NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 19-1140 (and consolidated cases)

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

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

v.

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

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency

PROOF CORE LEGAL ISSUES BRIEF OF THE STATE OF NORTH DAKOTA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties and intervenors are listed in the brief for the State and Municipal Petitioners. The amici are listed in the brief for the U.S. Environmental Protection Agency ("EPA").

B. Ruling Under Review

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

C. Related Cases

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

/s/ *Paul M. Seby*
Paul M. Seby

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GLOSSARY OF TERMS

ACE Rule	Affordable Clean Energy Rule
BSER	Best System of Emission Reduction
CAA	Clean Air Act
CO_2	Carbon Dioxide
CPP	Clean Power Plan
EGU	Electric Generating Unit
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
GHG	Greenhouse Gas

INTRODUCTION

In 2015 the EPA promulgated the regulation entitled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Clean Power Plan" or "CPP"), regulating greenhouse gas ("GHG") emissions from large existing electric generating units ("EGUs"). The CPP violated the Clean Air Act ("CAA") and broke with decades of EPA regulatory practice by forcing States to apply an energy sector-wide best system of emission reduction ("BSER") as a hard CO_2 lb/MWhr limit, rather than an emission control guidance that could be applied by States at a source-specific level when establishing performance standards for EGUs. The goal of the CPP was not to provide guidelines for the States to use to set facility-specific emissions standards but rather to force States to shift away from coal-fired electricity generation based on fixed state-wide CO_2 lb/MWhr mandates for the electricity generating sector.

This sector-wide generation shifting requirement violated the text of Section 111(d) of the CAA in at least three important ways. First, EPA unlawfully usurped States' authority by imposing a sector-wide

performance mandate on each States' electricity generating sector. Section 111(d) limits EPA's authority to "establish a procedure" pursuant to which the States, not EPA, will set performance standards for EGUs. Second, EPA's energy sector-wide mandate violated the limitation that Section 111(d) directs EPA to establish guidelines, and the States to create performance standards, "for any *existing source* for any air pollutant." 42 U.S.C. § 7411(d) (emphasis added). BSER must be based on an evaluation of control measures that can be applied at existing categories of emission sources (e.g., coal-fired EGUs, natural gas-fired EGUs), not an energy sector-wide approach imposing mandates on States to shift generation between sources without regard to the capability of existing sources to reduce their emissions. Lastly, the CPP's unilateral federal efficiency mandate violated Section 111(d)'s requirement that EPA's procedures "shall permit" States to take into consideration source-specific factors when setting performance standards for EGUs, including the remaining useful life of existing sources.

As a major energy producing state (from significant lignite coal, oil, natural gas, and wind resources), North Dakota has a sovereign

interest in regulating its natural resources and their uses. The North Dakota legislature has declared it to be an essential government function and public purpose to foster and encourage the wise use and development of North Dakota's vast lignite coal resources to maintain and enhance the economic and general welfare of North Dakota. N.D. CENT. CODE § 54-17.5-01.

The CPP violated the CAA and North Dakota's sovereign interests by imposing performance requirements that stripped North Dakota of its right to set performance standards for existing sources. The CPP would have required North Dakota to reduce the carbon dioxide (CO_2) emission rate of its energy generation sector by 44.9%, more than all but two other states. *See North Dakota v. U.S. EPA,* Application by the State of North Dakota for Immediate Stay of Final Agency Action Pending Appellate Review, at 8, 15A793 (U.S. Jan. 29, 2016), JA____. According to EPA's studies, EPA's draconian mandate would have required an immediate shift from lignite coal-powered electric generating plants in North Dakota in favor of gas-powered plants or renewable sources, closing several coal-fueled power plants and causing significant loss of jobs, tax revenues, and coal royalties. *Id.* at 9-14, 20-

21 (Citing to U.S. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule, Table ES-3 at ES-7, EPA-HQ-OAR-2013-0602-37105, JA____). Thus, in violation of 111(d), the CPP was aimed at shutting down coal-fired power plants, not at controlling emissions from these existing sources.

After the CPP was stayed by the Supreme Court (North Dakota was one of four parties to independently to petition the Supreme Court for that stay), EPA set out to correct its jurisdictional overreach, which it has accomplished in the final rule under review here entitled *Repeal of the Clean Power Plan; Emissions Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019) (the "ACE Rule"). The ACE Rule properly repeals the CPP and returns to the cooperative federalism and limitations of Section 111(d) by promulgating BSER guidelines for States to follow in establishing source-specific standards for GHG emissions from existing EGU's.

