of this section” does not preclude a similar use of “application” in section 111(d).

EPA introduces a new argument in the Final Rule, based on section 105(a)(1)(A)’s definition of “implementing,” that did not appear in the Repeal NPRM. EPA now contends the CPP used the terms “implement” and “apply” interchangeably, whereas the Clean Air Act defines the terms disjunctively. But the plain text of section 105 and section 111—as well as the Final Rule’s own usage of “apply” and “implement”—contradict EPA’s argument.

According to EPA, section 105 defines “implementing” with a list of synonymous terms that does not include “application” or “applying.” 84 Fed Reg. 32,527.¹⁵ “Functionally, the terms

¹⁴ The States and Cities have already provided comment showing EPA’s arguments construing section 111(a)(1) and section 111(d) are incorrect, and therefore do not repeat them here. *See generally* States & Cities CPP Repeal Comments at 19-38.

¹⁵ *See* 42 U.S.C. § 7405(a)(1)(A): “The Administrator may make grants to air pollution control agencies . . . in an amount up to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards. For the purpose of this section, ‘implementing’ means any activity related to the planning, developing, establishing, carrying-out, improving, or maintaining of such programs.”

send different signals,” EPA argues, because “apply” carries an indirect object, and “implement” does not. *Id.*

However, section 105’s definition of “implementing” is not an Act-wide definition, as the Final Rule treats it: section 105 defines “implementing” “[f]or the purpose of this section” only. 42 U.S.C. § 7405(a)(1)(A). Because section 105(a), by its plain terms, limits itself to the context of grants to state agencies to implement their National Ambient Air Quality Standards (“NAAQS”) and other pollution control programs, it sheds no interpretive light on the use of “application,” “apply,” or “implement” in section 111.

Section 111 further belies EPA’s claim that the Act uses “apply” and “implement” with grammatically distinct functions. In the Final Rule, EPA offers one example in which section 111 uses “apply” with an indirect object and “implement” with none. 84 Fed. Reg. at 32,527. But that single example does not support EPA’s contention that the words must *always* be used in such ways. Indeed, section 111 also uses “apply” without specifying any indirect object:

Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

42 U.S.C. § 7411(g)(3); *see also id.* § 7411(f)(2)(C) (“nationally applicable new source standards of performance”); *id.* § 7411(j)(1)(A)(ii) (“the standards of performance which would otherwise apply”) (all emphases added).

While section 105 does not happen to explicitly treat “apply” and “implement” synonymously, nothing in that provision (or any other) *prohibits* such a usage—and indeed, EPA

in the Final Rule itself refers to “implementing” the HRIs at sources, despite its protestations that “apply” and “implement” are distinct concepts.¹⁶

Because the Repeal NPRM did not cite section 105, or otherwise suggest EPA would look to the state grant program to interpret section 111, the States and Cities had no opportunity to comment on this argument or its errors. As with the section 302 argument, the failure of this statutory interpretive argument is “of central relevance,” because EPA relied on these arguments to support its position that the Act’s plain language required repeal of the CPP. EPA should therefore grant the petition and promptly convene a reconsideration proceeding.

II. EPA FAILED TO CONSIDER THE IMPACT OF REMOVING PROPOSED NEW SOURCE REVIEW REGULATION REVISIONS ON ITS DETERMINATION OF THE BEST SYSTEM OF EMISSION REDUCTION.

EPA’s decision to defer its proposed changes to the NSR regulations was, as EPA itself acknowledges, a major shift from the original ACE proposal. *See* 84 Fed. Reg. at 32,555; 83 Fed. Reg. 44,746. The Final Rule anticipates that, without those NSR revisions, states may find two of the HRIs included in the BSER (blade path upgrades and redesigned/replaced economizers) too costly for power plants to implement, and “not as reasonable as anticipated at proposal.” 84 Fed. Reg. at 32,555. More candidly, the Final RIA predicts *no* power plant in the country—not one—will apply a blade path upgrade or replace its economizers. Final RIA, at 1-16, 1-17. Thus, not only did the Final Rule remove NSR revisions from the ACE proposal; practically, it removed blade path upgrades and economizers from the suite of HRIs making up the best system of

