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EPA's House of Cards: the Affordable Clean Energy Rule

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I. Introduction

EPA is pursuing a legally risky strategy in its Repeal of the Clean Power Plan (Repeal) and Affordable Clean Energy rule (ACE) to curtail its authority under the Clean Air Act. EPA argues that its interpretation of subsections 111(a)(1) and (d) of the Clean Air Act reflects the "plain meaning" of "unambiguous" statutory language.[1] EPA does not acknowledge ambiguity in section 111 of the Clean Air Act and it does not try to show that its interpretation is reasonable. As a result, EPA does not give the D.C. Circuit a basis for deferring to the agency and upholding its interpretation of section 111. Since EPA's "plain meaning" arguments are strained, EPA is taking a risk that the rule will be remanded, or even vacated, given the distinctive way the D.C. Circuit reviews agencies' statutory interpretation.

We posit that EPA chose this approach for three reasons. First, there is little cost from EPA's perspective, since a remand would simply delay implementation of ACE. Second, a decision holding that subsection 111(d) unambiguously requires EPA to issue rules based on measures that can be implemented by each individual source would complicate or even doom efforts by any future EPA to write a meaningful carbon dioxide (CO_2) reduction rule under subsection 111(d). Third, this approach allows EPA to avoid taking account of the rulemaking record, which compels a rule that would achieve far greater CO_2 reductions from power plants than ACE, which requires almost no reductions.[2] The record also makes a strong case that EPA's interpretation in ACE is unreasonable because it led to an unreasonable conclusion: that Congress barred EPA from considering the most effective ways to reduce power plant pollution when implementing subsection 111(d). It would have been very difficult for the agency to face the record and overcome it. EPA has opted to forego the chance to earn the court's deference rather than to take that risk.

EPA is gambling in a bid to win a definitive D.C. Circuit or Supreme Court ruling, that as a matter of law it is beyond the agency's authority to consider the most effective power plant CO_2 reduction measures under subsection 111(d).

1 *See* U.S. EPA, 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, 32,524 (July 8, 2019).

2 ACE is projected to achieve about a 0.7 percent reduction in CO2 emissions. Office of Air Quality Planning and Standards, U.S. EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, EPA-452/R-19-003, ES-6 (June 2019).

II. EPA Reverses Course, Decides 111(d) Is Unambiguous

EPA issued the CPP in 2015 to address CO_2 emissions from coal- and natural gas-fired power plants. If the CPP were fully implemented, CO_2 emissions from the electricity sector would fall by at least 32% below 2005 levels by 2030.[3] The CPP locked in those reductions by requiring plants to achieve them as a matter of law. The CPP's CO_2 reduction requirements were also projected to produce substantial reductions in emissions of oxides of nitrogen and sulfur dioxide.[4]

EPA relied on subsection 111(d) of the Clean Air Act to issue the Clean Power Plan. Subsection 111(d) provides, in part:

> 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.[5]

Subsection 111(a)(1) defines the term "standard of performance" as

> 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 impacts and energy requirements) the Administrator determines has been adequately demonstrated.[6]

Under the Clean Power Plan, EPA determined that the "best system of emission reduction" (BSER) for coal- and natural gas-fired power plants was a combination of improving coal plant operating efficiency and shifting generation from those plants to lower- and zero-emitting generators, specifically natural gas plants and renewable energy sources. The CPP's determination of the best system of emission reduction reflected fundamental attributes of power plants and how they operate.

Power plants do not operate as isolated sources of electricity generation. Rather, they are connected to each other by a network and their operations must be harmonized to reflect the physics of electric power. Shifting generation between units across the network is integral to normal operation.

Utilities have historically relied on shifting generation from higher-emitting to lower- or zero-emitting facilities to comply with other pollution-control requirements such as the state-enforced CO_2 emissions limitations of the Regional Greenhouse Gas Initiative, the SO_2 and NOx requirements of the EPA's Cross State Air Pollution Rule, and the SO_2

3 *See* U.S. EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,665 (Oct. 23, 2015).