Several Petitions for Review ("Petitions") were filed challenging the ACE Rule that have been consolidated into this case number 19-

1140. These Petitions must be denied, and the ACE Rule must be upheld as a proper return to the limits of EPA's statutory authority.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

North Dakota adopts EPA's Statement of the Issues.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addenda to Petitioners' and EPA's briefs.

STATEMENT OF THE CASE

North Dakota adopts the Statement of the Case in EPA's and State and Industry Intervenors' Briefs.

SUMMARY OF ARGUMENT

The ACE Rule correctly walked back EPA's jurisdictional overreach in the CPP by returning to States their authority to establish performance standards for existing EGUs.

North Dakota adopts the arguments in EPA's, Intervenors for Respondent's, and State and Industry Intervenors' briefs, and writes separately to emphasize the following issues:

First, the ACE Rule properly restored the cooperative federalism balance codified in the CAA under which "air pollution prevention . . . and air pollution control at its source *is the primary responsibility of*

States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added). The ACE Rule lawfully returns to States the authority to establish performance standards based on guidelines set by EPA. The ACE Rule recognizes that Section 111 mandates that EPA plays a specific and limited role within the CAA, including vesting EPA with limited authority under Section 111(d) to establish "procedures" that allow States – and not EPA – to establish performance standards for existing sources. The ACE Rule properly repealed the CPP's unlawful CO_2 emission standards which mandated that North Dakota shut down coal-fired power plants, usurping the sovereignty reserved to North Dakota under the CAA.

Second, the ACE Rule conforms to the limits of EPA's authority under the CAA by basing the BSER on emission control technologies that States can apply when setting source-specific performance standards. This corrects the CPP's generation shifting approach that forced States to apply the BSER at the grid level, and adheres to the requirement in Section 111 that EPA set a BSER that can be applied by the States at a source-specific "building, structure, facility, or installation." 42 U.S.C. § 7411(a)(3).

Third, the ACE Rule properly permits States the flexibility to account for source-specific factors, including the remaining useful life of facilities, when establishing performance standards. This follows the text of the CAA, by which Congress directed that EPA "shall permit" States the flexibility to consider "the remaining useful life" of "the existing source" for "any particular source" to which such standard applies. 42 U.S.C. § 7411(d)(1).

ARGUMENT

I. The ACE Rule Properly Returned Authority to States to Establish Standards of Performance for CO_2 Emissions Under the Cooperative Federalism Codified in the Clean Air Act

The CAA "made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The CAA contains several programs under which EPA sets standards, such as for the concentration of certain pollutants in ambient air, that are then implemented and administered by the States through State Implementation Plans. *See generally* 42 U.S.C. § 7410.

In this "experiment in cooperative federalism," *Michigan v. E.P.A.*, 268 F.3d 1075, 1083 (D.C. Cir. 2001), the CAA establishes that

improvement of the nation's air quality will be pursued "through state and federal regulation," where the source control of air pollution is the primary responsibility of the States. *BCCA Appeal Group v. E.P.A.*, 355 F.3d 817, 821-22 (5th Cir. 2003); *see also* 42 U.S.C. § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source is *the primary responsibility of States and local governments*") (emphasis added); and 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .").

Section 111(d) implements this cooperative approach by requiring EPA to "establish a procedure" for *States* to submit plans that "establish[] standards of performance for [certain] existing source for any air pollutant[s]". . . . *Id.* A "standard of performance" is "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) [EPA] determines has been *adequately demonstrated*." 42 U.S.C. § 7411(a)(1) (emphasis added).

EPA may not set emission reduction requirements for States or existing sources. EPA instead is only authorized to "establish a procedure" (42 U.S.C. § 7411(d)(1)) for States to submit plans containing State performance standards. EPA then reviews State plans to determine if the performance standards are "satisfactory" (42 U.S.C. § 7411(d)(2)(A)). But EPA's power to establish procedures and review State plans is limited and cannot be used, as was attempted in the CPP, to dictate a minimum required level of emissions reduction for the energy sector in North Dakota or any other State, or to force States to completely revamp their energy generation infrastructure.