¹⁶ *See, e.g.*, 84 Fed. Reg. at 32,535 (“The commenters argued that it is not possible to adopt uniform, nationally applicable standards of performance based on implementation of particular HRI technologies because each individual unit is subject to a unique combination of factors that can affect the unit’s heat rate”); *id.* at 32,537 (“Based on these statutory divisions of roles and responsibilities, EPA proposed to determine the BSER as HRI achievable through implementation of certain technologies, equipment upgrades, and improved O&M practices.”); *id.* at 32,539 (“In evaluating the applicability of the BSER technologies, states will consider ‘other factors’ that will include expected utilization rate, remaining useful life, physical/space limitations, etc. That evaluation of ‘other factors’ will identify whether implementation of a BSER candidate technology is reasonable.”); *see also* ACE NPRM, 83 Fed. Reg. at 44,765 (discussing “measures ... implemented at the source itself”) (all emphases added).

emission reduction. EPA contradictorily assumes, for purposes of the BSER determination, that “these technologies [are] generally applicable across the fleet of existing [generating units],” but models them as never being applied at any unit in that fleet. 84 Fed. Reg. at 32,555.

Worse, blade path upgrades and replaced economizers are the two HRIs most effective at reducing GHG emissions, according to EPA. 84 Fed. Reg. at 32,537. That means, by EPA’s own analysis, EPA’s BSER is either more expensive or less effective at reducing GHG emissions than originally modeled.¹⁷ In light of this major shift in cost and benefits, it is incumbent on EPA to reconsider whether this more limited or more expensive suite of HRIs is truly the best system of emission reduction, as compared to other candidate systems.

Because EPA originally included NSR revisions in its ACE proposal, the States and Cities were not given adequate notice of—and had no opportunity to comment on—EPA’s choice to retain its BSER determination without finalizing the NSR revisions. That change goes directly to EPA’s BSER determination, in that more effective systems EPA previously deemed too costly (such as natural gas co-firing or CCS) may prove the best system of emission reduction if compared against the true cost and impact of the more limited HRIs. EPA’s deferral also places the states in an uncertain limbo, in which states risk disapproval if they submit a state plan without NSR revisions and EPA ultimately finalizes such revisions, or if they submit a state plan assuming NSR revisions that EPA never finalizes. Therefore, the deferral of NSR revisions is “of central relevance” and EPA must reconsider the Final Rule.

¹⁷ Neither does the NSR proposal EPA released on August 9, 2019, remove the need for reconsideration. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 Fed. Reg. 39,244. That NPRM does not propose any of the NSR revisions originally included in the ACE proposal, and in fact, only proposes codifying EPA’s interpretation of NSR applicability regulations at the time of the ACE proposal. *See* 84 Fed. Reg. at 39,244. To the extent these newly proposed NSR revisions do make blade path upgrades or economizer replacements more likely to be implemented, however, that only underscores the need for EPA to reconsider its regulatory impact analysis, which anticipated no plants would apply those HRIs, and revisit its BSER determination accordingly.

III. THE FINAL RULE WRONGLY AND WITHOUT NOTICE REINTERPRETED ITS AUTHORITY TO DISAPPROVE STATE PLANS THAT CUT EMISSIONS MORE EFFECTIVELY THAN EPA’S FAVORED SYSTEM.

In the Final Rule, EPA for the first time announced it could disapprove state plans that cut emissions more effectively than its selected BSER requires. The Final Rule radically reinterprets controlling law to declare that: (1) EPA will not approve state plans that include measures that contravene EPA’s new statutory interpretations, including interpretations EPA has not articulated yet; and (2) EPA might not approve state plans that are more stringent than EPA’s emission guidelines. 84 Fed. Reg. at 32,560-61. Both positions misread the Clean Air Act, inflict burdensome uncertainty on State pollution control agencies, and chill vitally needed innovation in pollution control.

EPA did not provide notice of or opportunity to comment on either reinterpretation, both of which contravene the Act and EPA’s own regulations. Neither has it provided a reasoned explanation for its departure from its previous position. EPA’s new, incorrect interpretation of its authority over state plans is “of central relevance” to the rule’s adoption because it significantly affects how states will implement the Final Rule—and how effective the Final Rule will be. Therefore, EPA must reconsider the Final Rule.

