

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

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**No. 19-1140**

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

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AMERICAN LUNG ASSOCIATION, *et al.*,

*Petitioners,*

v.

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

*Respondents.*

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

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**INITIAL BRIEF FOR PETITIONER  
BIOGENIC CO2 COALITION**

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April 17, 2020

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28, petitioner Biogenic CO2 Coalition, through undersigned counsel, hereby certifies the following as to parties, rulings, and related proceedings in this case:

***Parties, Intervenors, and Amici*****A. Petitioners**

Biogenic CO2 Coalition (19-1185); American Lung Association, American Public Health Association and American Public Health Association (No. 19-1140); State of New York, State of California, State of Colorado, State of Connecticut, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, People of the State of Michigan, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, State of Wisconsin, District of Columbia, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami (No. 19-1165); Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club (No. 19-1166);

Chesapeake Bay Foundation, Inc. (No. 19-1173); Robinson Enterprises, Inc., Nuckles Oil Company, Inc., Construction Industry Air Quality Coalition, Liberty Packing Company, Inc., Dalton Trucking, Inc., Norman R. Brown, Joanne Brown, Competitive Enterprise Institute, Texas Public Policy Foundation (No. 19-1175); Westmoreland Mining Holdings LLC (No. 19-1176); City and County of Denver Colorado (No. 19-1177); The North American Coal Corporation (No. 19-1179); Advanced Energy Economy (No. 19-1186); American Wind Energy Association, Solar Energy Industries Association (No. 19-1187); Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group, Inc., Sacramento Municipal Utility District (No. 19-1188).

**B. Respondents**

United States Environmental Protection Agency (“EPA”) (Nos. 19-1140, -1165, -1166, -1173, -1175, -1176, -1177, -1179, -1185, -1186, -1187 and -1188) and Andrew Wheeler, EPA Administrator (Nos. 19-1140, -1175, -1176, -1179, and -1185).

**C. Intervenors for Petitioners**

The State of Nevada.

**D. Intervenors for Respondents**

AEP Generating Company; AEP Generation Resources Inc.; American Lung Association; American Public Health Association; America's Power; Appalachian

Mountain Club; Appalachian Power Company; Basin Electric Power Cooperative; Center for Biological Diversity; Chamber of Commerce of the United States of America; Chesapeake Bay Foundation, Inc.; City and County of Denver Colorado; City of Boulder; City of Chicago; City of Los Angeles; City of New York; City of Philadelphia; City of South Miami; Clean Air Council; Clean Wisconsin; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Commonwealth of Virginia; Conservation Law Foundation; District of Columbia; Environmental Defense Fund; Environmental Law and Policy Center; Georgia Power Company; Indiana Energy Association; Indiana Michigan Power Company; Indiana Utility Group; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; Kentucky Power Company; Minnesota Center for Environmental Advocacy; Mississippi Public Service Commission; Murray Energy Corporation; National Mining Association; National Rural Electric Cooperative Association; Natural Resources Defense Council; Nevada Gold Energy LLC; Nevada Gold Mines LLC; Phil Bryant, Governor of the State of Mississippi; Powersouth Energy Cooperative; Public Service Company of Oklahoma; Sierra Club; Southwestern Electric Power Company; State of Alabama; State of Alaska; State of Arkansas; State of California; State of Colorado; State of Connecticut; State of Delaware; State of Georgia; State of Hawaii; State of Illinois; State of Indiana; State of Kansas; State of

Kentucky, by and through Governor Matthew G. Bevin; State of Louisiana; State of Maine; State of Maryland; State of Michigan; State of Minnesota; State of Missouri; State of Montana; State of Nebraska; State of Nevada; State of New Jersey; State of New Mexico; State of New York; State of North Carolina; State of North Dakota; State of Ohio; State of Oklahoma; State of Oregon; State of Rhode Island; State of South Carolina; State of South Dakota; State of Texas; State of Utah; State of Vermont; State of Washington; State of West Virginia; State of Wyoming; United Mine Workers of America, AFL-CIO; Westmoreland Mining Holdings LLC; and Wheeling Power Company.

#### **E. Amici Curiae for Petitioners**

American Academy of Allergy, Asthma, & Immunology; American College of Occupational and Environmental Medicine; American Thoracic Society; Maximilian Auffhammer; Coalition to Protect America's National Parks; Philip Duffy; Kenneth Gillingham; Lawrence H. Goulder; Institute for Policy Integrity at New York University School of Law; Thomas C. Jorling; National Medical Association; National Parks Conservation Association; James Stock; Union of Concerned Scientists; NS Gernot Wagner.

#### **F. Amicus Curiae for Respondents**

National Association of Home Builders of the United States.

### ***Rulings Under Review***

*Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations; Final Rule*, 84 Fed. Reg. 32,520 (July 8, 2019) (“Affordable Clean Energy Rule” or “ACE Rule”).

### ***Related Cases***

Petitioner is unaware of any related cases pending in this Court, other than the cases that have already been consolidated with this case; however, challenges to EPA action on biogenic emissions in prior Clean Air Act rulemakings are pending in *Biogenic CO2 Coalition v. EPA*, No. 15-1479 (D.C. Cir. filed Dec. 22, 2015) (challenging EPA’s Clean Power Plan and subsequently dismissed as moot, without opposition, as the Clean Power Plan rulemaking in that case was repealed and replaced by the Affordable Clean Energy rulemaking at issue in this case); *Biogenic CO2 Coalition v. EPA*, No. 15-1480 (D.C. Cir. filed Dec. 22, 2015) (challenging EPA’s New Source Performance Standards); and *Biogenic CO2 Coalition v. EPA*, No. 16-1358 (D.C. Cir. filed Oct. 14, 2016) (challenging EPA’s aircraft emissions endangerment finding).

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 and Circuit Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Biogenic CO2 Coalition, petitioner in No. 19-1185, an unincorporated association, and its members state the following: The members of Petitioner association, for the purposes of this petition, are the following: American Bakers Association, Corn Refiners Association, American Farm Bureau Federation and National Corn Growers Association. Petitioner and each of constituent trade association members are non-governmental trade associations, are not owned in whole or in part by a parent corporation or a publicly traded company, and do not issue stock.

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## **GLOSSARY**

ACE Rule	Affordable Clean Energy Rule
BSER	Best System of Emissions Reduction
CO2	Carbon dioxide
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
USDA	U.S. Department of Agriculture

## JURISDICTION

This Court has jurisdiction under 42 U.S.C. §7607(b)(1) to review EPA's Affordable Clean Energy rulemaking ("ACE Rule") published July 8, 2019, which sets emissions standards for power plants under Clean Air Act §111(d).

## STATEMENT OF ISSUES

1. Whether EPA erred in disqualifying biomass co-firing as a compliance measure for regulated facilities to meet emissions limits under Clean Air Act §111(d).

## STATEMENT OF THE CASE

### A. The Science of Biogenic Greenhouse Gas Emissions

Certain agricultural biomass material, such as corn stalks, oilseed hulls, and other farm field residues, can be economically processed into biofuel and "co-fired" at coal-fired power plants. Bode Decl. ¶20; *accord* 83 Fed. Reg. at 44,762 (JA\_\_) ("there are some existing coal-fired EGUs that currently co-fire with biomass fuel"), 44,765 (JA\_\_) ("The Agency specifically recognizes that some entities may be interested in using biomass as a compliance option for meeting the state determined emissions standard"). A power plant that co-fires biofuels necessarily emits "biogenic" carbon dioxide from the combustion of the carbon-based biomass, but these emissions are distinguishable from fossil fuel emissions.

As greenhouse gases, all carbon dioxide emissions (whether fossil or biogenic) are "atypical" pollutants, *Utility Air Regulatory Group v. EPA*, 573 U.S.

302, 314, 320 (2014) (“*UARG*”), for which a “context-appropriate” reading of Clean Air Act statutory language is necessary to ensure sensible implementation. *Id.* at 316. As a special subset of greenhouse gas emissions, biogenic CO<sub>2</sub> from agricultural biomass, unlike emissions from fossil fuels, does not contribute to elevated concentrations of greenhouse gas in the atmosphere because photosynthesis captures and sequesters carbon when farmers grow crops. When agricultural biomass is processed for food, fiber and fuel, the “biogenic” emissions simply return carbon to the atmosphere that farmers already removed from the carbon cycle. *See, e.g.,* EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2007* at 3-1 (Apr. 15, 2009) (JA\_\_\_) (“Carbon dioxide emissions from [combustion of biomass] are not included in national emissions totals because biomass fuels are of biogenic origin. It is assumed that the C [carbon] released during consumption of biomass is recycled as U.S. forests and crops regenerate, causing no net addition of CO<sub>2</sub> to the atmosphere.”).<sup>1</sup>

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<sup>1</sup> ([https://www.epa.gov/sites/production/files/2015-12/documents/ghg2007entire\\_report-508.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/ghg2007entire_report-508.pdf)). *See also* Biogenic CO<sub>2</sub> Coalition Comments, EPA-HQ-OAR-2017-0355-23710 (JA\_\_\_) (collecting authorities and scientific literature); EPA, *1997 U.S. Climate Change Action Report* at 9 (July 1997) (“For example, fuel wood burned one year but regrown the next only recycles carbon, rather than creating a net increase in total atmospheric carbon.”) ([https://www.epa.gov/sites/production/files/2016-02/documents/inv\\_97.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/inv_97.pdf)); Intergovernmental Panel on Climate Change, “*Frequently Asked Questions*” Q2-10, at 9 (JA\_\_\_) (“For annual

Recognizing that that not all greenhouse gases are harmful, EPA defined greenhouse gas pollution in a 2009 endangerment finding as “excess” levels of greenhouse gas concentrations above a natural baseline concentration. 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009) (“The Administrator finds that *elevated* concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger” public health and welfare) (emphasis added); *id.* at 66,536

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crops, the IPCC Guidelines assume that biomass carbon stock lost through harvest and mortality equal biomass carbon stock gained through regrowth in that same year and so there are no net CO<sub>2</sub> emissions or removals from biomass carbon stock changes.”) (<http://www.ipcc-nggip.iges.or.jp/faq/FAQ.pdf>); USDA, *Technical Bulletin 1939, Quantifying Greenhouse Gas Fluxes in Agriculture and Forestry: Methods for Entity-Scale Inventory*, at 3.43 (July 2014) (JA\_\_) (“Both IPCC (2006) and [EPA] (2011) consider herbaceous biomass carbon stocks to be ephemeral and recognize that there are no net emissions to the atmosphere following crop growth and senescence during one annual crop cycle.”) ([http://www.usda.gov/oce/climate\\_change/estimation.htm](http://www.usda.gov/oce/climate_change/estimation.htm)); accord EPA, *Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program*, 72 Fed. Reg. 23,900, 23,982-83 (May 1, 2007) (JA\_\_) (“in the long run the CO<sub>2</sub> emitted from biomass-based fuels combustion does not increase atmospheric CO<sub>2</sub> concentrations, assuming the biogenic carbon emitted is offset by the uptake of CO<sub>2</sub> resulting from the growth of new biomass”); M.Q. Wang, *GREET 1.5 - Transportation Fuel-Cycle Model, Vol. 1: Methodology, Development, Use, and Results*, at 76 (ANL/ESD-39, Vol. 1) (Aug. 1999) (JA\_\_) (EPA emissions model “assigns a zero value to all CO<sub>2</sub> emissions from (i) combustion of agricultural biomass to generate steam”) (<https://www.anl.gov/energy-systems/publication/greet-15-transportation-fuel-cycle-model-volume-1-methodology-development>); EPA, *Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis*, at 424 (Feb. 2010) (EPA-420-R-10-006) (JA\_\_) (“emissions from combustion of biomass fuel source are not assumed to increase net atmospheric CO<sub>2</sub> levels”) (<https://www.epa.gov/sites/production/files/2015-08/documents/420r10006.pdf>).