The CPP established a BSER based largely on restructuring the energy generation sector rather than considering achievable and demonstrated emission controls at specific categories of existing emission sources as required by Section 111. EPA Br. at 31 (citing ACE Rule, 84 Fed. Reg. at 32,526/3). Rather than providing guidelines for controlling emissions at existing facilities, the CPP mandated a CO_2 emission rate performance requirement of 1305 CO_2 per lb/MWhr for the energy generation sector generally that was not tied to any specific category of air emissions generating that electricity. 80 Fed. Reg. at

64,742. Not surprisingly, most of the control measures implicit in the CPP's BSER had nothing to do with controlling emissions from coal-fired power plants and had everything to do with closing coal-fired EGUs and replacing them with natural gas EGUs or power from renewable resources. EPA did not even pretend that the CPP's mandate could be achieved by existing power plants, concluding that States would be forced to explore "generation shifting from higher emitting to lower-emitting EGUs as a component of BSER." 80 Fed. Reg. at 64,729. The BSER established in the CPP discarded the statutory mandate that performance standards must be "achievable" and "demonstrated" by the category of air emissions source to which they are applicable. The entire point of the CPP was to mandate a minimum emission limitation that was not achievable by existing coal-fired power plants in order to force States to re-structure their power generation infrastructure in order to meet EPA's CO_2 reduction goals. The CPP therefore violated Section 111(d) by establishing a BSER that was not based on controlling emissions from existing sources using demonstrated and achievable methods and compounded this error imposing an energy sector-wide performance standard that usurped the

States' authority and ability to establish performance standards for existing sources. There was no conceivable, much less available or demonstrated, performance standard for existing coal-fired power plants that North Dakota could come up with that would allow the State to meet the CPP's mandate.

The CPP's unprecedented strategy to use the CAA to exercise federal control over how and by whom energy can be generated was an unlawful power grab that not even the Federal Energy Regulatory Commission ("FERC") could exercise under the Federal Power Act. While the Federal Power Act grants FERC authority to regulate facilities used for the "*transmission or sale* of electric energy," (16 U.S.C. § 824(b)(1)) (emphasis added), Congress carefully preserved States' sovereign authority over the regulation of electric *generation* state-wide. *See* 16 U.S.C. § 824(a) (Federal regulation extends "only to those matters which are not subject to regulation by the States"); *see also* EPA Br. at 101.

Further, EPA's duty to promulgate BSER regulations guiding State standards of performance is not a requirement to establish hard emissions limitations. Public Health and Environmental Petitioners

incorrectly attempt to read Section 111(d) as requiring that EPA set the "minimum degree of emission limitation to be incorporated in standards of performance." Env. Br., at 20. This strained reading of the definition of a "standard of performance" only addresses the first part of the definition, "the degree of emission limitation achievable" and leaves out the operative tail of that definition "*through the application* of the [BSER]" (and also ignores the definition's consideration of cost and that the achievability of the standards must be demonstrated). 42 U.S.C. § 7411(a)(1). The Petitioners incorrectly conclude that Section 111 requires that EPA set a "quantitative emission limit," such as the 1305 CO_2 per lb/MWhr mandate set in the CPP. *Id.* at 21.

As EPA has amply demonstrated in its brief, the BSER is an emissions *guideline* that is then left to States to apply, using their own expertise, to set source-specific performance standards. EPA Br. at 231. EPA properly adhered to this statutory mandate in the ACE Rule through a specified range of reduction available for heat rate improvement measures. *Id.*

The Public Health and Environmental Petitioners' also ignore the cooperative federalism element of Section 111(d), wherein EPA

establishes a "procedure" (e.g., the BSER) that the States use to exercise their authority to establish performance standards for specific categories of sources. The States, not EPA, set the performance standards. Only if a State "fails to submit a satisfactory plan," or fails "to enforce the provisions of such plan," may EPA step in and regulate itself by setting and enforcing standards. 42 U.S.C. § 7411(d)(2). The CPP, and the Public Health and Environmental Petitioners here, would shift EPA's role from establishing guidelines to assist the States to issuing fixed mandates that hamstring the States. Further, they would eviscerate North Dakota's express authority under Section 111(d) to "establish" standards of performance. Transforming the structure of Section 111(d), Public and Environmental Petitioners advocate for a mandated CO_2 per lb/MWhr limit that would require States to completely upend their power generation infrastructure to meet (EPA previously admitted that the CO_2 per lb/MWhr standard in the CPP could only be met through generation shifting, not performance standards for controlling air emissions from existing facilities). This would usurp North Dakota's authority to "establish" performance standards by requiring that EPA dictate what the standards must be.