A. For the first time, and contrary to section 111(d), EPA claims a state plan’s implementation measures must also “correspond with” EPA’s favored system of emissions reduction.

The Final Rule prohibits state plans from implementing and enforcing their standards of performance with measures that do not “comport with” EPA’s new interpretation of section 111 and “correspond with” its BSER determination. 84 Fed. Reg. at 32, 556, 32,560-61. EPA gave no opportunity to comment on this novel stance, which misreads the relationship between the BSER determination and a 111(d) plan’s implementation measures. Neither has EPA provided a

reasoned explanation for breaking from its longstanding policy and the cooperative federalism principles supporting state plan flexibility.

The Clean Air Act grants the states flexibility to select the mix of control measures that will implement and enforce the standards of performance for existing sources. 42 U.S.C. § 7411(d)(1)(B) (state plans to “provide[] for the implementation and enforcement” of standards of performance); see *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976) (“So long as the national standards are met, the State may select whatever mix of control devices it desires.”).¹⁸

In the ACE NPRM, EPA envisioned states would be “free to give the source flexibility to meet [its] standard of performance using either BSER technologies or some other non-BSER technology or strategy.” 83 Fed Reg. at 44,765. EPA proposed two additional limiting criteria: compliance measures must be (1) “implemented at the source itself,” and (2) “measurable at the source of emissions.” *Id.*¹⁹ In the Final Rule, EPA adds a further, unbounded and undefined limitation, asserting state plans can include only “measures that are authorized statutorily.” 84 Fed. Reg. at 32,560. But the Act nowhere limits a state plan in this way—or, for that matter, “authorizes statutorily” any particular measures. The Act’s only criterion for 111(d) plans is that they must “implement[] and enforce[]” the standards of performance that they establish. 42 U.S.C. § 7411(d)(1)(B).

The Final Rule does not provide a complete list of EPA’s new “statutory” limitations, but gives three “examples.” None of these three limiting examples is in fact required by the statute.

¹⁸ Although *Union Electric* (and *Train v. NRDC*, 421 U.S. 60, 79 (1975)) concerned NAAQS promulgated under section 110 of the Act, their application of cooperative federalism principles is equally relevant to section 111, which directs EPA to follow section 110 in designing the system for submission and approval of 111(d) state plans. 42 U.S.C. § 7411(d)(1); see CPP Legal Mem. at 28 (“EPA’s action on a 111(d)(1) state plan is structurally identical to the EPA’s action on a SIP.”).

¹⁹ See States & Cities ACE Comments at 76 (objecting to “implemented at the source itself” requirement).

First, EPA asserts, “CAA section 111(d)(1) clearly contemplates that state plans may only contain requirements for existing sources, and not other entities.” 84 Fed. Reg. at 32,560. But there is no such provision in section 111(d), which directs states to establish standards of performance “for any existing source.” 42 U.S.C. § 7411(d)(1)(A). That direction is a minimum requirement for state plans, but does not limit how state plans “implement[] and enforce[]” those standards. 42 U.S.C. § 7411(d)(1)(B). As a practical matter, EPA’s proposition that state plans cannot contain requirements for third parties is plainly wrong: EPA elsewhere admits Congress specifically endorsed off-site fuel cleaning, typically done by third-parties;²⁰ carbon capture and storage uses third parties to sequester emissions;²¹ and EPA’s own BSER includes third-party HRI appraisals. 84 Fed. Reg. at 32,540. The same mechanisms that state plans would employ to control the quality of such third-party services are available to implement emissions trading or generation-shifting systems.²²

Second, EPA prohibits a state plan that includes “standards of performance or implementation measures that do not result in emission reductions from an individual designated facility, such as the use of biomass or emissions trading.”²³ 84 Fed. Reg. at 32,560. Again EPA overly constricts section 111. A state plan requiring plants to use or co-fire lower-carbon fuels or

²⁰ See EPA’s Responses to Public Comments on the EPA’s *Repeal of Carbon Dioxide Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units* (June 2019), Ch. 1, p. 10.

²¹ EPA explicitly approved carbon capture and storage as a compliance measure. 84 Fed. Reg. at 32,556.

