

ORAL ARGUMENT NOT YET SCHEDULED
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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American Lung Association, <i>et al.</i> ,)	
)	
	<i>Petitioners,</i>)	
)	No. 19-1140
v.)	No. 19-1166
)	
)	
U.S. Environmental Protection Agency, <i>et al.</i> ,)	
)	
	<i>Respondents.</i>)	
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PETITIONERS’ JOINT NONBINDING STATEMENT OF ISSUES

Pursuant to the Court’s Orders of August 2, 2019, (ECF 1800451) and September 11, 2019, (ECF 1806060), Petitioners¹ submit this joint nonbinding statement of issues to be raised in support of their petitions for review of the final actions of the United States Environmental Protection Agency (“EPA”) published at 84 Fed. Reg. 32,520 (July 8, 2019), and titled “Repeal of Clean Power Plan;

¹ The Petitioners joining in this statement are American Lung Association and American Public Health Association (Petitioners in No. 19-1140); Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club (Petitioners in No. 19-1166).

Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations” (“Final Rule”). The Final Rule effects three interrelated Agency actions: (1) it repeals the Clean Power Plan (“Repeal”); (2) it adopts new emission guidelines applicable to certain existing coal-fired power plants that EPA names the Affordable Clean Energy rule (“ACE Rule”), and (3) it amends the general regulations implementing section 111(d) of the Clean Air Act (“Act”), 42 U.S.C. § 7411(d), for all source categories (“Framework Regulations”).

Petitioners maintain that the Final Rule is in multiple respects arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; assert that it is inconsistent with applicable statutes, without observance of procedure required by law, *see* 42 U.S.C. § 7607(d)(9); and set forth the following nonbinding statement of issues to be raised:

I. Issues Concerning the Repeal of the Clean Power Plan

1. Whether the Repeal is unlawful, arbitrary, and capricious because it is based on an erroneous interpretation of the Clean Air Act as unambiguously limiting the “best system of emission reduction” under section 111 to measures that can be applied to and at an individual source.

2. Whether the Repeal is unlawful, arbitrary, and capricious because it mischaracterizes the Clean Power Plan as adopting a system of emission reduction that cannot be applied to and at an individual source.
3. Whether the Repeal is unlawful, arbitrary, and capricious because, in it, EPA deemed irrelevant factors that Congress instructed the Agency to consider in identifying the “best system of emission reduction,” including the quantity of emission reduction and severity of pollution problem; disregarded factual circumstances relevant to regulating carbon dioxide from existing power plants, including the interconnected nature of the electric grid and fungibility of electricity; and failed adequately to consider the record underlying the Clean Power Plan and EPA’s own detailed factual findings as to the feasibility and cost-effectiveness of deploying emission-reduction measures already widely deployed in the power sector.

II. Issues Concerning the ACE Rule

4. Whether the ACE Rule is unlawful, arbitrary, and capricious because, in adopting it, EPA erroneously limited its consideration of the “best system of emission reduction” to measures that can be applied to and at an individual source.

5. Whether the ACE Rule is unlawful, arbitrary, and capricious, because, in it, EPA failed to discharge its duties to identify: (a) the “best system of emission reduction” for existing fossil fuel-fired power plants that is consistent with the requirements of section 111, instead providing a list of vaguely described “candidate technologies;” and (b) the degree of emission limitation achievable through application of the “best system of emission reduction.”
6. Whether the ACE Rule is unlawful, arbitrary, and capricious because the system EPA has determined is “best” (a) achieves minimal or no reductions in carbon dioxide pollution from the nation’s largest stationary sources of greenhouse gas emissions; (b) achieves far fewer reductions of carbon dioxide pollution than other systems that the record demonstrates are adequately demonstrated and widely employed at reasonable cost in the power sector; and (c) would likely result in emission *increases* from a large number of coal-fired power plants even though the ACE Rule contemplates a source-by-source “best system” analysis.
7. Whether the ACE Rule is unlawful, arbitrary, and capricious because it fails to discharge EPA’s mandatory duty under section 111 of the Clean Air Act to curb power plants’ dangerous greenhouse gas

emissions to the degree achievable taking into account statutory factors.