4 *See id.* at 64,670.

5 42 U.S.C. § 7411(d) (2012).

6 *Id.* at § 7411(a)(1).

limitations imposed by Title IV of the Clean Air Act to address acid rain.

On February 9, 2016, the Supreme Court stayed the Clean Power Plan (CPP). The stay halted implementation of the CPP until the legal challenges before the D.C. Circuit Court of Appeals, and any potential appeals to the Court itself, were resolved.

The D.C. Circuit, sitting *en banc,* heard oral argument on the CPP on September 27, 2016. As of President Trump's inauguration in January 2017, the court had not issued its opinion. Shortly thereafter EPA asked the court to hold its decision in abeyance as it began the rulemaking process to repeal the CPP and draft a replacement rule.

On July 8, 2019, the Environmental Protection Agency (EPA) issued the Repeal of the Clean Power Plan (Repeal) and promulgated the Affordable Clean Energy (ACE) Rule to replace the Clean Power Plan. EPA has repealed the CPP because it now believes that its 2015 interpretation of subsection 111(d) and its determination of the "best system of emission reduction" were illegal. In both the Repeal and ACE, EPA asserts that the language of the Clean Air Act is "unambiguous" and that the *only possible* interpretation of subsection 111(d) is that the BSER must include only measures that can be applied at an individual source (inside-the-fenceline). The result, according to EPA, is that BSER may not include the replacement of high-emitting generation with lower-emitting generation because such generation shifting entails activities that cannot be implemented by a single source (beyond-the-fenceline).

In ACE, EPA determined that the BSER for CO_2 emissions from coal-fired power plants is a set of heat rate improvement measures to increase operational efficiency and to be installed at individual facilities. EPA concedes that these measures will not achieve more than a 1% reduction in CO_2 emissions, and will not lock in the emissions reductions that the sector is likely to achieve on its own.[7] In addition, ACE covers only coal-fired plants and does not cover natural gas plants, in contrast to the CPP.[8] Comments on the ACE proposal included peer-reviewed analysis estimating that ACE would increase CO_2 emissions in 18 states and that 20 states could see increases in nitrogen oxides or sulfur dioxide emissions.[9] A similar analysis produced results that "… demonstrate that the ACE rule does little to address climate change and is likely to have even greater adverse air quality and health effects in some states compared to no policy…."[10]

7 *See* Office of Air Quality Planning and Standards, U.S. EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, EPA-452/R-19-003, ES-6 (June 2019) (estimating a decrease of 0.7 percent compared to business as usual).

8 *See* U.S. EPA, 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, 32,543 (July 8, 2019).

9 *See* Amelia T. Keyes et. al, *The Affordable Clean Energy rule and the impact of emissions rebound on carbon dioxide and criteria air pollutant emissions,* 14 Envtl. Res. Letter 044018 (April 9, 2019).

10 Kathy Fallon Lambert et. al, *Carbon Standards Re-Examined: An Analysis of Potential Emissions Outcomes for the Affordable Clean Energy Rule and the Clean Power Plan*, Harvard C-CHANGE (July 17, 2019), https://www.hsph.harvard.edu/c-change/news/carbon-standards-re-examined/.

III. EPA's Strategic Choice: Risk a Remand in a Bid to Curtail Its Own Authority

EPA is taking an avoidable risk by not coupling its plain meaning argument with an alternative argument defending the reasonableness of its interpretation. If the D.C. Circuit agrees with challengers that the statute is ambiguous, EPA will not have an argument to fall back on and will have forfeited the deference the court could have granted to EPA's interpretation.