²² For example, just as a state plan could require coal-fired plants to retain the services of a fuel-cleaning service that meets certain minimum criteria, a state plan could require the plant to cover its emissions above a cap with emission allowances that meet certain minimum reporting, verification, and trading criteria. *See also* 80 Fed. Reg. at 64,832-37 (CPP options for state plans, consisting of federally enforceable measures that apply only to affected plants).

²³ In the ACE NPRM, EPA did solicit comment specifically on the use of emissions trading in state plans; however, the limiting principles EPA articulates in the Final Rule—and EPA’s suggestion of other, unarticulated limiting principles—go well beyond the specific emissions trading issue. *See* 83 Fed. Reg. at 44,767-68.

trade allowances still “enforce[s]” a standard for emissions that “reflects” an emission reduction and limitation. 42 U.S.C. § 7411(a)(1), (d)(1).

Third, EPA declares it “cannot approve a standard that is a requirement for a designated facility shut down,” because “[s]uch a standard is an operational standard rather than a standard of performance.” 84 Fed. Reg. at 32,560. Here, EPA conflates the standard of performance (*i.e.*, the emission limit) with the measures taken to achieve that limit. Retiring a plant—resulting in zero emissions—achieves any emission limit the state could set for that plant by applying EPA’s HRIs; therefore it is a valid option for a state plan measure or source’s compliance measure.

These three limiting examples are not found in section 111(d), and by applying these restrictions to the states, EPA compounds the flaws in its restrictive interpretation of section 111. EPA’s fundamental premise is that state plans’ standards of performance “by definition ‘reflect[] ... the application of the [BSER]’—implementation and enforcement of such standards should correspond with the approach used to set the standard in the first place.” 84 Fed. Reg. at 32,556. But that premise misreads the statute, conflating how compliance is achieved with how the standards are set. The provision’s unclipped text specifies that standards of performance “reflect the degree of emission limitation achievable through the application of the [BSER].” 42 U.S.C. § 7411(a)(1) (emphasis added). In other words, rather than reflecting the use of the system EPA selects as BSER—and only that system—standards of performance reflect a *limit*: the emission limit achievable through use of that system. How a state plan implements and enforces that limit is up to the state, under the Act.

Because section 111(d) does not, in fact, require the limiting principles EPA articulates for state plans, it was arbitrary and capricious for EPA to impose these restrictions on the states’

discretion, and contrary to the Act’s principle of cooperative federalism.²⁴ For the same reason, EPA’s legal argument cannot supply a “reasoned explanation” required by *Fox Television* to depart from its longstanding policy of state flexibility. 556 U.S. at 516.

B. For the first time, and contrary to its own regulation, EPA reserves the right to reject state plans that reduce emissions more than EPA’s favored system.

Even if a state plan includes only measures EPA finds “authorized statutorily,” the Final Rule states EPA may still disapprove the plan if it is “more stringent than required.” 84 Fed. Reg. at 32,559-60. For the first time, EPA renounces its prior interpretation—that it lacks authority to disapprove more stringent plans—and asserts that the reverse contention—that it lacks authority to *approve* more stringent plans—“has merit.” 84 Fed. Reg. at 32,559 & n.255, 32,560.²⁵ EPA provided the States and Cities no opportunity to comment on this reversal, which contravenes both *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), and EPA’s adherence to *Union Electric* in section 111 rulemakings.

In *Union Electric*, the Supreme Court held that state implementation plans (SIPs) under section 110 may be “more stringent than federal law requires and that [EPA] must approve such plans if they meet the minimum requirements of § 110(a)(2).” 427 U.S. at 265. Because “EPA’s action on a 111(d)(1) state plan is structurally identical to the EPA’s action on a SIP,” EPA previously found it lacked authority to disapprove a state plan that meets and exceeds federal

²⁴ Moreover, because EPA leaves open the possibility of announcing more limiting principles beyond its three “examples,” the Final Rule is arbitrarily and prejudicially vague.

²⁵ Confusingly, EPA avows that it will not “prejudge” the approvability of more stringent state plans, 84 Fed. Reg. at 32,560, even though its authority or lack of authority to approve such plans is a matter of statutory interpretation that should not vary from plan to plan. Moreover, every time the Final Rule touches the subject of plan stringency, EPA conspicuously discusses when state plans may relax the stringency associated with the BSER, and never when state plans may exceed it—suggesting EPA has indeed made up its mind against more stringent state plans. *See, e.g.*, 84 Fed. Reg. at 32,551 (discussing when states may set standards of performance that “fall outside the range” of values in the Final Rule’s Table 1, but only situations that would cause the standards to fall *below* such range).

stringency requirements under section 111 as well. CPP Legal Mem. at 28-30; 80 Fed. Reg. at 64,840.