(“to help appreciate the distinction between air pollution and air pollutant, the air pollution can be thought of as the total, cumulative stock in the atmosphere, while the air pollutant can be thought of as the [carbon] flow that changes the size of the total [carbon] stock”). EPA based the ACE Rule on this 2009 endangerment finding, 84 Fed. Reg. at 32,522 n.5 (JA\_\_\_), and has acknowledged this principle in other greenhouse gas rulemakings. *See, e.g.*, 75 Fed. Reg. 25,324, 25,397 (May 7, 2010) (greenhouse gas “concentrations accumulate when emissions exceed the rate at which natural processes remove greenhouse gases from the atmosphere”).

Thus, biogenic CO<sub>2</sub> emissions have a fundamentally different effect on the atmosphere than do emissions from fossil fuels because biogenic emissions represent a return of CO<sub>2</sub> recently removed from the atmosphere through photosynthesis. Indeed, the natural baseline concentration of greenhouse gas created by biogenic emissions is necessary for a stable climate. 75 Fed. Reg. 31,514, 31,518 (June 3, 2010) (“Greenhouse gases trap the Earth’s heat that would otherwise escape from the atmosphere into space and form the greenhouse effect that helps keep the Earth warm enough for life.”). In contrast, fossil fuels mined from underground are scientifically viewed as transferring carbon from geological stocks to atmospheric stocks, which adds excess carbon dioxide to the atmosphere and elevates the concentration of greenhouse gases.

These basic scientific tenets are not disputed by EPA in the ACE Rule. Nonetheless, the ACE Rule purports to block the use of biofuels at power plants under the rationale that the uptake of carbon on the farm field that creates the biofuel occurs outside the fenceline of the power plant, and therefore cannot be counted as a compliance measure under the Clean Air Act even though the biofuel itself is co-fired at the power plant. EPA's interpretation is unsupported by the statutory text, inconsistent with the science of greenhouse gases, and would lead to the absurd result that power plants cannot use low-carbon biofuels to lower their greenhouse gas footprint.

**B. EPA's Section 111(d) Emissions Guidelines for Power Plants**

Congress established a program in Clean Air Act §111, 42 U.S.C. §7411, to regulate pollution at industrial facilities based on emissions limits achievable by available technology. Under §7411(d), EPA has a “narrow” role to identify a best system of emissions reduction (“BSER”) and to promulgate guidelines for “implementation and enforcement” of performance standards to be established by the states. 84 Fed. Reg. at 32,523 (JA\_\_). Congress gave states primary discretion to “establish standards of performance for existing sources within their jurisdiction consistent with that BSER.” 84 Fed. Reg. at 32,521 (JA\_\_). Performance standards are numerical emissions limits at regulated facilities; and in the ACE Rule, EPA expresses those limits as pounds of CO<sub>2</sub> emissions per unit of

electricity produced at the power plant. 84 Fed. Reg. at 32,554 (JA\_\_\_) (“states are obligated to set rate-based standards of performance. These will generally be in the form of the mass of carbon dioxide emitted per unit of energy (for example pounds of CO<sub>2</sub> per megawatt-hour or lb/MWh)”).

Once EPA identifies the BSER, and after states establish emissions limits based on the BSER, regulated sources have flexibility to meet those standards using any technologies or techniques that the owner or operator elects to employ. 84 Fed. Reg. at 32,521 (JA\_\_\_); R. Nordhaus et al., *Regulation of CO<sub>2</sub> Emissions From Existing Power Plants Under §111(d) of the Clean Air Act: Program Design and Statutory Authority*, 44 Env't. L. Rep. 10,366, 10,384 (May 2014) (“A state-established performance standard is not required to force sources to implement BSER; rather, it must only ‘reflect[]’ the degree of emission limitation achievable through the application of [BSER]”).

Despite giving lip service to compliance flexibility, the ACE Rule blocks the use of low-carbon biomass as a compliance measure. In doing so, EPA establishes two “criteria” which it asserts limit compliance measures to activities that physically take place at the regulated facility itself (*i.e.*, within the fenceline of the facility): “(1) [compliance measures] can be applied to the source itself; and (2) [compliance measures] are measurable at the source of emissions.” 84 Fed. Reg. at 32,557-58 (JA\_\_\_). But these criteria are not properly derived from the statutory

text, intrude on the role of states, and as applied to biomass fuel co-fired at power plants overlook the unique science of atypical greenhouse gases.

### **SUMMARY OF ARGUMENT**

I. This case turns on EPA’s regulation of biogenic greenhouse gas emissions – that is, carbon dioxide from the use of low-carbon agricultural feedstocks. The ACE Rule prevents power plants from counting biomass co-firing to comply with numerical emissions limits, despite the scientific fact that biofuels capture carbon from the atmosphere through photosynthesis and thus are not considered harmful pollution. EPA’s reading of the term “application” in §7411 as disqualifying biomass co-firing as a compliance measure cannot be squared with the Act, which gives states and facilities compliance flexibility to use clean fuels. In doing so, EPA fails to heed the Supreme Court’s instruction to consider, in statutory context, the nature of “atypical” pollutants like greenhouse gases.

II. Even if EPA can permissibly limit compliance measures to those “applied at” a facility, its view that biomass co-firing is not in fact applied at the facility is arbitrary in light of the science and EPA’s regulatory treatment of other compliance measures such as coal washing and carbon capture and storage.

III. If allowed to stand, the ACE Rule would have the improper back-door effect of regulating biogenic emissions as dangerous pollution without a predicate science-based determination or regulatory basis.

## STANDING

As agricultural producers of low-carbon feedstocks and facility owners who process those feedstocks, the Biogenic CO<sub>2</sub> Coalition has standing. Some Coalition members supply biomass suitable for co-firing at power plants, Bode Decl. ¶28 (Standing Addendum), and thus are the direct object of the ACE Rule's disqualification of using biofuels under Clean Air Act §111(d). These Coalition members are aggrieved by EPA's regulatory treatment of their products and competitive interests. *National Biodiesel Board v. EPA*, 843 F.3d 1010, 1015 (D.C. Cir. 2016) (domestic biofuel producers standing "self-evident"); *Alon Refining Krotz Springs Inc. v. EPA*, 936 F.3d 628, 664-665 (D.C. Cir. 2019) (advantage given to other fuel types); *Delta Construction v. EPA*, 783 F.3d 1291, 1299 (D.C. Cir. 2015) (standing of vegetable-based fuel "self-evident"); *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1231 (10th Cir. 2020) (corn growers who supply biogenic feedstocks have standing); *Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363 (D.C. Cir. 2004) (lost sales due to policy favoring alternative products); *accord U.S. v. S.C.R.A.P.*, 412 U.S. 669, 685 (1973) (EPA policy adversely affected market conditions). Petitioner seeks a remedy setting aside EPA's disqualification of biomass-based fuels as compliance measures.

Other Coalition members are themselves regulated entities that operate industrial facilities subject to §111(d). Bode Decl. ¶44. Biogenic emissions at

these facilities would be considered dangerous pollution under EPA's new interpretation of §111(d). As the direct object of agency regulation, "there is ordinarily little question that the action or inaction has caused [the regulated entity] injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

In addition, if biogenic emissions are regulated in the ACE Rule, it will be the first time that biogenic emissions (as opposed to fossil fuel emissions) are subject to actual control under the Clean Air Act, which triggers facility permitting consequences under EPA's Prevention of Significant Deterioration ("PSD") permitting program. Bode Decl. ¶51. This is the same basis on which the Supreme Court considered challenges to EPA's fossil-fuel greenhouse gas regulations in *UARG*.

In terms of zone of interests, low-carbon feedstocks are "useful for the statute's purpose" as compliance measures to reduce greenhouse gas emissions. *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2002); 84 Fed. Reg. at 32,525 (purpose of §7411 to operate sources to reduce emissions); accord *Sierra Club v. Costle*, 657 F.2d 298, 359 (D.C. Cir. 1981) (when setting §111 power plant emissions limits, EPA must consider "fuel characteristics"). Coalition members that are regulated sources have an interest in proper regulation under the Clean Air Act, and there is no indication in §7411 that Congress intended to exclude these

key stakeholders. *Clarke v. Securities Industry Ass’n*, 479 U.S. 388 (1987); *Delta Construction*, 783 F.3d at 1300; *Energy Future Coalition v. EPA*, 793 F.3d 141, 145 (D.C. Cir. 2015).

## STANDARD OF REVIEW

EPA has the “initial burden of promulgating and explaining a non-arbitrary, non-capricious rule” under Clean Air Act §111. *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 431 (D.C. Cir. 1980). EPA “must consider all of the relevant factors and demonstrate a reasonable connection between the facts on the record and the resulting policy choice.” *Sierra Club*, 657 F.2d at 323. The Court must take a hard look at EPA’s rationale, *Nat’l Lime Ass’n*, 627 F.2d at 451 n.126, and must set aside actions taken under §111 if “not clearly or closely examined by EPA,” *id.* at 440, or if arbitrary, capricious, an abuse of discretion or not in accordance with law. §7607(d)(9)(A), (C). EPA’s interpretation of the Act is reviewed under the framework of *Chevron v. NRDC*, 467 U.S. 837 (1984).

## ARGUMENT

### **I. EPA’S NEW “FENCELINE” POLICY IS INCONSISTENT WITH THE CLEAN AIR ACT, WHICH PLACES NO LIMITS ON BIOMASS CO-FIRING AS A COMPLIANCE MEASURE**

The Biogenic CO<sub>2</sub> Coalition challenges EPA’s disqualification of low-carbon biofuels as a compliance measure to meet numerical CO<sub>2</sub> emissions limits at power plants, as well as EPA’s backdoor regulation of biogenic emissions as dangerous pollution. To be clear, the Coalition is not challenging EPA’s decision

to exclude biomass co-firing as BSER for purposes of setting numerical emissions limits under §7411 in the first instance. However, once emissions limits are set, any requirement that BSER be “applied” at the source itself does not by implication also foreclose compliance measures that are not (in EPA’s view) “applied at” the source.

**A. EPA’s Transference of “Application” From BSER to Compliance Measures Is Not Supported By the Statute**

EPA’s interpretation of §7411 as foreclosing biomass co-firing cannot be squared with the statute and is thus impermissible under *Chevron*. As noted, *supra* at 6, EPA asserts that the Act compels disqualification of biomass co-firing based on criteria derived from the word “application” in the definition of “standard of performance” in §7411(a)(1), which reads in relevant part: “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.” 84 Fed. Reg. at 32,557-58 (JA\_\_) (discussing criteria for co-firing). But EPA’s asserted authority to disqualify certain control measures, as distinct from its authority to select BSER, appears nowhere in the statutory text; nor does the Act expressly preclude the use of biofuel co-firing. Accordingly, EPA decision to disqualify across the board any use of biofuels at power plants for compliance



purposes based solely on its transference of the single word “application” from the definition of emissions standard to compliance measures is impermissible.

