ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*, *Petitioners*, v. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	No. 19-1140 and consolidated cases

EPA'S RESPONSE IN OPPOSITION TO BIOGENIC CO2 COALITION'S MOTION TO SEVER AND HOLD ISSUES RELATING TO BIOGENIC EMISSION IN ABEYANCE

EPA opposes the Biogenic CO2 Coalition's (the "Coalition") motion to sever its petition from all of the other consolidated cases challenging the ACE Rule[1] and hold the issues they intend to raise in abeyance. Contrary to the Coalition's assertion, Coalition Mot. at 4, any issue the Coalition might properly raise in a challenge to EPA's rule will necessarily relate to core legal issues in that rule that other Petitioners are likely to challenge.

[1] "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," 84 Fed. Reg. 32,520 (July 8, 2019).

The ACE Rule finalized three separate and distinct rulemakings. First, EPA repealed the Clean Power Plan, in which EPA had promulgated Clean Air Act (CAA) Section 111(d) emission guidelines for states to follow in developing plans to reduce greenhouse gas emissions from power plants, because the Clean Power Plan exceeded EPA's statutory authority. 80 Fed. Reg. 64,662 (Oct. 23, 2015). Second, EPA finalized replacement emission guidelines for states to use when developing plans, premised on an alternative regulatory approach to that set forth in the Clean Power Plan. Third, EPA finalized new regulations for EPA and state implementation of those guidelines and any future emission guidelines issued under CAA Section 111(d). As suggested by the Coalition, the issue it seeks to raise[2] in this matter goes to the second of the three; specifically, to EPA's determination of what measures may be used to demonstrate compliance with state plan standards established pursuant to EPA's emission guidelines. However, as explained below, this issue is also inextricably linked to the first part—the repeal of the Clean Power Plan.

Based on the Coalition's administrative petition for reconsideration, "the biogenic issue" is an argument that EPA should have "categorically exclude[d] from the methods for determining compliance with the ACE Rule those CO2 emissions resulting from the combustion of biomass derived from short-cycle agricultural crops

[2] The Coalition's motion hides the ball, as it does not describe the issue they intend to raise. However, it references the Coalition's petition for administrative reconsideration as raising "the biogenic issue." Coalition Mot. at 4.

or crop residues and otherwise clarif[ied] that biogenic emissions are not harmful pollution under the Clean Air Act." Coalition Admin. Pet. for Recon. at 2-3; *see also* 84 Fed. Reg. at 32,557-58.

In their comments on the ACE Rule, the Coalition argued that "biogenic emissions are a valid compliance option" for regulated sources.[3] Coalition Comment Ltr. at 4, Docket No. EPA-HQ-OAR-2017-0355-23710. The Coalition elaborated that their position is based on an assumption that agricultural biomass used for co-firing is beneficial "when entering the fenceline of the affected source because the farmer has already captured CO_2 from the atmosphere when growing the crop." *Id.* at 5. That is, the Coalition asserts that emission reductions achieved through the growth of agricultural biomass should be considered when determining compliance with state plan standards. This position is predicated on an assumption that CAA Section 111(d) allows for consideration of activities that are not applied at or to the regulated source and are not under the control of that source.[4] EPA addressed this issue in the

[3] The Coalition also argued in their comments on the ACE Rule that EPA cannot regulate biogenic CO_2 emissions because the Agency has not made an endangerment or cause-and-contribute finding specifically for CO_2 emissions from agricultural feedstocks. *See* Coalition Comment Ltr. at 4, Docket No. EPA-HQ-OAR-2017-0355-23710. To the extent the Coalition seeks to challenge the inclusion of biogenic CO_2 in EPA's greenhouse gas endangerment and cause or contribute findings under Title II of the Clean Air Act, such challenges would be time-barred collateral attacks. *See* 42 U.S.C. § 7607(b)(1).

[4] Such activities are sometimes colloquially referred to as occurring "beyond the fenceline" of a source, although the ACE Rule itself does not use that terminology.

ACE Rule, explaining that the "construct of this final ACE rule necessitates that measures taken to meet compliance obligations for a source actually reduce its emission rate in that: (1) They *can be applied to the source itself* . . . ." ACE Rule at 32,558 (emphasis added). Therefore, EPA determined that biomass co-firing could not be a compliance mechanism because "biomass firing in and of itself does not reduce emissions of CO_2 emitted *from that source*." *Id.* (emphasis added). EPA also explained that biomass co-firing could not be considered in the Administrator's determination of the "best system of emissions reduction" for similar reasons, as it would conflict with the "plain language of CAA section 111." *Id.* at 32,546. Specifically, "the [best system of emission reduction] determination must include systems of emissions reduction that are *achievable at the source*," and biomass co-firing thus did not qualify. *Id.* at 32,546-47 (emphasis added).

The "biomass issue" is thus tied to one of the principal challenges that the other Petitioners intend to bring to the ACE Rule: that EPA erred in concluding that CAA Section 111(d) does not authorize EPA to "select as the [best system of emission reduction] a system that is premised on application to the source category as a whole or to entities entirely outside the regulated source category." *Id.* at 32,524 (explaining further that "the [best system of emission reduction]—like standards of performance—cannot be premised on a system of emission reduction that is implementable only through the combined activities of sources or non-sources"); *see also id.* at 32,523-32; Mot. for Abeyance at 3-4, *Am. Lung Ass'n v. EPA*, Dkt. 19-1140,

Doc. No. 1807492 (Sept. 20, 2019). The Coalition's "biogenic issue" should be addressed concurrently with other challenges to this statutory interpretation because the interpretation was the principal basis for EPA's rejection of the Coalition's position in the ACE Rule, the repeal of the Clean Power Plan, and the newly promulgated emission guidelines.