This is inconsistent with the statutory language of Section 111 and is precisely why EPA repealed the CPP.

In the ACE Rule, EPA has properly corrected the CPP's jurisdictional overreach by establishing BSER that the States can apply to specific categories of existing EGUs, and not upend the entire energy sector. The ACE Rule correctly rejects the notion that EPA has the authority regulate energy generation and returns to State authority "matters traditionally reserved for States: 'administration of integrated resource planning and . . . utility generation and resource portfolios'." ACE Rule, 84 Fed. Reg. at 32,529 (quoting *New York v. FERC*, 535 U.S. 1, 24 (2002)). The ACE Rule also restores the Federal-State relationship established by the statute, with EPA setting guidelines in BSER tied to specific categories of sources of emissions, which the States use to "set rate-based standards of performance . . . generally be in the form of the mass of carbon dioxide emitted per unit of energy (for example pounds of CO2 per megawatt-hour or lb/MWh)." ACE Rule, 84 Fed. Reg. 32554/3. As the ACE Rule properly returns this statutorily mandated authority to the States, it must be upheld and Petitioners' challenges must be dismissed.

II. The Clean Air Act Mandates that States Retain Their Sovereign Power to Regulate Emissions from Existing Sources

State and Municipal Petitioners assert that "the flexibility that both States and sources have in section 111(d)'s regulatory scheme" under the cooperative federalism enshrined in the CAA "supports EPA's authority to consider a broad range of emission-reduction measures" such as the generation shifting strategy of the CPP. State Pets. Br., 38. This turns cooperative federalism on its head and mischaracterizes what EPA did in the CPP.

The CAA's cooperative federalism and Section 111(d) mandate the exact opposite of what State and Municipal Petitioners argue. EPA's role is limited to establishing control measures and guidelines that States use to adopt standards of performance under the sovereignty reserved to them in the CAA. EPA's statutory grant of authority is limited to guiding States to apply the BSER (properly established) at "any particular" existing source. 42 U.S.C. § 7411(d)(1)(B). Thus "States retain the last word" in a federal-state regulatory partnership (*FERC v. Electric Power Supply Ass'n.*, 136 S.Ct. 760, 780 (2016)), and "enumerated limitations to set out an exclusive list" that restricts EPA's

regulatory authority (*T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 303 (2015)). As EPA amply demonstrated in its Opening Brief, this mandate requires that EPA establish a BSER that the States can apply at a source-specific level (EPA Br. 58-70), so that States can create performance standards for such sources and maintain the flexibility to design those standards based on the States' expertise.

This is not to say that States have unfettered authority or discretion. States must use EPA's guidelines (i.e., the BSER) in setting performance standards, and EPA then retains the authority to review the States' plans. *Cf. Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 482 (2004). However, the BSER upon which the States rely must be one that EPA is statutorily authorized to promulgate under Section 111(d) (i.e., guidance for control measures that can be applied at the source, not a binding mandate for the energy sector as a whole, divorced from sources of emissions).

While State and Municipal Petitioners argue that the CPP's novel generation shifting mandate is "the best at effectively reducing CO_2

emissions," and a good policy choice (State Pets. Br. 39)[1], EPA is an agency of limited jurisdiction and is not free to refashion the nation's entire energy generation infrastructure. Section 111(d) specifically mandates that EPA issue emission reduction guidelines as they apply to specific sources or air emissions, and that States be left to administer their own expertise in creating and applying the appropriate standard of performance. There is nothing in the CAA that gives EPA authority to pick winners and losers in the energy generation business. The CPP was an unprecedented effort by EPA to assert – through regulation – a degree of federal control over energy generation that Congress has never granted any federal agency, including FERC. If State and Municipal Petitioners want to take the power to regulate energy generation away from the States and give it to EPA, they are free to ask Congress. Until then, EPA's authority is constrained by the text of the CAA, not whatever Petitioners might think is good policy. Congress' clear intent codified in the CAA must control under *Chevron*. *See*

[1] North Dakota contested whether generation shifting was the best approach to reducing emissions as a part of a coalition challenging the CPP in *West Virginia v. EPA*, No. 15-1363, Doc. 1610031 (D.C. Cir. Apr. 22, 2016); Pet. Opening Br. on Core Legal Issues, id., Doc. 1610010 (D.C. Cir. Apr. 22, 2016).