As an initial matter, the ACE Rule is procedurally flawed with respect to its criteria for biomass co-firing. EPA’s 2018 proposal phrased the first criterion as “*implemented* at the source itself,” 83 Fed. Reg. at 44,765 (JA\_\_), whereas the final rule subtly changed the phrasing to “*applied* to the source itself.” 84 Fed. Reg. at 32,558 (emphasis added). Although EPA does not acknowledge this switch of terminology, it appears to be a belated attempt to tie its rationale for excluding biomass co-firing to the term “application” in §7411 – but this rationale was never expressed in the proposal, in violation of §7607(d)(6)(A)(ii) which requires that a rule proposal include a “summary of . . . major legal interpretations and policy considerations”). Similarly, EPA proposed a different outcome in the proposal: “that [fuel co-firing methods] be *allowed* as compliance options that states may consider,” 83 Fed. Reg. at 44,762 (JA\_\_) (emphasis added), based on the opposite factual determination: “EPA believes that biomass co-firing can meet the two criteria [*i.e.*, implemented at the source and measurable at the source] because the biomass *can be burned at the source* and there are different methods that can be used to monitor or calculate biogenic CO<sub>2</sub> emissions associated with

biomass use at a unit.” 83 Fed. Reg. at 44,765 n.33 (JA\_\_\_) (emphasis added).<sup>2</sup>

Even if a permissible interpretation, the final rule does not adequately explain the agency’s *volte face*, in contravention of §7607(d)(6) (administrative record must include an “explanation of the reasons for any major changes in the promulgated rule from the proposed rule”), which itself warrants remand. *Americans for Clean Energy v. EPA*, 864 F.3d 691, 735 (D.C. Cir. 2017) (agency decision must be “reasonable and reasonably explained”).

On the merits, EPA’s interpretation excluding biomass co-firing as a compliance measure cannot be squared with the text of the statute, particularly in the context of regulating biogenic greenhouse gases. The term “application” in the phrase “degree of emission limitation achievable through the *application* of the [BSER]” is itself not defined. EPA interprets “application” as limiting the types of BSER that it may select to “systems that can be applied at and to a stationary source (i.e., as opposed to off-site measures).” 84 Fed. Reg. at 32,534 (JA\_\_\_). Thus reading §7411(d) as limiting BSER to technologies that can be applied inside

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<sup>2</sup> EPA’s new position is also an unexplained departure from its previous position in the Clean Power Plan, which the ACE Rule replaces. 79 Fed. Reg. 34,830, 34,924 (June 18, 2014) (“Because of the positive attributes of certain biomass-derived fuels, the EPA also recognizes that biomass-derived fuels can play an important role in CO2 emission reduction strategies.”); 80 Fed. Reg. 64,662 64,886 (Oct. 23, 2015) and 40 C.F.R. § 60.5800 (agricultural feedstocks may be included in state plans as a replacement for fossil fuels).

the power plant fenceline, EPA rejected various systems from qualifying as BSER, such as renewable energy at other power plants and biomass co-firing, since it viewed these systems as being applied outside the fenceline of the regulated power plant.<sup>3</sup> As a result, EPA determined that emissions reductions achievable through these outside-the-fenceline systems need not be reflected in emissions limits under state implementation plans.<sup>4</sup>

But EPA impermissibly leverages the term “application” in the context of BSER selection to create two new criteria limiting compliance measures, which (in EPA’s view) requires all compliance measures to be “applied to the source itself.” 84 Fed. Reg. at 32,558 (JA\_\_\_). On that basis, EPA disqualifies biomass co-firing as a compliance measure because in its view growing agricultural feedstocks (the activity that creates the low-carbon nature of the fuel) occurs outside the fenceline of the facility. 84 Fed. Reg. at 32,558 (JA\_\_\_). But there is no basis in the text of

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<sup>3</sup> 84 Fed. Reg. at 32,546 (JA\_\_\_) (“[a]lthough biomass co-firing methods are technically feasible . . . any potential net reductions in emissions from biomass use occur outside of the regulated source and are outside of the control of the designated facility, which is incompatible with the interpretation of the EPA’s authority and the permissible scope of BSER”).

<sup>4</sup> As noted, Petitioner is not challenging EPA’s interpretation of “application” in the context of BSER given EPA’s broad authority in §7411(d)(1) to “prescribe regulations” governing state plans which in turn “establish[] standards of performance for any existing source for any air pollutant,” and also because EPA based its disqualification of biomass co-firing as BSER in part on cost and supply considerations. 84 Fed. Reg. at 32,546 (JA\_\_\_).

the Clean Air Act, nor any precedent, for limiting compliance measures in the same way as EPA limited BSER, and tellingly EPA cites none.

As EPA admits, the Clean Air Act provides flexibility for regulated facilities to meet numerical emissions limits based on EPA's selection of BSER. 84 Fed. Reg. at 32,521 (JA\_\_) (“Each regulated source then must meet those standards using the measures they believe is appropriate (e.g., via the heat rate improvement measures identified by the EPA as the BSER . . . or other approaches such as CCS or natural gas co-firing).”); *accord Sierra Club*, 657 F.2d at 318 n.38 (under §7411, EPA must “allow sources of pollution to choose the control technology they will employ to meet emissions standards”). In fact, the Act expressly restricts EPA from mandating any particular control measures or otherwise limiting how regulated entities comply with numerical emissions limits. *See, e.g.*, §7411(b)(5) (“Except as otherwise authorized under subsection (h), nothing in this section 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.”); *Sierra Club*, 657 F.2d at 359 n.56 (Congress provided “a degree of flexibility in approaches to achieving the standard”). The compliance flexibility for new sources in §7411(b)(5) extends by necessary implication to existing sources under §7411(d) “to which a standard of performance under this section

would apply if such existing source were a new source.” §7411(d)(1). The Act further evinces flexibility even where EPA establishes a design or work practice under §7411(h), rather than a numerical emissions limit, allowing EPA to “permit the use of such alternative [means of emission limitation] for purposes of compliance with this section with respect to such pollutant.” §7411(h)(1).

There is no indication in the statute that Congress intended the concept of “application of BSER” in setting an emissions standard to also limit compliance measures. To the contrary, although EPA has the authority to identify BSER and establish an emissions rate for regulated facilities corresponding to the performance of BSER, it is the emissions rate – not the BSER itself – that is translated into a standard of performance prescribed by states under §7411(d). As discussed above, the Act suggests, and EPA has consistently taken the position in the past, that regulated facilities enjoy latitude to meet that emissions rate through whatever means make sense economically or operationally for the facility. The only limitation on compliance measures expressed in the statute is that “it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance [i.e., numerical emissions limit] applicable to such source.” §7411(e). Because performance standards under the ACE Rule are expressed as an emissions rate, any measure that a facility applies to reduce the rate of emissions – including biomass co-firing in which biogenic

emissions are not counted as polluting emissions – would be consistent with the performance standard. Accordingly, because the Act does not limit the types of control measures in any way, no deference is due EPA’s reading of “application” because Congress left no gap for EPA to fill under *Chevron*. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006).

Indeed, contrary to EPA’s conclusion disqualifying biofuels, the Act expressly recognizes low-emissions fuels as an appropriate compliance measure. For example, §7411(a)(7) defines the phrase “technological system of continuous emission reduction” with reference to “reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels” without any limitation on where the cleaning or treatment must take place.<sup>5</sup> As discussed above, science teaches that biofuels reduce emissions prior to their combustion by capturing carbon from the atmosphere. EPA’s original §7411 power plant rules read the statute as crediting similar low-emissions fuels based on off-site activities which were credited toward on-site percentage reductions for power plants: “credit may be given for any cleaning of the fuel, or reduction in pollutant characteristics of the fuel, after

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<sup>5</sup> This definition of technological system dovetails with the definition of “standard of performance” in which EPA must set targets based on “application of the best system of emission reduction.” §7411(a)(1).

mining and prior to combustion.” 44 Fed. Reg. 33,580, 33,581 (June 11, 1979); *Sierra Club*, 657 F.2d at 357, 368-373 (describing credit under §7411 for off-site “coal washing”). *Sierra Club* also recognized that EPA has “discretion to consider air quality effects” resulting from use of various fuels under §7411. *Id.* at 325.

EPA argues that the “construct” of the ACE Rule itself “necessitates” the interpretation that EPA adopted. 84 Fed. Reg. at 32,557-58 (JA\_\_). But the construct of an EPA rule cannot bootstrap new restrictions on compliance options if the rule is not rooted in the text of the Act itself. Indeed, EPA’s new fenceline concept foreclosing biomass co-firing is flatly inconsistent with its own description of the construct of §7411(d) under which “regulated source[s] then must meet those standards using the measures they believe is appropriate.” 84 Fed. Reg. at 32,521 (JA\_\_).

Here EPA makes the same mistake as it did when promulgating the greenhouse gas regulations rejected by the Supreme Court in *UARG* – the agency is reading words without considering the statutory context and intent of the Clean Air Act. The Act does not limit compliance measures but does recognize clean fuels. EPA’s interpretation also cannot be squared with the science underlying biogenic emissions, which recognizes that biomass fuels do not add additional carbon dioxide to the atmosphere regardless of where the crops are grown or where the biomass feedstock is ultimately used. *Supra*, at 1-5. There is no discussion in

the final rule of how the science of “atypical” greenhouse gases plays into its interpretation. Similarly, EPA entirely disregards the practical effect of its interpretation, which is to smother any market for biomass co-firing and block power plants from using a cost-effective and available control measure. *Cf. UARG*, 573 U.S. at 329 (overly broad impact “should have alerted EPA that it had taken a wrong interpretive turn”).

**B. EPA’s Interpretation Impermissibly Creates An Unworkable Standard As Applied to Greenhouse Gases**

EPA’s “rigid insistence” on reading the term “application” to constrict control measures and foreclose biomass co-firing is particularly problematic when applied to biogenic greenhouse gases. *UARG*, 573 U.S. at 320. As described above, it is undisputed in the record that biogenic emissions from biofuels used for co-firing do not add greenhouse gas to the atmosphere because the embedded carbon in the biofuel comes from photosynthesis of agricultural crops. Nothing in the statute indicates that Congress intended to foreclose consideration of carbon cycle science, such that emissions inside the facility fenceline must be counted while scientifically inseparable emissions reductions outside the facility are disregarded. But EPA’s reading forces the agency to ignore the scientific context of low-carbon biomass, and thus violates the Supreme Court’s direction that the agency must consider “context-appropriate” readings of Clean Air Act statutory language where necessary to ensure sensible interpretations, especially when



involving “atypical” pollutants such as greenhouse gases. *UARG*, 573 U.S. at 320. On the other hand, an interpretation of §7411 that recognizes the low-carbon nature of biofuels would avoid the conflict between the ACE Rule and the underlying science, and would be consistent with federal jurisprudence.