In the Final Rule, EPA now claims to have identified a “potentially salient structural distinction” that, in its view, allows it to disapprove a more stringent state plan. Under sections 109 and 110, EPA argues, the EPA sets a health-based standard, and states design SIPs to meet it; while section 111(d) “more narrowly prescribes that the contents of state plans include performance standards based on application of [] measures” identified by EPA as the BSER. 84 Fed. Reg. at 32,559-560 & n.255.

Once again, EPA’s distinction is based on a misreading of section 111, which directs state plans to establish “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the [BSER].” 42 U.S.C. § 7411(a)(1) (emphasis added). Thus, both SIPs under section 110 and state plans under section 111 aim at specific thresholds: SIPs must achieve health-based air concentration levels, *i.e.*, the NAAQS; while 111(d) plans address endangerment from pollutants by achieving measure-based emissions limits, *i.e.*, the degree of emission limitation achievable from applying the BSER. EPA’s “structural distinction” is premised on its flawed view, discussed *supra*, that state plan measures must fit the same restrictions EPA imposes on the BSER.

But even accepting this distinction, EPA’s argument fails to address *Union Electric’s* holding that disapproving a more stringent state plan also conflicts with section 116 of the Act. That section authorizes states to adopt emissions standards that are stricter than federal requirements. 42 U.S.C. § 7416; *see also* 40 C.F.R. § 60.24a(f). Amici in *Union Electric* argued, as EPA argues now, that “such standards must be adopted and enforced independently of the

EPA-approved state [] plan.” 427 U.S. at 263-64; *see* 84 Fed. Reg. at 32,559. The Court squarely rejected the suggestion:

This construction of §§ 110 and 116, however, would not only require the Administrator to expend considerable time and energy determining whether a state plan was precisely tailored to meet the federal standards, but would simultaneously require States desiring stricter standards to enact and enforce two sets of emission standards, one federally approved plan and one stricter state plan. We find no basis in the [CAA] Amendments for visiting such wasteful burdens upon the States and the Administrator, and so we reject the argument of Amici.

427 U.S. at 264. Nothing in EPA’s new “structural distinction” makes the Court’s logic any less applicable to 111(d) state plans. Split-level regulation—wherein a source would be subject to one federally enforced emission limit and a stricter, state-enforced emission limit—is just as wasteful for states and burdensome to industry under section 111 as under section 110.

Indeed, EPA’s own regulation, 40 C.F.R. § 60.24a(f), reaffirms a state’s prerogative to adopt more stringent emission limits as “standards of performance” *in its 111(d) plan*. 40 C.F.R. § 60.24a(f)(1); 84 Fed. Reg. at 32,577. Although EPA’s new implementing regulations provide that section 111(d) emission guidelines supersede regulations if they “identify explicitly” the provision to be superseded (40 C.F.R. § 60.20a(a)(1); 84 Fed. Reg. at 32,575), in the Final Rule, EPA did not “identify explicitly” section 60.24a(f) as a regulation to be superseded. Thus, EPA fails in the Final Rule to alter its own default rule that prohibits the agency from rejecting a state plan as too stringent. The inherently self-contradicting stance EPA takes is itself sufficient reason to reconsider the Final Rule.

Further, because EPA’s argument against *Union Electric*’s application is both inaccurate (as to its “structural distinction” between sections 110 and 111) and incomplete (in its failure to account for section 116 or its own implementing regulation), EPA has not provided the “reasoned explanation ... for disregarding facts and circumstances that underlay ... the prior

policy” needed to overturn longstanding policy on state plans’ stringency. *Fox Television*, 556 U.S. at 516.

