

Oral Arguments Not Yet Scheduled

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

ENERGY & ENVIRONMENT)

LEGAL INSTITUTE)

Petitioner,)

v.)

UNITED STATES ENVIRONMENTAL)

PROTECTION AGENCY)

Respondent.)

Case No.15-1398
and consolidated cases

Petitioners' Non-Binding Statement of Issues to Be Raised

Pursuant to this Court's order dated November 30, 2015, *see* ECF 1585786, Petitioner Energy & Environment Legal Institute in case No. 15-1398 submits the following nonbinding statement of issues to be raised in this proceeding reviewing the final rule of the United States Environmental Protection Agency (EPA) entitled, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"):

1. Whether the United States Environmental Protection Agency's Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Rule, 80 Fed. Reg. 64662 (Oct. 23, 2015) (the "Rule"), is

arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the Clean Air Act (“CAA”), the Administrative Procedure Act (“APA”), or other law.

2. Whether the Rule is contrary to law because the text of Clean Air Act Section 111(d), 42 U.S.C. § 7411(d)(1)(A)(i), precludes EPA from regulating fossil fuel- fired power plants under that Section because the Agency has already regulated those sources under Clean Air Act Section 112, 42 U.S.C. § 7412, see 77 Fed. Reg. 9,304 (Feb. 16, 2012).
3. Whether EPA exceeded its authority under 42 U.S.C. § 7411 by establishing “standards of performance for any existing source” in the fossil fuel-fired electric generating unit category that require the curtailment or closure of affected facilities rather than improvement in those facilities’ emissions performance?
4. Whether EPA’s Rule is unlawful because it attempts to establish standards of “non-performance” by forcing sources to curtail operations or shutter entirely, rather than the “standards of performance” required by Section 111(d) of the CAA, 42 U.S.C. § 7411(d).
5. Whether EPA exceeded its authority under 42 U.S.C. § 7411 by defining the “best system of emission reduction” for existing fossil fuel-fired electric

generating units to include measures such as construction of new renewable sources of energy that cannot be implemented by the sources themselves?

6. Whether EPA exceeded its authority under 42 U.S.C. § 7411(d) by subjecting existing fossil fuel-fired electric generating units to national average performance rates that are more stringent than the performance standards that EPA has finalized under 42 U.S.C. § 7411(b) for new sources in the same category?
7. Whether the Rule is contrary to statute because it was promulgated in the absence of a final, legally valid new source emission standard under 42 U.S.C. § 7411(b) covering the same sources, as expressly required under 42 U.S.C. §7411(d)(1)(a)(ii).
8. Whether EPA has the authority to force States to transform their energy economies to favor only certain sources of electricity, under the guise of regulating power plants under CAA § 111(d), 42 U.S.C. § 7411(d).
9. Whether the Rule impermissibly intrudes on the exclusive authority of the Federal Energy Regulatory Commission to regulate the interstate electricity market.
10. Whether the Final Rule is arbitrary, capricious, or otherwise contrary to law because it does not contain adequate provisions to ensure a reliable electricity supply under all reasonably foreseeable circumstances

11. Whether EPA has violated the Tenth Amendment to the U.S. Constitution in the Final Rule by intruding on powers reserved to the States, such as the power to establish interstate energy policies, violating constitutional principles including federalism and separation of powers.
12. Whether EPA's Rule is unlawful because it deprives States of their statutory authority to consider the remaining useful life of existing sources to adjust "standards of performance."
13. Whether EPA properly placed into the public docket and agency record during the Notice of Proposed Rulemaking (NPRM) all relevant and necessary material as required by 5 U.S. Code § 553.
14. Whether EPA engaged in improper ex parte communications prior to the NPRM which formed the basis of the agency action and were undisclosed during the notice-and-comment process.
15. Whether EPA allowed personnel with conflicts of interest to draft the rule and failed to recuse decisionmakers with "unalterably closed minds" from reaching the determination to implement the Final Rule.
16. Whether EPA failed to respond to substantial issues raised in comments to the NPRM.

Petitioner reserves the right to present and argue any other issues that have been preserved for judicial review or that arise during these proceedings.

Dated: December 18, 2015

Respectfully Submitted

ENERGY AND ENVIRONMENT
LEGAL INSTITUTE

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CERTIFICATE OF SERVICE

I certify that on this 18th day of December, 2015, a copy of the foregoing *Petitioners' Non-Binding Statement of Issues to be Raised* was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Chaim Mandelbaum
Chaim Mandelbaum