Even if this Court decides that EPA’s reading is permissible, the statutory text certainly does not foreclose alternative readings (such as discussed herein) under which compliance measures would not be restricted by the same criteria applicable to BSER selection. EPA acted arbitrarily by not at least considering a more workable reading that recognizes biogenic emissions from biomass co-firing at the facility as reducing net emissions for purposes of meeting §7411 emissions standards, for example, by counting those emissions as *de minimis* based on carbon cycle science.<sup>6</sup> In fact, following the Supreme Court’s decision in *UARG* and this Court’s amended judgment on remand from that decision *sub nom. Coalition for Responsible Regulation v. EPA*, 606 F. Appx 6, 8 (D.C. Cir. 2015), EPA is under a mandate to “consider whether any further revisions to its regulations are

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<sup>6</sup> The Supreme Court reaffirmed in *UARG* the long-standing principle that EPA has the authority to determine *de minimis* levels of emissions for purposes of Clear Air Act regulatory programs. *UARG*, 573 U.S. at 333 (“EPA may establish an appropriate *de minimis* threshold . . . for a source’s greenhouse-gas emissions”); *id.* at 332 (“EPA may require an ‘anyway’ source to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse-gases . . . EPA may establish an appropriate *de minimis* threshold . . . for a source’s greenhouse-gas emissions”).

appropriate in light of [the Supreme Court’s ruling with regard to greenhouse gases], and if so, undertake to make such revisions.” EPA’s interpretation of §7411 as foreclosing “offsite” carbon benefits contravenes *UARG*’s mandate to consider sensible context-appropriate interpretations in light of the unique nature of greenhouse gas emissions. *UARG*, 573 U.S. at 319 (before applying a particular Clean Air Act regulatory program to greenhouse gases, EPA must determine whether “their inclusion would be inconsistent with the statutory scheme”). Accordingly, EPA should have considered an interpretation of the term “application” that reconciled the applicable science and responded to the Supreme Court’s mandate to consider context-appropriate regulation of greenhouse gases.

Because EPA adopted an unworkable construct that conflicts with established science, and incorrectly fancied itself bound by a single interpretation, the Court should remand the rule for the agency to consider alternative approaches. §7607(d); *cf. UARG*, 573 U.S. at 321 (remand appropriate where “EPA was mistaken in thinking the Act compelled a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers”).

### **C. EPA’s Reading Intrudes On States’ Discretion**

Equally problematic, EPA’s reading intrudes on the discretion of states to set emissions standards while also denying regulated facilities the compliance flexibility afforded to other pollutants. Congress created a cooperative federalism

structure in §7411 under which EPA and the states have distinct roles. 84 Fed. Reg. at 32,523 (JA\_\_\_) (“Congress found that ‘air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments’”); 83 Fed. Reg. at 44,765 (JA\_\_\_) (“cooperative-federalist structure of section 111(d)” requires “considerable flexibility for states . . . for “measures and processes that they put in place for affected EGUs to meet their compliance obligations”). EPA stated unequivocally in the ACE proposal that “the state is free to give the source flexibility to meet that standard of performance using either BSER technologies or some other non-BSER technology or strategy” and pointed specifically to “fuel co-firing (natural gas or certain biomass)” as examples of acceptable compliance measures. 83 Fed. Reg. at 44,765 (JA\_\_\_).

But in the final rule, EPA prohibited states from allowing biomass co-firing as a compliance measure. This intrudes on the “broad discretion in establishing and applying emissions standards consistent with BSER” granted to states by Congress. 84 Fed. Reg. at 32,521 (JA\_\_\_); *accord* R. Nordhaus, 44 *Env't. L. Rep.* at 10,384 (“state plans do not need to implement the BSER, they must only have a level of stringency that reflects reductions achievable through the application of the best system”). The statute directs EPA to implement §7411 in a similar manner to state implementation plans under §7410. §7411(d)(1). As noted by Professor Nordhaus, D.C. Circuit decisions under §7410 “hold that EPA may not use the SIP

process to force States to adopt specific control measures.” *Id.* at 10,386-87.

Thus, §7411 should be read similarly. *Id.* at 10,390 (“the general language of §111(d) and the implied division of responsibility between the states and EPA appears to give states broad authority to spell out the means by which EGUs must comply with the standards of performance [states] prescribe. Thus, even if EPA did not base its emissions guidelines on beyond-the unit [i.e., beyond the fenceline] measures . . . states and EGUs would, as a general matter, have strong arguments that these measures may be used as a means of compliance.”).

The statute also expressly requires EPA to “permit the State in applying a standard of performance to any particular source . . . to take into consideration, *among other factors* . . . [useful life of the facility].” §7411(d)(1) (emphasis added). EPA itself construes this as a congressional grant of authority to the states to consider a range of factors in setting performance standards. 84 Fed. Reg. at 32,553 (JA\_\_). Under this cooperative federalism approach, states should have the ability to consider the science of carbon cycles in determining whether to allow biomass co-firing as a measure that facilities can adopt to meet the emissions rates established in the state plan. Because EPA’s interpretation intrudes into territory that Congress reserved to the states, this aspect of the ACE Rule must be remanded.

## **II. BIOMASS CO-FIRING IS IN FACT “APPLIED” AT REGULATED FACILITIES, CONSISTENT WITH EPA’S INTERPRETATION**

Even if EPA were correct that compliance measures must be applied inside the fenceline, biomass co-firing fits both of EPA’s fenceline criteria because biofuels (1) are used at the source itself and (2) can easily be measured at the source of emissions.

As noted, the science is indisputable (and EPA does not dispute) that when low-carbon biofuels are used in place of fossil fuels at a facility, greenhouse gas emissions are reduced as a matter of scientific accounting of the net greenhouse gas effect on the atmosphere. EPA argues in the preamble that “[w]hile the firing of biomass occurs at a designated facility, biomass firing in and of itself does not reduce emissions of CO<sub>2</sub> emitted from that source. Specifically, when measuring stack emissions, biomass emits more CO<sub>2</sub> per Btu than fossil fuels, thereby increasing the CO<sub>2</sub> emission rate at the source.” 84 Fed. Reg. at 32,557-58 (JA\_\_). Although EPA is correct that biogenic CO<sub>2</sub> at the facility stack itself is not reduced by using low-carbon biomass fuel, the science is clear that greenhouse gas pollution (which EPA has defined as excess levels of atmospheric concentrations of greenhouse gases) is reduced on a one-for-one basis for each ton of fossil fuel emissions displaced by biogenic emissions. EPA’s view that it must artificially account only for emissions at the stack without considering the low-carbon nature of biofuels puts its §7411(d) emissions guidelines at odds with the

widely accepted science of greenhouse gas emissions accounting, as described *supra*.

EPA does not dispute, however, that the physical use of low-carbon biofuels in fact occurs at the facility. Biomass fuel that is co-fired with fossil fuels (typically coal) is brought onto the facility site, stored, and fed into the boiler in exactly the same way as coal. The only difference is that the biomass fuel is already low-carbon, because its growth in the farm field already captured carbon. When the biofuel is combusted at the facility to create electricity, the resulting biogenic emissions equal out, such that there is no net contribution of excess emissions to the atmosphere. Thus, use of agricultural feedstocks for biomass co-firing at a power plant is fully consistent with EPA's statement that "CAA section 111 unambiguously limits the BSER to those systems that can be put into operation at a . . . facility . . . [such as] add-on controls (e.g., scrubbers) and inherently lower-emitting processes/practices/designs." 84 Fed. Reg. at 32,524 (JA\_\_). For EPA to say that biofuel use does not occur at the facility arbitrarily ignores the science of biogenic carbon cycles, which as discussed above, was extensively documented in the record and which EPA does not dispute. The Supreme Court in *UARG* previously chastised EPA for failing to consider the unique nature of greenhouse gases, and EPA makes the same mistake here.

EPA also argues that “recognition of any potential CO<sub>2</sub> emissions reductions associated with biomass firing at a designated facility relies on accounting for activities not applied at and largely not under the control of that source.” 84 Fed. Reg. at 32,558 (JA\_\_\_). EPA is mistaken for the same reasons. A regulated facility can easily account for the volume of biomass fuel that it brings on-site and uses to produce electricity. By nature, the mass of carbon in the biofuel is not considered excess greenhouse gas because it was captured by photosynthesis before it was released at the facility. A facility can easily determine through on-site accounting which fuel is biomass and which fuel is fossil fuel through purchasing records, materials management or physical testing on-site to determine organic content. EPA arbitrarily declines to consider this approach and fails to reconcile the extensive scientific literature teaching that off-site carbon capture means that biogenic emissions at a facility are not counted as greenhouse gas emissions.<sup>7</sup>

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<sup>7</sup> To the extent EPA is concerned with indirect emissions from growing biomass feedstocks (such as emissions from farm tractors), 84 Fed. Reg. at 32,546 (JA\_\_\_), there is no precedent under the Clean Air Act for counting such indirect emissions in the context of regulating emissions from fuels used at a stationary source under §7411. The focus of §7411 is only on emissions from the fuel itself. To wit, EPA does not consider indirect emissions from the mining equipment and trucks transporting coal from the mine to the power plant.

The irrationality of EPA's position is easily illustrated. Suppose that EPA chooses to regulate new biomass-to-electricity facilities (*i.e.*, power plants that use only biomass as opposed to co-firing biomass at a predominantly fossil-fuel power plant) as a source category under §7411(b), which would trigger an obligation to regulate existing biomass facilities under §7411(d). Under EPA's interpretation, the biogenic emissions from such facilities would be counted as greenhouse gas pollution, even though EPA guidance has already stated that such emissions are carbon neutral. *See* EPA, *Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production* at 5 (Mar. 2011) (JA\_\_\_) (concluding that "utilization of biomass fuel alone is BACT" for bioenergy facilities). But under its new reading of §7411, EPA would be foreclosed from considering the low-carbon nature of the biofuel either in its BSER selection or approval of compliance measures at these biomass-to-electricity plants. Thus, contrary to Supreme Court's mandate in *UARG*, EPA has failed to consider how its new policy would upset the function of §7411 emissions standards.

In contrast, an interpretation of §7411(d) that recognizes the low-carbon nature of biomass fuels is compatible with the text and structure of the Clean Air Act. Allowing that biomass co-firing is "applied to and at" the source would not undermine EPA's position that all candidate BSER technologies must be applied



inside the fenceline (based on the statutory term “application”), particularly where EPA has already ruled out biomass co-firing as BSER based on cost and feedstock availability. 84 Fed. Reg. at 32,546 (JA\_\_\_). EPA never identifies any reason that it cannot reconcile its BSER interpretation with allowing biomass co-firing as a compliance measure, which makes its insistence on an interpretation that economically damages the biofuels industry wholly arbitrary. *Cf. UARG*, 573 U.S. at 328 (overly broad impact on regulated sectors “should have alerted EPA that it had taken a wrong interpretive turn”).