* * *

EPA’s incomplete and legally unsound directives about more stringent plans, or plans including measures not “authorized statutorily,” prejudices the States by introducing uncertainty into the state plan approval process and discouraging innovation in air pollution control. States will spend months or years of administrative staff time; draft, negotiate, and pass state laws; and promulgate state regulations, all while trying to determine what is stringent enough, but not *too* stringent, for EPA’s approval. Given the negligible benefits and significant net harms to public health and environmental quality the Final Rule produces, for states to water down their laws to match EPA’s level of stringency would be in many cases irresponsible—and unacceptable, given states’ sovereign responsibility to protect the health and welfare of their residents. The undefined discretion EPA reserves to disapprove a state plan exposes the States to arbitrary disapprovals, potential imposition of a federal plan, and sanctions. These burdens are far from the spirit of cooperative federalism the Act champions, and the current Administration claims to support. Moreover, EPA’s unprecedented suggestion that its emission guidelines may act as a ceiling on air pollution control discourages the development of new systems of emission reduction that would likely be more effective than EPA’s selected BSER. Such a foreclosure of new and better control systems is the precise opposite of what Congress intended the Act to achieve.

EPA did not give the States and Cities opportunity to comment on its new interpretation of *Union Electric*,²⁶ or its new prerogative to reject state plan measures as “unauthorized.” As

²⁶ While EPA did signal some ambivalence about more stringent state plans in the ACE proposal, *see* 83 Fed. Reg. at 44,767 n.37, nothing in that footnote approaches the mirror-opposite stance EPA now takes on *Union Electric* and its applicability to section 111(d) plans. *Cf. Clean Air Council v. Pruitt*, 862 F.3d at 10 (final rule “fails the logical

discussed above, those interpretations are contrary to the Act, EPA regulations, and Supreme Court precedent, as well as arbitrary and capricious given the prejudice to states. Nor do EPA's flawed legal arguments supply the "reasoned explanation" to justify departure from its policy of state plan flexibility and cooperative federalism. Because these issues are critical to how states implement ACE—and how effective those measures will be in reducing GHG emissions—these issues are "of central relevance," and EPA must reconsider the Final Rule.

IV. EPA DISTORTS THE FINAL RULE'S IMPACT BY USING AN INACCURATE BASELINE IN ITS REGULATORY IMPACT ANALYSIS.

The Final Rule's regulatory impact analysis for the first time removes the Clean Power Plan from its baseline scenario, disguising the full health, economic, and environmental costs of EPA's action. In the Proposed ACE RIA, EPA updated its 2015 CPP model and used it as the base case scenario, as OMB guidance requires. Proposed ACE RIA, at ES-1 to ES-2, 3-7. That analysis showed ACE was a less effective, more expensive rule for reducing coal plant emissions than the CPP, leading to the premature deaths of up to 1,400 Americans and billions of dollars in net harms. Proposed ACE RIA, 4-33, 4-42.

The Final RIA attempts to hide those costs by assuming a "no-CPP" base case. EPA's justification for this change has four components. First, EPA inaccurately characterizes ACE as a distinct regulatory action occurring after CPP repeal, such that the "baseline" is a scenario occurring in the phantom instant between repeal and replacement. Second and third, EPA revises its previous CPP models to include two new assumptions: a three-year pushback of emissions target deadlines, due to the Supreme Court's stay in *West Virginia v. EPA*; and interstate trading systems in which states that cut emissions below CPP targets sell allowances to states that over-

outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule").

emit. With these assumptions (and a few more), EPA argues the CPP baseline will lead to no more emission reductions than a no-CPP case. Fourth, EPA “confirms” its analysis using non-binding utility retirement commitments and market trends to project that the power sector will, on its own, cut more emissions than the CPP demanded.

As shown below, each component fails on closer inspection. Because EPA did not give the States and Cities an opportunity to comment on use of a no-CPP baseline in the Final RIA, and because this distorted analysis was central to EPA’s selection of HRIs as the BSER, as well as candidate technologies within the BSER, EPA must promptly convene a reconsideration proceeding.

A. The Final RIA’s use of a no-CPP baseline is contrary to OMB guidance on cost-benefit analysis and represents arbitrary decisionmaking.