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). As the Supreme Court recently acknowledged, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest . . [o]nly the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton County,* 140 S.Ct. 1731, 1737 (2020). EPA's BSER codified in the ACE Rule as an emission control guideline established at a source-specific level, and not a sector-wide CO_2 limit, must be upheld.

III. The ACE Rule Properly Allows States to Consider Source-Specific Factors When Establishing Performance Standards For Regulated Sources.

EPA's Section 111(d) regulations must permit a State, "in applying a standard of performance to any particular source under a plan," to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1)(B). Unlike the CPP, the ACE Rule complies with this statutory requirement by permitting States to rely on source-specific factors, including remaining useful life of a particular source. ACE Rule, 84 Fed. Reg. at 32,521/2. "In this way, the state and federal roles complement each other as the EPA has the authority and

responsibility to determine the BSER at the national level, while the States have the authority and responsibility to establish and apply standards of performance for their existing sources, taking into consideration source-specific factors where appropriate." *Id.*

Public Health and Environmental Petitioners mischaracterize Section 111(d) as solely allowing States to request a "variance from a standard of performance" in order to consider the remaining useful life of any given source, which requires a demonstration that "EPA must approve" when a State submits its standard of performance. Env. Br. at 24. This argument is inconsistent with the language of Section 111(d): EPA "shall permit the state in applying a standard of performance" to consider "the remaining useful life" of "the existing source" for "any particular source" to which such standard applies. 42 U.S.C. § 7411(d)(1); *see* also ACE Rule, 84 Fed. Reg. at 32,524; *id.* at 32,526. There is nothing in this text about States having to petition EPA for variances and the phrase "shall permit" does not leave any discretion to EPA to prohibit the States considering the useful life of existing sources. Their argument is also inconsistent with the title of Section 111(d): "Standards of performance for existing sources; *remaining useful*

life of source." *Id.* (emphasis added). In Section 111(d) Congress unequivocally codified that a State maintains the sovereign authority to make decisions, based on its own expertise, of what source-specific factors to consider, including whether to strand capital investment or ensure the continued productivity of such legacy investments. The statutory text is not a variance conditioned on EPA approval[2] – it is an absolute right. Thus Congress spoke directly under *Chevron* step one to the statutory interpretation question of whether States may consider source-specific factors when applying BSER to a particular source, and answered in the affirmative. *See Chevron,* 467 U.S. at 842-43.

EPA's previous Section 111(d) regulations (other than the CPP) complied with the statute and permitted States to take into account factors such as plant age when using EPA's guidelines to set performance standards without having to seek a variance from EPA. *See e.g.* 40 C.F.R. § 60.24(f) ("States may provide for the application of less stringent emissions standards or longer compliance schedules . . .

[2] EPA's authority to review a State's standard of performance determination discussed in Section II., *supra,* pp. 16-17, determines whether a State has made a supportable conclusion, not whether the State is eligible to consider source-specific factors in the first place.

provided that the State demonstrates . . . [u]nreasonable cost of control resulting from plant age, location, or basic process design . . . or . . . factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable"). States such as North Dakota are uniquely positioned and equipped to consider such factors for sources within their own borders in a way that EPA is not.

The ACE Rule now properly returns to States the ability to take into account these unique and source-specific factors in contrast to the CPP, which failed to allow for any source-specific considerations when applying the federal performance requirements.[3]

CONCLUSION

For the reasons explained above, and in EPA's, Intervenors for Respondent's, and State and Industry Intervenors' Briefs, the Court should deny the petitions for review and declare that the ACE Rule was promulgated in accordance with law.

[3] Which, as noted in Section I, *supra* at 10, were tied to fixed CO_2 emission rate performance requirement of 1305 CO_2 per lb/MWhr applicable to the entire energy generation sector.

Dated: July 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing brief contains 4,002 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: July 16, 2020

/s/ *Paul M. Seby*
Paul M. Seby

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of July, 2020, a copy of the foregoing brief was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ *Paul M. Seby*
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