EPA’s inconsistent regulatory treatment of other compliance measures also reveals its arbitrary nature. *PPG Industries, Inc. v. Harrison*, 660 F.2d 628 (5th Cir. 1981) (setting aside inconsistent treatment under NSPS regulations). As noted, EPA’s early power plant rules provided a credit under §7411 for “coal washing” as a compliance measure to meet BSER performance standards. Coal washing is a process that removes sulfur from coal by crushing, washing and separating to remove pyrite crystals – all of which is done outside the power plant fenceline before being shipped to the regulated electric facility. *Sierra Club*, 657 F.2d at 368-373. These activities are clearly not “applied at and to” the facility as EPA now attempts to require, yet these off-site emissions reductions were credited under §7411 as an application of BSER at the source.

Similarly, in the ACE Rule itself, EPA allows carbon capture and sequestration (“CCS”) as a compliance option yet disallows biomass co-firing. CCS involves capturing CO<sub>2</sub> at the facility stack but transporting the CO<sub>2</sub> offsite for permanent underground disposal. The sequestration and measurement of sequestered CO<sub>2</sub> is conducted entirely *outside* the fenceline of the regulated facility. *See, e.g.*, 40 C.F.R. Part 98 Subpart RR. CCS is the mirror image of using biomass fuels: with CCS, the fuel is used at the facility then the carbon dioxide is transported and stored offsite, whereas with biofuels the carbon is captured first, then the biofuel is transported to the facility and used onsite.

EPA discusses none of these considerations in the final rule. Even if the Clean Air Act could be interpreted as limiting compliance measures to on-site activities, EPA acted arbitrarily by failing to evaluate the alternative approach under which biomass co-firing can be considered “applied at the facility” and thus reconciled with the science of biogenic greenhouse gases. Because EPA’s crabbed and inconsistent view of how low-carbon biofuels are “applied” at a facility would require EPA to ignore the science of carbon accounting, the ACE Rule’s disqualification of biomass co-firing must be set aside as arbitrary and capricious under §7607(d). Similarly, EPA’s failure to consider all the dimensions of its decision warrants remand to the agency for proper consideration of these factors.

### III. EPA’S BLOCKING BIOMASS CO-FIRING CONSTITUTES ILLEGAL REGULATION OF BIOGENIC EMISSIONS

EPA’s rigid interpretation of §7411(d) forces industrial facilities to count 100% of biogenic carbon dioxide emissions at the facility without regard to carbon captured through photosynthesis, as if the emissions were from fossil fuels. 84 Fed. Reg. at 32,546 (JA\_\_\_), 32,558 (JA\_\_\_) (facilities must count biogenic emissions “when measuring stack emissions”). EPA’s reading of §7411 thus regulates biogenic emissions as harmful pollution through a back door where EPA has not previously determined that biogenic emissions (as contrasted with fossil-based emissions) are dangerous emissions.

As noted, EPA’s 2009 engagement finding defined harmful pollution as “excess” levels of greenhouse gases, but never found any effect of biogenic emissions on elevated atmospheric greenhouse gas concentrations – and indeed the science of carbon cycles would contradict any such finding because biogenic emissions do not constitute excess atmospheric concentrations of greenhouse gas. The ACE Rule abrogates these scientific principles by extending to biogenic emissions *sub silentio* a finding made with respect to fossil fuels.

Although biogenic emissions, like fossil-based emissions, are an “airborne substance” within the broad Act-wide *Massachusetts v. EPA* definition of “air pollutant,” *UARG*, 573 U.S. at 318, biogenic emissions are not the same air pollutant that EPA has linked to climate change. The scientific literature is clear

that biogenic CO<sub>2</sub> emissions are considered an inherently different pollutant than fossil-based emissions. The Supreme Court has cautioned EPA that before applying a particular Clean Air Act regulatory program to greenhouse gases, the agency must determine whether “their inclusion would be inconsistent with the statutory scheme.” *UARG*, 573 U.S. at 319. The ACE Rule fails to reconcile the fact that biogenic emissions, like “steam, oxygen, or other harmless airborne substances,” while definitionally pollutants, are scientifically distinct from fossil emissions at power plants because of their low-carbon origin, and cannot be regulated as harmful pollution in the context of §7411 emissions guidelines. *Id.* at 317. This Court has likewise instructed that the Clean Air Act does not compel regulation of a substance in the context of greenhouse gas regulations simply because it is an air pollutant. *Coalition Resp. Reg., Inc. v. EPA*, 684 F.3d 102, 134-35 (D.C. Cir. 2012) (“The Clean Air Act’s universal definition of ‘air pollutant’ – the one at issue in *Massachusetts v. EPA* – provides that the term includes ‘any physical, chemical, biological [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.’ *Id.* § 7602(g). Of course, nothing in the Clean Air Act requires regulation of a substance simply because it qualifies as an ‘air pollutant’ under this broad definition.”). By commanding facilities to count biogenic CO<sub>2</sub> emissions as pollution without regard to the low-carbon origin of the fuel, EPA violates the principle that Clean Air Act regulations apply to only

those emissions “that may sensibly be encompassed within the particular regulatory program.” *UARG*, 573 U.S. at 319; *cf. id.* at 316 (“where the term ‘air pollutant’ appears in the [Clean Air] Act’s operative provisions, EPA has routinely given it a narrower, context-appropriate meaning”).

The term “application” in §7411, which is the only basis for EPA’s inclusion of biogenic emissions in counting a facility’s greenhouse gas emissions, presents “no inseparable textual barrier” to sensibly recognizing biomass co-firing as reducing overall greenhouse gas pollution at a power plant through biofuels which have previously captured carbon via photosynthesis. *UARG*, 573 U.S. at 320. EPA’s insistence on an interpretation of §7411 that closes its eyes to the low-carbon origin of biomass fuels – and conflicts with the indisputable carbon cycle science – is impermissible under the *Chevron* and *UARG* standards because it fails to heed the Supreme Court’s instruction to interpret the operative provisions of the Clean Air Act in a “context-appropriate” manner. *Id.*

EPA could have chosen a “context-appropriate” reading of the term “application” in §7411(d) that would allow consideration of the science underlying biofuel co-firing and better accord with “common sense.” *Id.* at 318. But the record barely discusses the science of carbon cycles, and EPA mistakenly considered itself constrained by a rigid understanding of what “application” of a control measure at a facility means in the context of climate change pollution.

EPA thus failed to properly consider the parameters of its authority. *Id.* at 319 (“*Massachusetts* [v. *EPA*] does not strip EPA of authority to exclude greenhouse gases from the class of regular air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme”). The Court should remand for the agency to consider whether biogenic emissions can be regulated at facility stacks in a manner that reconciles the underlying science of biofuels as applicable to EPA’s regulation of greenhouse gas pollution.

### CONCLUSION

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

Respectfully submitted,

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April 17, 2020

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# STATUTORY ADDENDUM



**§ 7411. Standards of performance for new stationary sources**

**(a) Definitions**

For purposes of this section:

(1) The term “standard of performance” means 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.

(2) The term “new source” means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term “stationary source” means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term “modification” means any physical change in, or change in the method of

operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term “owner or operator” means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term “existing source” means any stationary source other than a new source.

(7) The term “technological system of continuous emission reduction” means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) 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.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supercedes such Act [15 U.S.C. 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii)<sup>1</sup> of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

**(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards**

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission lim-

itations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section 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.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii)<sup>1</sup> of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

**(c) State implementation and enforcement of standards of performance**

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

**(d) Standards of performance for existing sources; remaining useful life of source**

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance 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, 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 of performance to any particular source under a plan sub-

<sup>1</sup> See References in Text note below.

mitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

**(e) Prohibited acts**

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

**(f) New source standards of performance**

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

**(g) Revision of regulations**

(1) Upon application by the Governor of a State showing that the Administrator has failed

to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) 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.

(4) Upon application of the Governor of a State showing that—

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either—

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

**(h) Design, equipment, work practice, or operational standard; alternative emission limitation**

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-

air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

**(i) Country elevators**

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

**(j) Innovative technological systems of continuous emission reduction**

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial

likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consider-



ation the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to—

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date—

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

(July 14, 1955, ch. 360, title I, §111, as added Pub. L. 91-604, §4(a), Dec. 31, 1970, 84 Stat. 1683; amended Pub. L. 92-157, title III, §302(f), Nov. 18, 1971, 85 Stat. 464; Pub. L. 95-95, title I, §109(a)-(d)(1), (e), (f), title IV, §401(b), Aug. 7, 1977, 91 Stat. 697-703, 791; Pub. L. 95-190, §14(a)(7)-(9), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 95-623, §13(a), Nov. 9, 1978, 92 Stat. 3457; Pub. L. 101-549, title I, §108(e)-(g), title III, §302(a), (b), title IV, §403(a), Nov. 15, 1990, 104 Stat. 2467, 2574, 2631.)

#### REFERENCES IN TEXT

Such Act, referred to in subsec. (a)(8), means Pub. L. 93-319, June 22, 1974, 88 Stat. 246, as amended, known as the Energy Supply and Environmental Coordination Act of 1974, which is classified principally to chapter 16C (§791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsec. (a)(8), was amended generally by Pub. L. 101-549, title VII,

§701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

Subsection (a)(1) of this section, referred to in subsec. (b)(6), was amended generally by Pub. L. 101-549, title VII, §403(a), Nov. 15, 1990, 104 Stat. 2631, and, as so amended, no longer contains subpars.

#### CODIFICATION

Section was formerly classified to section 1857c-6 of this title.

#### PRIOR PROVISIONS

A prior section 111 of act July 14, 1955, was renumbered section 118 by Pub. L. 91-604 and is classified to section 7418 of this title.

#### AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101-549, §403(a), amended par. (1) generally, substituting provisions defining “standard of performance” with respect to any air pollutant for provisions defining such term with respect to subsec. (b) fossil fuel fired and other stationary sources and subsec. (d) particular sources.

Subsec. (a)(3). Pub. L. 101-549, §108(f), inserted at end “Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.”

Subsec. (b)(1)(B). Pub. L. 101-549, §108(e)(1), substituted “Within one year” for “Within 120 days”, “within one year” for “within 90 days”, and “every 8 years” for “every four years”, inserted before last sentence “Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard.”, and inserted at end “When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.”

Subsec. (d)(1)(A)(i). Pub. L. 101-549, §302(a), which directed the substitution of “7412(b)” for “7412(b)(1)(A)”, could not be executed, because of the prior amendment by Pub. L. 101-549, §108(g), see below.

Pub. L. 101-549, §108(g), substituted “or emitted from a source category which is regulated under section 7412 of this title” for “or 7412(b)(1)(A)”.

Subsec. (f)(1). Pub. L. 101-549, §108(e)(2), amended par. (1) generally, substituting present provisions for provisions requiring the Administrator to promulgate regulations listing the categories of major stationary sources not on the required list by Aug. 7, 1977, and regulations establishing standards of performance for such categories.

Subsec. (g)(5) to (8). Pub. L. 101-549, §302(b), redesignated par. (7) as (5) and struck out “or section 7412 of this title” after “this section”, redesignated par. (8) as (6), and struck out former pars. (5) and (6) which read as follows:

“(5) Upon application by the Governor of a State showing that the Administrator has failed to list any air pollutant which causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness as a hazardous air pollutant under section 7412 of this title the Administrator shall revise the list of hazardous air pollutants under such section to include such pollutant.

“(6) Upon application by the Governor of a State showing that any category of stationary sources of a hazardous air pollutant listed under section 7412 of this title is not subject to emission standards under such section, the Administrator shall propose and promulgate such emission standards applicable to such category of sources.”