EPA’s primary justification for a no-CPP baseline is a legal fiction: namely, “the ACE action only occurs after the repeal of the CPP.” 84 Fed. Reg. at 32,561; Final RIA, at 2-1. But both ACE and the CPP repeal were adopted at the same time, with the same effective date, and published the same day in the Federal Register. 84 Fed. Reg. at 32,520, 32,521. The no-CPP “base case” did not exist for even a millisecond.²⁷ EPA cannot rationally use this scenario as “the best assessment of the way the world would look absent the proposed action.” OMB Circular A-4, at 15; *see also id.* (“For review of an existing regulation, a baseline assuming ‘no change’ in the regulatory program generally provides an appropriate basis for evaluating regulatory alternatives.”).

Absent the Final Rule as promulgated, the CPP would be the operative section 111(d) regulation. For this reason, the no-CPP baseline is counterfactual and arbitrary.

²⁷ Indeed, had the EPA repealed the CPP without a replacement section 111(d) regulation, EPA would have been in violation of the Clean Air Act. *See* States & Cities’ CPP Repeal Comment, at 10-12.

B. EPA’s three-year pushback of CPP emissions target deadlines is an unreasonable assumption in light of the power sector’s progress toward compliance.

EPA attempts to bolster its no-CPP baseline with an argument that “there is likely to be no difference between a world where the CPP is implemented and one where it is not.” Final RIA, at 2-1. But to make that argument, EPA first had to revise its CPP modeling to delay the CPP’s emissions targets by three years, so that its model measures state compliance against the 2025, 2028, and 2030 state goals for reducing emissions in 2028, 2031, and 2033, instead.²⁸ *Id.* at 2-17. EPA justifies this revision based on the three-year delay from the Supreme Court’s stay in *West Virginia v. EPA*, assuming that, if the CPP were to come back into effect, “its deadlines for compliance would likely require adjustment.” *Id.* at 2-16.

The States and Cities agree that, if the CPP were to take effect after the *West Virginia* stay, EPA would have to revise its deadlines for the submission of state plans. But EPA nowhere justifies pushing back the state emissions goals, when most states are already on track to comply. Final RIA, at 2-4 to 2-5. More likely, EPA would keep those goals as they are while allowing states more time to submit a 111(d) plan. For EPA to take the course it assumes in the Final RIA would be arbitrary, given Congress’s intent in the Clean Air Act, EPA’s mandate to limit dangerous air pollution, and the urgent need to decarbonize the power sector as fast as possible to address the climate change crisis.

C. EPA’s revision of the CPP model to include unrestricted interstate trading is unreasonable.

To reach its conclusion that “there is likely to be no difference between a world where the CPP is implemented and one where it is not,” EPA has to additionally assume allowance trading

²⁸ EPA does not commit to postponing the deadlines in this manner, however, admitting that it has not done “a full analysis of all the facts and circumstances” necessary to justify such an action. *Id.* at 2-17 n.29.

between states that emit GHGs below their CPP targets and states that exceed their targets, without restrictions based on state GHG policies. *Id.* at 2-20. EPA concedes it has never found such an assumption likely enough to include in its 2015 CPP model, or even in the ACE NPRM. *Id.*; Proposed ACE RIA, at 3-7. EPA accounts for its change of approach only by noting general support for trading among states and industry stakeholders—a factor that existed at the time of the 2015 and 2018 modeling of the CPP as well. *See* Final RIA, at 2-20. This is not, then, an adequate justification for EPA’s about-face.

While the States and Cities do support national and regional trading as a CPP compliance mechanism, the Final RIA’s model fails to realistically account for the steps necessary to implement it. Trading states have to agree on consistent protocols to monitor, record, and verify emissions reductions; and they have to design compatible market rules on banking, stringency, enforcement, and price controls. Though the success of the Regional Greenhouse Gas Initiative shows that states can successfully implement a regional trading system, the States and Cities’ experience has shown that any trading mechanism will take time and careful planning.

Far from reckoning with these obstacles, the Final RIA invents a robust trading market from whole cloth, imagining that by 2025, *all* states have joined a regional trading group. Final RIA, at 2-23, 2-24.²⁹ Even with unrestricted, regional trading in place, and even with the three-year pushback of CPP targets, EPA still cannot support its conclusion that the no-CPP case matches the CPP baseline, because even the delayed targets are binding in the Midwest/Central region. *Id.* at 2-25. EPA thus assumes an additional set of coal plant retirements that, elsewhere,

²⁹ The Final RIA also models the even unlikelier scenario of a national trading market, but focuses on the regional trading model. Final RIA, at 2-21.

it asserted were too uncertain to be incorporated into its modeling. *Id.* at 2-29; *see also* Part IV.D *infra*.