Moreover, the Coalition is incorrect in suggesting that EPA has "indicated that it will resolve the biogenic issue [raised in the ACE Rule] in an administrative proceeding this year." Coalition Mot. at 4. Although EPA is developing a proposed rule that concerns biogenic CO_2, that rulemaking is intended to "address the treatment of biogenic carbon dioxide (CO2) emissions from the use of certain biomass feedstocks at stationary sources *under the Prevention of Significant Deterioration (PSD) and Title V permitting programs*."[5] These programs are based on Sections 165-169 and 501-507 of the Clean Air Act and thus involve different provisions of the Clean Air Act that impose different legal requirements than Section 111(d). EPA has not represented that the PSD/Title V rulemaking will address the "biogenic issue" relating to compliance with the ACE Rule that the Coalition suggests it will raise in its petition before this Court for review of that Rule. *See supra* at 2-3. As explained above—and unlike cases in which EPA consented to an abeyance because the challenged action arguably left unresolved some question regarding the appropriate regulatory treatment

[5] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AU03 (emphasis added).

of biogenic CO_2, as was the case in the EPA's Clean Power Plan and New Source Performance Standards rulemakings, *see* Coalition Mot. at 3 (citing those challenges)—EPA has already definitively spoken to the "biogenic issue" in the context of the ACE Rule, and it is now ripe for judicial review. Put succinctly: a rulemaking addressing the treatment of biogenic CO_2 under the Clean Air Act's PSD and/or Title V provisions would not impact EPA's conclusion in the ACE Rule that biogenic CO_2 emissions cannot be treated differently than other CO_2 emissions for purposes of complying with standards set pursuant to CAA Section 111(d).

In light of these facts, severing the Coalition's petition would undermine judicial economy and be prejudicial to EPA and the other parties who desire resolution of the core legal questions underlying the ACE Rule. Related issues in these consolidated challenges to the ACE Rule should be briefed together, rather than requiring EPA to file separate briefs, at a later time, responding to the "biogenic issue." Nor is it efficient for the Court to address these issues separately. Indeed, because the "biogenic issue" relates to the statutory interpretation underlying the repeal of the Clean Power Plan and EPA's formulation of the ACE Rule's emission guidelines, if the Coalition wants to be heard *at all* on EPA's statutory interpretation, it must litigate that issue *now*.[6]

[6] This includes, for example, any argument the Coalition might advance that biogenic CO_2 is an appropriate measure to be included in the best system of emissions reduction or used as a compliance mechanism under EPA's statutory interpretation.

The Coalition's passing suggestion that proceeding in this case could undermine "the Court's interest in the efficient and consistent resolution of the biogenic issues under the Clean Air Act and would raise the specter of conflicting rulings," Coalition Mot. at 5, is specious. Although there may be a common general policy question raised in these various matters regarding regulation of emissions from biogenic CO_2, the other cases the Coalition cites remain in abeyance and challenge different rules promulgated under different legal requirements and regulatory contexts.[7] Furthermore, even to the extent that there is overlap between the policy issues raised in those cases and the "biogenic issue" the Coalition raises here, a resolution of the distinct legal issue in this matter will not create conflicting rulings; to the contrary, such a ruling may clarify the legal landscape in a manner that could assist EPA with resolving the policy issues in these other contexts.

Finally, EPA has moved to expedite the Court's consideration of these consolidated cases. *See* EPA Mot. to Expedite, Doc. No. 1803976 (D.C. Cir. Aug. 28, 2019); EPA Reply in Support of Mot. to Expedite, Doc. No. 1806760 (D.C. Cir. Sept. 16, 2019). The same rationales as articulated in that motion counsel in favor of

[7] The Coalition's petition for review of the Clean Power Plan has been dismissed as moot. *See Biogenic CO2 Coalition v. EPA*, Dkt. 15-1479, Doc. No. 1808434 (D.C. Cir. Sept. 27, 2019). The other two cases the Coalition cites relate to EPA's New Source Performance Standards rulemaking for coal-fired power plants, *see Biogenic CO2 Coalition v. EPA*, Dkt. 15-1479 (D.C. Cir. Dec. 22, 2015), and EPA's Aircraft Endangerment Finding rulemaking, *see Biogenic CO2 Coalition v. EPA*, Dkt. 16-1358 (D.C. Cir. Oct. 14, 2016).

resolving all aspects of these consolidated cases, including the Coalition's challenge, expeditiously. The Court should promptly draw to a close the nationally important and long-running dispute over the scope of EPA's authority to regulate emissions from existing coal-fired electricity generating units under Section 111(d) and provide certainty to states and the regulated community.

EPA respectfully requests that the Court deny the Coalition's motion, enter the schedule set forth in EPA's motion to expedite, and, following the completion of briefing, schedule this case, including the Coalition's petition for review, for oral argument in April of 2020.

Respectfully submitted,

Dated: October 7, 2019

/s/ Benjamin Carlisle
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify that the foregoing complies with the type-volume limitation because it contains 1,801 words, according to the count of Microsoft Word.

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I hereby certify, pursuant to Fed. R. App. P. 25(c), that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

/s/ Benjamin Carlisle
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