1978—Subsecs. (d)(1)(A)(ii), (g)(4)(B). Pub. L. 95-623, §13(a)(2), substituted “under this section” for “under subsection (b) of this section”.

Subsec. (h)(5). Pub. L. 95-623, §13(a)(1), added par. (5). Subsec. (j). Pub. L. 95-623, §13(a)(3), substituted in pars. (1)(A) and (2)(A) “standards under this section” and “under this section” for “standards under subsection (b) of this section” and “under subsection (b) of this section”, respectively.

1977—Subsec. (a)(1). Pub. L. 95-95, §109(c)(1)(A), added subpars. (A), (B), and (C), substituted “For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect” for “a standard for emissions of air pollutants which reflects”, “and the percentage reduction achievable” for “achievable”, and “technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environment impact and energy requirements)” for “system of emission reduction which (taking into account the cost of achieving such reduction)” in existing provisions, and inserted provision that, for the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

Subsec. (a)(7). Pub. L. 95-95, §109(c)(1)(B), added par. (7) defining “technological system of continuous emission reduction”.

Pub. L. 95-95, §109(f), added par. (7) directing that under certain circumstances a conversion to coal not be deemed a modification for purposes of pars. (2) and (4).

Subsec. (a)(7), (8). Pub. L. 95-190, §14(a)(7), redesignated second par. (7) as (8).

Subsec. (b)(1)(A). Pub. L. 95-95, §401(b), substituted “such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger” for “such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of”.

Subsec. (b)(1)(B). Pub. L. 95-95, §109(c)(2), substituted “shall, at least every four years, review and, if appropriate,” for “may, from time to time,”.

Subsec. (b)(5), (6). Pub. L. 95-95, §109(c)(3), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95-95, §109(d)(1), struck out “(except with respect to new sources owned or operated by the United States)” after “implement and enforce such standards”.

Subsec. (d)(1). Pub. L. 95-95, §109(b)(1), substituted “standards of performance” for “emission standards” and inserted provisions directing that regulations of the Administrator permit the State, in applying a standard of performance to any particular source under a submitted plan, to take into consideration, among other factors, the remaining useful life of the existing source to which the standard applies.

Subsec. (d)(2). Pub. L. 95-95, §109(b)(2), provided that, in promulgating a standard of performance under a plan, the Administrator take into consideration, among other factors, the remaining useful lives of the sources in the category of sources to which the standard applies.

Subsecs. (f) to (i). Pub. L. 95-95, §109(a), added subsecs. (f) to (i).

Subsecs. (j), (k). Pub. L. 95-190, §14(a)(8), (9), redesignated subsec. (k) as (j) and, as so redesignated, substituted “(B)” for “(8)” as designation for second subpar. in par. (2). Former subsec. (j), added by Pub. L. 95-95, §109(e), which related to compliance with applicable standards of performance, was struck out.

Pub. L. 95-95, §109(e), added subsec. (k).

1971—Subsec. (b)(1)(B). Pub. L. 92-157 substituted in first sentence “publish proposed” for “propose”.

#### EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d)

of Pub. L. 95-95, set out as a note under section 7401 of this title.

#### REGULATIONS

Section 403(b), (c) of Pub. L. 101-549 provided that:

“(b) REVISED REGULATIONS.—Not later than three years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990], the Administrator shall promulgate revised regulations for standards of performance for new fossil fuel fired electric utility units commencing construction after the date on which such regulations are proposed that, at a minimum, require any source subject to such revised standards to emit sulfur dioxide at a rate not greater than would have resulted from compliance by such source with the applicable standards of performance under this section [amending sections 7411 and 7479 of this title] prior to such revision.

“(c) APPLICABILITY.—The provisions of subsections (a) [amending this section] and (b) apply only so long as the provisions of section 403(e) of the Clean Air Act [42 U.S.C. 7651b(e)] remain in effect.”

#### TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official in Environmental Protection Agency related to compliance with new source performance standards under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

#### PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

#### MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

# STANDING ADDENDUM





3. In this action, the Biogenic CO2 Coalition challenges EPA's treatment of carbon dioxide emissions from agricultural biomass fuels used at electric power plants under the Clean Air Act.

4. I serve as representative of the Biogenic CO2 Coalition and am authorized to submit this declaration on behalf of the coalition, its constituent trade associations, and their members.

5. I am the President and Chief Executive Officer of the Corn Refiners Association, a non-profit trade association. The Corn Refiners Association is, along with the American Bakers Association, American Farm Bureau Federation and National Corn Growers Association, a member of the Biogenic CO2 Coalition.

6. I have over 40 years of experience working with producers, processors and marketers of agricultural commodities and products. I served in three Presidential appointments at the U.S. Department of Agriculture, including Assistant Secretary of Agriculture for Food and Consumer Services. Before joining the USDA in 1981, I was on the staff of the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, and served on the staff of then-Governor of Oklahoma David L. Boren.

7. As a necessary function of my work, I am knowledgeable about the agricultural sector and about regulatory programs affecting the sector, including the U.S. EPA's regulation of air emissions under the Clean Air Act and the impact

of those regulations on agricultural producers, processors and supply chain stakeholders.

8. This declaration is based on discussions with Coalition members, discussions with, inquiries and knowledge about individual companies and persons impacted by EPA's regulatory policy, my knowledge of agricultural and biofuel markets, and my knowledge of the history and development of EPA's regulation of greenhouse gases and biogenic carbon dioxide emissions.

**A. The Biogenic CO2 Coalition**

9. The Biogenic CO2 Coalition was formed to advocate in favor of sensible regulatory policies recognizing the science of biogenic feedstocks, fuels and products, and the low-carbon nature of biogenic emissions from the processing, use and utilization of agricultural materials. For purposes of this litigation the members of the Coalition are the Corn Refiners Association, American Bakers Association, American Farm Bureau Federation and National Corn Growers Association.

10. The **Corn Refiners Association** (CRA) is the national trade association representing a full 100% of the corn refining industry of the United States. The Corn Refiners Association and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, starch, advanced bioproducts, corn oil, and feed products

from corn components such as starch, oil, protein, and fiber. These products are manufactured by processing agricultural feedstocks (primarily corn) at industrial facilities located in the United States through various processes, such as fermentation, which generate biogenic carbon dioxide and other associated air emissions.

11. The **American Bakers Association** (ABA) is a national association that represents the interests of bakers before the U.S. Congress, federal agencies, and international regulatory authorities. ABA advocates on behalf of more than 700 baking facilities and baking company suppliers. Baking facilities include various processes, such as fermentation, that generate biogenic carbon dioxide and associated emissions.

12. The **American Farm Bureau Federation** (AFBF) is an independent, non-governmental, voluntary organization governed by and representing farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being. AFBF represents numerous members that produce and sell agricultural products, including biomass that is used as feedstocks in various food processing and industrial processes, including the power sector.

13. The **National Corn Growers Association** (NCGA) represents more than 40,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers. The National Corn Growers Association and its 48 affiliated state organizations work together to create and increase opportunities for corn growers. Corn growers sell their agricultural products to a variety of different downstream users, including to food processing facilities such as those represented by the Corn Refiners Association and American Bakers Association, as well as biomass feedstocks including fuels that can be co-fired at electric power plants.

14. Each constituent trade association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b), is not owned in whole or in part by a parent corporation or publicly traded company, and does not issue stock. Further, the Biogenic CO<sub>2</sub> Coalition is not owned in whole or in part by a parent corporation or publicly traded company, and does not issue stock.

15. Each constituent trade association represents essentially the entire sector within its respective membership: producers of agricultural feedstocks that result in biogenic CO<sub>2</sub> emissions when used for power or processed into products; and processors of those feedstocks to create products which employ industrial processes that create biogenic CO<sub>2</sub> emissions.

16. Within each trade association, all of the members will be harmed in similar ways. For example, all of the members that are involved in the supply

chain of producing biomass fuels that are, or can be, co-fired at power plants are harmed because EPA's position on regulation of biogenic emissions from those fuels will impose a regulatory burden on the use by power plants of those fuels and thereby depress the market for biomass fuels. In other words, because biogenic emissions from use of biomass fuels will be counted under the ACE Rule as regulated air emissions, these biofuels will be less desirable to power plants than if the emissions were considered carbon neutral.

17. Similarly, all Coalition members that own industrial facilities that themselves emit biogenic carbon dioxide will be adversely affected in a similar manner by EPA's interpretation of Clean Air Act §111(d) under which the low-carbon nature of agricultural feedstocks used at a facility cannot be considered for permitting purposes because (in EPA's view) the carbon capture takes place outside the fenceline facility. The result of this policy is that EPA is regulating biogenic emissions from those facilities (inappropriately) as harmful pollution.

18. In addition, if biogenic emissions are regulated in the manner asserted by EPA in the ACE Rule, it will constitute the first time that biogenic emissions have been subject to regulation under the Clean Air Act, which will trigger facility permitting consequences under EPA's Prevention of Significant Deterioration permitting program, thus creating additional permitting burdens on facilities owned or operated by Coalition members.

**B. Interests of Coalition Members**

19. The interests of the Biogenic CO<sub>2</sub> Coalition, its constituent associations, and their members are adversely impacted by the ACE Rule in various ways, including: (1) as suppliers of biomass fuels and feedstocks that are used by power plants; (2) as regulated entities that own and operate facilities that emit greenhouse gases that are subject to, or impacted by EPA's interpretation of, Clean Air Act § 111(d); and (3) as owners or operators of facilities that will be impacted by the "triggering effect" of EPA's regulation of power plants in the ACE Rule which gives rise to permitting obligations bearing on other stationary sources under EPA's permitting regime.

20. Biomass Co-firing Fuels. Biomass fuels from agricultural feedstocks are available to be used, and are being used, at electric power plants subject to the ACE Rule, as well as at other energy-related combustion and gasification facilities. EPA acknowledged the existence of this market in its ACE Rule proposal at 83 Fed. Reg. 44,746, 44,762 (Aug. 31, 2018) ("there are some existing coal-fired EGUs that currently co-fire with biomass fuel"), 44,765 ("The Agency specifically recognizes that some entities may be interested in using biomass as a compliance option for meeting the state determined emissions standard"). Biomass fuels are made from agricultural products, such as energy crops like fast-growing grasses, and field residues such as corn stover, rice hulls, wheat straw or oil seed processing

waste. In a process known as “co-firing”, certain amounts of biomass fuel can be added to fossil fuel (typically coal) in power plant boilers, which displaces the amount of fossil fuel used to generate electricity.

21. Biomass fuel co-firing is a significant practice at electric generating units, including some facilities affected by the ACE Rule, as it is widely understood to lower greenhouse gas emissions because of the biogenic nature of the biomass fuel.