Rather than present a realistic forecast of the CPP, EPA projects a less ambitious regulation (that does not exist) onto an operational interstate allowance trading market (that also does not exist), in order to support a no-CPP “base case” (that never existed). A counterfactual, arbitrary analysis such as this cannot support rational agency decision-making. Further, EPA provided no opportunity to comment on these new assumptions or the purported explanation for its departure from prior ones. EPA must promptly convene a reconsideration proceeding.

D. EPA’s reliance on non-binding utility commitments and fluctuating market trends is unreasonable.

Lastly, EPA uses “very recent changes” to the power sector, “not yet incorporated into the EPA’s modeling,” to “support” its conclusion that the no-CPP case will achieve as much GHG emission reduction as the implemented CPP. EPA credits non-binding utility commitments to decarbonize and downward trends in power sector emissions (due to the rise of natural gas and renewable energy, and a level demand for electricity) in finding the power sector will meet or exceed CPP targets on its own. Final RIA, at 2-2, 2-6 to 2-15. Because EPA states these market factors are not reliable enough to include in EPA’s modeling in the first place, they cannot “support” that modeling either. *See Sierra Club v. EPA*, 884 F.3d 1185, 1195 (D.C. Cir. 2018) (finding arbitrary and capricious EPA’s decision to revise an existing standard based on data it said was unreliable).

EPA acknowledges it generally does not include non-binding utility commitments in its modeling, because “they are not legally binding documents and can be changed and amended

over time.” *Id.* at 2-29. Recent and ongoing state efforts to prop up uneconomical coal plants³⁰ and impede market entry by renewables³¹ confirm EPA’s caution: a utility may fully intend to retire an uneconomical coal plant, but may change its mind when market or legislative changes make it viable again. The same forces can just as quickly reverse a market trend: in 2018, for the first time in years, the energy sector emitted more GHGs than the year before.³² EPA provides no meaningful analysis to support its assumption that trends in natural gas, renewables, electricity demand, or emissions will continue indefinitely. *See* Final RIA, at 2-14 to 2-15.³³ Rather than engage critically with these competing market and policy forces, EPA marshals the ones that support its conclusion and omits the ones that contradict it. This does not represent rational agency decision-making.

* * *

The Final RIA’s flaws are “of central relevance” because EPA’s evaluations of cost and impact were central to its selection of HRIs as the BSER, and candidate technologies within the BSER. 84 Fed. Reg. at 32,536, 32,541-42. Specifically, EPA justified eliminating natural gas co-firing and CCS based on their costs and impacts relative to HRIs. *Id.* at 32,543-46 (natural gas co-firing), 32,548-49 (CCS). Because the flawed RIA skewed those evaluations, EPA must reconsider the Final RIA and its BSER determination.

³⁰ Jim Siegel & Mark Williams, “Ohio House passes bill that shores up nuclear, coal plants,” *The Columbus Dispatch* (May 29 & 30, 2019), available at <https://www.dispatch.com/business/20190529/ohio-house-passes-bill-that-shores-up-nuclear-coal-plants>

³¹ Jeffrey Tomich, “Strangled Ohio wind industry: ‘We don’t want to give up,’” *E&E News* (July 12, 2019), available at <https://www.eenews.net/stories/1060727747>

³² Gavin Bade, “US power sector carbon emissions jump as gas boom outpaces coal decline,” *Utility Dive* (Jan. 8, 2019), available at <https://www.utilitydive.com/news/us-power-sector-carbon-emissions-jump-as-gas-boom-outpaces-coal-decline/545525/>

³³ For example, EPA never takes into account natural gas-fired plants’ own substantial GHG emissions and how they might affect the downward trend

RELIEF REQUESTED

For the foregoing reasons, the States and Cities respectfully request that, pursuant to 42 U.S.C. § 7607(d)(7)(B), the Administrator convene a proceeding for reconsideration of the Final Rule and afford the interested public the procedural rights due them under 42 U.S.C. § 7607(d)(3)-(5).

Dated: September 6, 2019

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