8. Whether EPA unlawfully, arbitrarily, and capriciously rejected more effective measures to reduce emissions from existing coal-fired power plants, including natural gas co-firing and conversion, carbon capture and sequestration, and reduced utilization of relatively high-emitting sources, as components of the “best system of emission reduction,” even though they are consistent with EPA’s own impermissibly constrained interpretation of the statute.
9. Whether the ACE Rule is unlawful, arbitrary, and capricious because EPA failed to adequately consider whether more effective systems of emission reduction could have been applied to subcategories of existing sources or through source-specific evaluation similar to what the ACE Rule requires for heat-rate improvements.
10. Whether the ACE Rule is unlawful, arbitrary, and capricious because EPA’s identification of the heat-rate improvement measures included in the “best system of emission reduction” is unreasonably limited.
11. Whether the ACE Rule is unlawful, arbitrary, and capricious because it delegates to the states EPA’s statutory responsibilities to identify the “best system of emission reduction” and the degree of emission

limitation resulting therefrom and fails to ensure that states establish standards of performance that reflect that degree of emission limitation.

12. Whether the ACE Rule is unlawful, arbitrary, and capricious, because it determined that averaging and trading is not permissible under section 111 as part of a “best system of emission reduction” and a compliance mechanism for individual sources, without any reasonable justification or basis in the statute.
13. Whether EPA’s analysis of the economic, emissions, and public health and environmental consequences of the ACE Rule is unlawful, arbitrary, and capricious, because, *inter alia*, EPA relied upon faulty modeling, including an unlawful and inaccurate analytical baseline; failed adequately to identify and analyze the environmental and economic impacts of the rule; and failed to consider the severe and growing harms associated with climate change, and the urgency of reducing greenhouse gas pollution.
14. Whether the ACE Rule is unlawful, arbitrary, and capricious, because it fails to establish any emission guidelines for existing oil- or natural gas-fired power plants, despite the fact that these sources would be regulated under section 111(b) if they were new or modified, and that

there are adequately demonstrated systems of emission reduction for these sources that are consistent with the requirements of section 111.

III. Issues Raised in a Petition for Reconsideration

To the extent consistent with section 307(d)(7)(B) of the Act, Petitioners may raise the following specific issues, related to several issues listed above, which are also presented in petitions for administrative reconsideration pending before EPA:

15. Whether new statutory arguments concerning the statutory terms “application” and “system,” and invoking section 302(l) of the Act, fail to support or justify EPA’s conclusion that the Clean Power Plan is precluded by statute and that its evaluation of systems in the ACE Rule must be limited to those that can be applied to or at an individual source.
16. Whether EPA’s new position in the Final Rule concerning the Agency’s authority to approve state plans more stringent than EPA’s emission guideline is unlawful, arbitrary, and capricious.
17. Whether EPA fails to fulfill its obligation to identify a binding emission limitation to inform the minimum stringency of the state plans by listing expected ranges of heat rate improvements available

from “candidate technologies,” rendering the Final Rule, unlawful, arbitrary, and capricious.

18. Whether the new analytical baseline and new analyses of the emissions impacts of the Clean Power Plan are unlawful, arbitrary, and capricious.
19. Whether EPA’s decision to finalize the ACE Rule while deferring final action on EPA’s proposed changes to the Clean Air Act’s New Source Review program is unlawful, arbitrary, and capricious.
20. Whether the Final Rule is unlawful because EPA failed to provide legally required notice and opportunity for public comment on, *inter alia*, the issues identified in paragraphs 15-19.

IV. Issues Concerning the Section 111(d) Framework Regulations

21. Whether the revisions to the Framework Regulations are unlawful, arbitrary, and capricious, because, among other reasons, EPA failed to provide a reasonable basis for, or factual analysis supporting, extending the current timelines for submission and approval of state plans implementing emission guidelines under section 111(d) of the Act.

Respectfully submitted,

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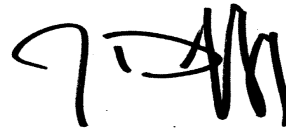
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Dated: October 7, 2019

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that, on this 7th day of October 2019, I caused the foregoing **Environmental and Public Health Petitioner' Nonbinding Statement of Issues** to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.



James P. Duffy