22. Due to the low-carbon nature of agricultural feedstocks, the use of biomass is widely recognized as lowering the overall greenhouse gas footprint of the power plant. As described by the International Energy Agency and International Renewable Energy Agency: “Biomass co-firing consists of combusting biomass and fossil fuels, mostly coal but also natural gas, in the same power plant . . . The advantage of biomass co-firing is that it reduces greenhouse gas emissions from coal-fired power . . . biomass feedstock can be sourced from residues or waste streams from forestry, agriculture, pulp and paper, and sugar industries, or from dedicated energy crops (e.g. short-rotation coppices) . . . Biomass co-firing has an enormous potential for reducing the CO<sub>2</sub> emissions as biomass can replace between 20% and 50% of coal.”<sup>2</sup>

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<sup>2</sup> See IEA-IRENA Energy Technology System Analysis Programme, *Biomass Co-firing in Coal Power Plants* at 1-2 (Jan. 2013) (<https://iea-etsap.org/E->

23. In 2018, the biomass fuel industry added 53.4 megawatts of electric generating capacity from “other biomass” fuel sources, including “agricultural byproducts.”<sup>3</sup>

24. A primary purpose of co-firing biofuels is to lower greenhouse gases from the facility on a net basis, considering that the biofuels capture carbon through photosynthesis when they are grown. As stated by the American Coal Council: “Coal consuming utilities and industrials are exploring biomass as an option for . . . compliance [with environmental laws] . . . Co-firing biomass is a potentially valuable tool to help decrease greenhouse gas and other emissions in coal-fueled boilers.”<sup>4</sup> And as further explained: “Biomass is considered to be ‘carbon-neutral,’ so its use can have a proportional reduction in GHG emission . . . The primary reason for co-firing coal with biomass is as a means of reducing the

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[TechDS/PDF/E21IR\\_Bio-cofiring\\_PL\\_Jan2013\\_final\\_GSOK.pdf](#)) (last visited Feb 19, 2020) (“some 230 power and combined heat and power (CHP) plants use co-firing, mostly in North Europe and the United States, with a capacity from 50 to 700 MWe”); (“Biomass feedstocks include forestry and agriculture residues, animal manure, waste, and dedicated energy crops”).

<sup>3</sup> See U.S. Energy Information Administration, Form EIA-860, *Annual Electric Generator Report, Table 4.6 Utility-Scale Capacity Additions, Retirements and Changes by Energy Source* (2018) ([https://www.eia.gov/electricity/annual/html/epa\\_04\\_06.html](https://www.eia.gov/electricity/annual/html/epa_04_06.html)) (last visited March 9, 2020).

<sup>4</sup> American Coal Council, *Biomass Cofiring with Coal as an Emissions Reduction Strategy* (2010) at 2-3 (<https://www.americancoalcouncil.org/page/biomass>) (last visited Feb 19, 2020).



potential environmental impacts associated with the combustion of fossil fuels . . .

‘Biomass’ includes any natural (biological), renewable fuels, such as wood (or wood wastes), agricultural residues, food wastes, and industrial wastes.’<sup>5</sup>

**C. Standing of the Biogenic CO2 Coalition**

Associational Standing

25. The Biogenic CO2 Coalition has associational standing to represent its constituent trade associations and their members on the following basis: (a) because of the adverse effects of the ACE Rule described herein, each member would have standing to bring this action in its own right; (b) as described herein, environmental regulation and regulatory burdens created by EPA policies is within the Coalition’s mission to advocate for regulatory policies recognizing the science and advantages of biomass products and low-carbon nature of greenhouse gas emissions; and (c) there is no reason that the participation of individual members is necessary since this proceeding is a challenge to a nationally applicable agency rulemaking that affects all members and the entirety of each of the sectors represented by the Coalition. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

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<sup>5</sup> *Id.* at 3.

26. Coalition members have standing based on several alternative grounds, as follows: (1) standing as fuel and feedstock suppliers; (2) standing as facilities regulated under Clean Air Act §111; and (3) standing as facilities regulated by Clean Air Act permitting requirements triggered by EPA's ACE Rule policies.

Standing As Fuel and Feedstock Suppliers

27. *First*, Coalition members have a competitive interest in selling agricultural feedstocks for use as biofuels at electric power plants or in processing and manufacturing biomass fuel from agricultural feedstocks to sell to regulated electric power plants. A key aspect of the competitiveness of these biofuels is that they have a lower carbon footprint in terms of carbon dioxide emissions than fossil fuel; accordingly, if EPA properly recognizes the low-carbon nature of these biofuels, electric power plants will have an incentive to use biofuels for co-firing at their regulated facilities in order to meet greenhouse gas emissions limits.

28. Coalition members are part of the biomass supply chain, and have sold, are selling, or plan to sell agricultural biomass feedstocks and fuels to power plants for purposes of co-firing at regulated power plants if EPA's policies change. The ability of these market participants to enter or remain in the biomass supply market is contingent on whether EPA's policies recognize the low-carbon nature of these feedstocks and fuels, since their greenhouse gas benefits are a significant

economic factor in terms of price, competitiveness in the market, and regulatory qualification.

29. As one example of the biomass co-firing biofuel market, one member of the Coalition was a company whose business model depended on selling biomass fuel to power plants (such as those regulated under the ACE Rule) before it suspended its business due in significant part to EPA's adverse policies regulating biogenic emissions at power plants. The company manufactured a biomass fuel known as "Bio-Coal" that could be substituted for fossil-fuel coal at power plants as a "drop-in" substitute for fossil coal.<sup>6</sup> The key to this company's business was recognition of the low-carbon nature of the biofuel vis-à-vis fossil fuels, which created an incentive for power plants to purchase and utilize some amounts of biofuel to lower the overall greenhouse gas emissions from power plant smokestacks.

30. In fact, the federal government was an investor in this company. In 2016, the U.S. Department of Agriculture provided \$500,000 "to help the company

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<sup>6</sup> *Press Release - Over \$1.6 Million Awarded to Recycling, Litter Programs, NDEQ Awards \$3.45 Million in Waste Reduction and Recycling Grants, Nebraska Dep't of Environmental Quality* at 5 (Apr. 26, 2016) (grant for "feasibility work to produce Enginuity Bio-Coal engineered biomass fuel, and develop new Nebraska-grown renewable bio-based products from agricultural waste materials") (<https://ecmp.nebraska.gov/DEQ-SWMS/Home/SearchDocuments?D=66793545>) (last visited Feb 6, 2020).

develop a solid biomass fuel production facility . . . The company plans to use this grant to produce eCARB-engineered fuel for testing and market commercialization” for use by electric power plants.<sup>7</sup> USDA also provided a \$2,000,000 loan to the company to “purchase equipment that will process biomass products into a densified solid fuel products.”<sup>8</sup>

31. However, because of EPA’s failure to recognize the low-carbon benefits of these fuels under the Clean Air Act in terms of biogenic carbon dioxide emissions, the market for the company’s product suffered.

32. With respect to this example and other similarly situated coalition members, the Coalition’s interests are akin to the situation in *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1232-33 (D.C. Cir. 1996), in which mill closures and employee layoffs resulting from government policies supported standing.

33. Coalition members are also similarly situated to fuel producer litigants that courts have concluded have competitive standing as fuel suppliers. Put

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<sup>7</sup> U.S. Dep’t of Agriculture, *USDA Rural Development, 2013 Progress Report*, Washington, D.C., National Office, March 2014, at 7 (<https://www.rd.usda.gov/resources/publications/reports>) (last visited Feb. 7, 2020).

<sup>8</sup> U.S. Dep’t of Agriculture, *USDA Rural Development – Fiscal Year 2014 Projects, Missouri State Office*, 2014, at 1 (<https://docplayer.net/15398503-Fiscal-year-2014-projects.html>) (last visited Mar. 9, 2020).

simply, the ACE Rule prevents biomass fuel produced or sold by Coalition members from being properly credited as low-carbon under the Clean Air Act and consequently disqualifies use of the fuel as a control measure for compliance with emissions limits at regulated power plants.

34. Because of the adverse effect of the ACE Rule, Coalition members are similarly positioned to parties that have been deemed to have standing on the basis that a regulation imposes a regulatory impediment and “hurdle impeding” use of fuels. *See, e.g., Energy Future Coalition v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.) (EPA regulation prohibiting use of certain biofuel creates “regulatory impediment” and basis for standing).

35. At the same time, by not counting the low-carbon benefits of biofuels, the ACE Rule advantages fossil fuel suppliers by giving high-carbon fossil fuel such as coal a competitive advantage vis-à-vis biofuel because coal emissions are given the same footing as biofuel emissions, even though the science is clear that the use of fossil fuels at power plants contributes greater levels of greenhouse gas to the atmosphere. In this way, Coalition members are similarly situated to the fuel producers in *Alon Refining Krotz Springs Inc. v. EPA*, 936 F.3d 628, 664-65 (D.C. Cir. 2019) (standing of biofuel producer to challenge advantage to suppliers of other fuel types); *National Biodiesel Board v. EPA*, 843 F.3d 1010, 1015 (D.C. Cir. 2016) (domestic biofuel producers had competitor standing where EPA rules

advantaged allegedly higher emissions imported fuel); and *Delta Construction v. EPA*, 783 F.3d 1291, 1299 (D.C. Cir. 2015) (standing of vegetable-based fuel standing was “self-evident” where EPA regulations incentivize other fuels).

36. The position of the Coalition members being unable to sell biofuel due to EPA’s failure to recognize the low-carbon nature of biofuel is also similar to the situation addressed in *Honeywell Int’l Inc. v. EPA*, 374 F.3d 1363, 1369 (D.C. Cir. 2004), in which the court recognized that EPA’s approval of an alternative product that put the petitioner at a competitive disadvantage in the market and resulted in lost sales was a legitimate basis for standing.

37. Unlike sellers of pollution control equipment, the interests of Coalition members do not depend on power plants being regulated, but only that EPA recognize the low-carbon nature of biofuels if power plants choose to co-fire biomass fuels.

38. The Coalition’s standing is reinforced because its member trade associations each “comprise the entire . . . category . . . and represent no other interests” and because “all the members of the organization are affected by the challenged activity.” *Alon Refining*, 936 F.3d at 664-65; Bode Decl. ¶15, *supra*. As this Court has observed, “[c]onsistent with the real purpose of the standing inquiry – that is, for the court to be satisfied that the requisite injury really has occurred or will occur in the future to members of the organization . . . there is no

need to identify injured members when all the members of the organization are affected by the challenged activity.” *Id.* at 665 (citing *Public Citizen v. FTC*, 869 F.2d 1541, 1552 (D.C. Cir. 1989), and *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)) (internal punctuation and brackets omitted).

39. In terms of prudential standing, the Clean Air Act itself recognizes the use of “clean fuels” as an element of the air quality program. Section 7411(a) defines the phrase “technological system of continuous emission reduction” with reference to clean fuels: “(B) 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.” This definition dovetails with the definition of “standard of performance” in which EPA must set targets based on “application of the best system of emissions reduction.” §7411(a)(1). In this case, the Coalition argues that biogenic fuels should be considered as a compliance measure to achieve reduction of greenhouse gas pollution at power plants, yet EPA’s regulations block use of these clean fuels for compliance purposes because of EPA’s mistaken “fenceline” interpretation. EPA’s interpretation thus thwarts Congress’ intention to encourage the use by power plants of clean fuels.

40. In this sense, Coalition members that produce biomass feedstocks and fuels are “unusually suitable champion[s]” of the goals of the program, which is to

reduce emissions at power plants through application of emissions technology, including clean fuels. *Delta Construction*, 783 F.3d at 1300 (discussing zone-of-interests test); *Energy Future Coalition*, 793 F.3d at 145 (zone-of-interests test “is not meant to be especially demanding”).

41. At bottom, the Coalition represents the biofuel supply chain which invests in environmentally beneficial activities and has a strong economic, environmental and policy motivation to increase biofuel production. This creates a “personal stake in the outcome of the controversy” to engage meaningfully in the adversarial process, which is the touchstone of the Article III case and controversy requirement. U.S. Const. Art III, § 2, cl. 1; *Warth*, 422 U.S. at 498-99; *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 685 (1973) (citizens have standing to challenge agency action that affects market conditions for recyclable goods).

42. The competitive disadvantage and regulatory impediment erected against biofuels in the ACE Rule is clearly caused by EPA’s policy that ignores established climate change science and refuses to recognize the low-carbon nature of biofuels.

43. In contrast, this harm would be remedied if EPA were to recognize the low-carbon nature of biofuels and allow the use of biomass co-firing as a



compliance measure under the ACE Rule, as EPA had previously done in the Clean Power Plan and as EPA proposed to do in the ACE Rule proposal.

Standing As Clean Air Act 111(d) Regulated Entities

44. *Second*, some Coalition members own or operate manufacturing facilities that process agricultural feedstocks and as a byproduct emit biogenic emissions. Because they own and operate industrial facilities, Coalition members are regulated entities under the Clean Air Act and will be adversely affected by an EPA policy that fails to recognize the low-carbon nature of biogenic emissions.

45. Like the power plants regulated by the ACE Rule, some of these facilities also fire or co-fire biomass fuels to generate power and steam at the processing facility, often by using the same agricultural feedstocks that are used in the processing lines. These facilities are regulated under the same Clean Air Act provisions applicable to power plants subject to the ACE Rule, and as regulated entities, these Coalition members will be adversely affected by any policy, precedent, or interpretation established by EPA.

46. Section 111 of the Clean Air Act requires EPA to identify “categories of stationary sources” that contribute to harmful air pollution. §7411(b)(1)(A). Stationary sources are defined at §7411(a)(3) as any facility which emits any air pollutant, and EPA has identified carbon dioxide (a greenhouse gas) as an air pollutant. *Massachusetts v. EPA*, 549 U.S. 497 (2007). With respect to any

category of stationary sources, EPA must establish performance standards for new sources under §7411(b) (“New Source Performance Standard” or “NSPS”) and emissions guidelines for existing sources under §7411(d).

47. Power plants are the first category of industrial facility that EPA chose to regulate under §7411 on the basis of greenhouse gas emissions. 40 C.F.R. Part 60 Subpart TTTT, Standards for GHG Emissions from New, Modified and Reconstructed Electric Utility Generating Units, and 40 C.F.R. Part 60 Subpart Da Electric Utility Steam Generating Units (Boilers). However, Coalition members own and operate industrial sources that likewise could be listed under the definition of “stationary source” in §7411(a) under EPA’s interpretation, and because these facilities emit carbon dioxide, they are regulated in the same manner based on the precedent that EPA is establishing for electric generating power plants under §7411(d). As EPA has itself stated, the regulations established in the ACE Rule will apply to “any future emission guidelines issued under CAA section 111(d).” 84 Fed. Reg. 32,520, 32,521 (July 8, 2019). EPA has also taken the position that regulated entities aggrieved by the rule must challenge the precedents established in the rule in this proceeding or be foreclosed in subsequent proceedings. 84 Fed. Reg. at 32,521 (“Under CAA section 307(b)(2), the requirements established by these final rules may not be challenged separately in

any civil or criminal proceedings brought by the EPA to enforce the requirements.”).

48. As noted, Coalition members that own or operate facilities that process agricultural feedstocks generate biogenic emissions at the facility. Although the greenhouse gas effect of these emissions should be considered insignificant because the feedstocks originated from agricultural crops grown through photosynthetic processes that captured the same carbon from the atmosphere, EPA has refused to recognize this scientific principle in the context of §7411 emissions standards. Accordingly, Coalition members will be prejudiced and subjected to unjustified regulatory burdens unless EPA recognizes the low-carbon nature of the biogenic emissions.

49. The increased regulatory and permitting burdens imposed under the Clean Air Act on facilities using biofuels is directly caused by EPA’s policy articulated in the ACE Rule that ignores established climate change science and refuses to recognize the low-carbon nature of biofuels.

50. In contrast, this harm would be remedied if EPA were to recognize the low-carbon nature of biofuels and allow the use of biomass co-firing as a compliance measure under the ACE Rule, as EPA had previously done in the Clean Power Plan and as EPA proposed to do in the ACE Rule proposal.

Standing as Regulated Entities Subject to EPA's Permitting Programs

51. *Third*, the rule being challenged represents the first time that biogenic carbon dioxide emissions have been regulated under the Clean Air Act, which would (under EPA's existing policies) trigger consequences for other stationary sources other than power plants under EPA's Prevention of Significant Deterioration (PSD) permitting program and associated Best Available Control Technology (BACT) requirements. Clean Air Act §165(a)(4), 42 U.S.C. §7475(a)(4) (under EPA permitting program, sources undertaking projects must install BACT emissions controls “for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility”).

52. The PSD trigger is the same basis on which the Supreme Court considered challenges by stationary sources to EPA's assertion that fossil-based greenhouse gases triggered PSD permitting when fossil-based greenhouse gas emissions were first regulated under the Clean Air Act. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).

53. As EPA explained in a prior greenhouse gas rule, when EPA first regulates a pollutant in an emissions category, that “triggers” permitting requirements under the Clean Air Act PSD program for every other category of emissions sources. “The provisions of the CAA are interconnected in multiple ways such that a decision to regulate one source category of GHGs could lead to

regulation of other source categories of GHGs . . . In addition, CAA standards applicable to GHGs for one category of sources could trigger PSD requirements for other categories of sources that emit GHGs.” U.S. EPA, *Regulating Greenhouse Gas Emissions Under the Clean Air Act, Advance Notice of Proposed Rulemaking*, 73 Fed. Reg. 44,354 (July 30, 2008).

54. EPA has acknowledged in the ACE Rule that the PSD program and associated BACT requirements are “interconnected” with the ACE Rule. 84 Fed. Reg. at 32524 (“Congress tied CAA section 111 to the [BACT] provisions in CAA section 165”), 32,525 (“Congress specified” that BACT cannot “result in greater emissions than allowed by ‘any applicable standard established pursuant to section [111]’”), 32,525 (“NSPS serve as the base upon which BACT determinations are made and are commonly viewed as the BACT ‘floor’”).

55. The ACE Rule represents the first time that an emissions source category has been regulated for biogenic carbon dioxide emissions (as distinguished from fossil fuel greenhouse gas emissions),<sup>9</sup> which under EPA’s

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<sup>9</sup> Although EPA previously regulated fossil fuel greenhouse gas emissions from motor vehicles, in that rule EPA specifically elected not to regulate biogenic emissions. *See, e.g.,* U.S. EPA and U.S. DOT, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) (providing credit for biogenic CO<sub>2</sub> emissions from motor vehicles due to carbon neutral nature of biofuels such that biogenic emissions were not subject to actual control, and therefore not subject to regulation).

view of the Clean Air Act would trigger permitting requirements for other industrial facility categories, such as fermentation units or non-utility power plants owned or operated by Coalition members. Thus, the ACE Rule is the starting point for EPA's regulation of biogenic greenhouse gas emissions under the PSD permitting program.

56. As noted, various Coalition members process agricultural crops or field residues into biomass-based products using fermentation or other processes that release the biogenic carbon that is embedded in the agricultural feedstocks during the manufacturing process. Certain of these members have plans to expand existing facilities or build new facilities to respond to growing consumer demand for plant-based products and low-carbon materials. (The particular members and facilities planning construction or expansion is business confidential information.)

57. As discussed, *supra* ¶44, facilities owned or operated by Coalition members would be subject to Clean Air Act §111 performance standards when EPA lists the relevant industrial categories pursuant to §111, whether as new or existing facilities. Accordingly, these facilities will be directly regulated by the interpretation of the Clean Air Act adopted by EPA in the ACE Rule.

58. But in addition to direct regulation of Coalition member facilities under Clean Air Act §111, projects undertaken at facilities owned or operated by

Coalition members will likely trigger PSD permitting review because of the associated increase in emissions other than greenhouse gases.

59. But for EPA's new policy articulated in the ACE Rule, these facilities should not have to count biogenic CO<sub>2</sub> emissions as increased emissions for permitting or BACT emissions control purposes. But under the ACE Rule's "fenceline" interpretation, biogenic emissions will have to be counted without consideration of the low-carbon nature of the biomass feedstocks that created the emissions.

60. EPA acknowledges in the ACE Rule that its "fenceline" interpretation in the context of §7411 will apply fully to the PSD permitting program and attendant BACT control technology determinations: "BACT is limited to control options that can be applied to the source itself and does not include control options that go beyond the source." 84 Fed. Reg. at 32,525.

61. EPA's policy in the ACE Rule will materially complicate, prolong, and compound the expense of the permitting process by requiring facilities to account for biogenic emissions as if they were fossil fuel emissions.

62. In addition, EPA or state permitting agencies may require emissions control technology to be evaluated and/or installed (an expensive outlay of capital and ongoing operation and maintenance expense).

63. EPA's policy will also force facilities to evaluate the environmental effects of biogenic emissions (an expensive bureaucratic process despite the fact that the final analysis will show no effect on climate).

64. As with many facility permitting proceedings involving climate change issues, it is likely that special interest groups would challenge these permits with attendant litigation expense and delay.<sup>10</sup>

65. The increased regulatory and permitting burdens imposed under the Clean Air Act on facilities owned or operated by Coalition members that have biogenic emissions is caused by EPA's policy articulated in the ACE Rule that ignores established climate change science and refuses to recognize the low-carbon nature of biofuels.

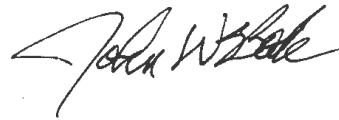
66. In contrast, this harm would be remedied if EPA were to recognize the low-carbon nature of biofuels, allow the use of biomass co-firing as a compliance measure under the ACE Rule, and allow accounting for biogenic CO<sub>2</sub> emissions as carbon neutral as EPA had previously done in the Clean Power Plan and as EPA proposed to do in the ACE Rule proposal.

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<sup>10</sup> See, e.g., *Helping Hand Tools v. EPA*, 836 F.3d 999, 1001, 1004 (9th Cir. 2016) (six and a half years to resolve permit for a cogeneration plant at an existing facility that would burn wood wastes creating biogenic CO<sub>2</sub> emissions).



Dated: April 16, 2020

A handwritten signature in black ink, appearing to read "John W. Bode", is positioned above a horizontal line.

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John W. Bode

**CERTIFICATE OF COMPLIANCE**

This response complies with the type-volume limit of this Court's order of January 31, 2020, because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this response contains 7,662 words.

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

/s/ David M. Williamson

David M. Williamson

April 17, 2020

**CERTIFICATE OF SERVICE**

I certify that on April 17, 2020, I caused to be filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ David M. Williamson

David M. Williamson

April 17, 2020