Under *Chevron v. Natural Resources Defense Council*, a court will defer to an agency's interpretation of an ambiguous provision in a statute that it administers, if the agency's interpretation is reasonable.[11] When presented with an agency's interpretation of a statute, a court first will investigate "...whether Congress has directly spoken to the precise question at issue."[12] (*Chevron* Step 1). If the court finds that there is not a definitive statement from Congress and the statute is ambiguous, it will assess whether the agency's interpretation of the statute is reasonable (*Chevron* Step 2). The agency does not even need to show that its chosen interpretation was the best among the options available in order to prevail. According to the Supreme Court in *Chevron*, Congress delegates authority to agencies to act according to their discretion and expertise when it leaves some ambiguity in a statute.[13] If the court finds the interpretation reasonable, it defers to the agency's expertise and upholds its interpretation.

EPA is taking an avoidable risk by not coupling its plain meaning argument with an alternative argument defending the reasonableness of its interpretation.

The riskiness of EPA's approach is especially acute in the D.C. Circuit. For more than 30 years and as recently as October 1, 2019,[14] the D.C. Circuit has applied what Professors Daniel Hemel and Aaron Nielson call the "*Chevron* Step 1.5" doctrine:

11 Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 US 837 (1984).

12 *Id*. at 842.

13 *Id*. at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.") (internal citations omitted).

14 Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051, 2019 WL 4777860, at *20 (D.C. Cir. Oct. 1, 2019) ("The Commission's burden here was only to show the reasonableness of its interpretation. It did so, and without running afoul of the doctrine that we must remand a decision when the agency rests its result on a mistaken notion that it is compelled by statute. *See, e.g., Prill v. NLRB*, 755 F.2d 941, 947–948 (D.C. Cir. 1985).").

> After deciding that the relevant statute is ambiguous but before deciding whether the agency's construction is permissible, the D.C. Circuit asks a separate question: whether the agency itself recognized that it was dealing with an ambiguous statute. In the D.C. Circuit, a misstep at this intermediate stage is fatal to an agency's cause: the court will remand if the agency claimed that the statute is clear but the court concludes it is not. In other words, the agency will lose if it mistakenly says that the issue can be resolved at *Chevron* Step One while the court determines that it should be resolved at *Chevron* Step Two. [15]

It is just this misstep that EPA is risking in the Repeal:

> [t]he definition of 'standard of performance,' and the scope of the 'best system of emission reduction' contained within, confers considerable discretion on the EPA to interpret the statute and make reasonable policy choices as to what is the best system to reduce emissions of a particular pollutant from a particular type of source....However... Congress spoke directly ... to the question of whether the BSER may contain measures other than those that can be put into operation at a particular source: It may not. The approach to BSER in the CPP is thus unlawful and the CPP must be repealed ...."[16]

As the D.C. Circuit puts it, "Where a statute grants an agency discretion but the agency erroneously believes it is bound to a specific decision, we can't uphold the result as an exercise of the discretion that the agency disavows."[17] If the agency's confidence in its "unambiguous" plain meaning argument turns out to be misplaced, the D.C. Circuit will not supply its own arguments on behalf of the reasonableness of EPA's interpretation to rule in favor of EPA. Instead, the court is more likely to force the agency to earn any potential deference by sending the Repeal and ACE back to the EPA to develop reasonableness justifications for its interpretation.

Given that the D.C. Circuit has remanded at least a dozen cases for this reason,[18] why didn't EPA set itself up to avoid remand and receive *Chevron* deference for the Repeal and ACE?

First, the immediate stakes for EPA are low because the D.C. Circuit has dismissed the case challenging the Clean Power Plan.[19] Even if the D.C. Circuit were to send the Repeal and ACE back to EPA to develop arguments that its interpretation of section 111 is a reasonable one, the only practical consequence would be a delay in the implementation of ACE.

15 Daniel Jacob Hemel & Aaron Nielson, *Chevron Step One-and-a-Half*, 84 U. Chi. L. Rev. 757 (2016).

16 U.S. EPA, 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, 32,532 (July 8, 2019).

17 United States v. Ross, 848 F.3d 1129, 1134 (D.C. Cir. 2017) (citing Prill v. NLRB, 755 F.2d 941, 947–48 (D.C. Cir. 1985)).

18 Daniel Jacob Hemel & Aaron Nielson, *Chevron Step One-and-a-Half: Appendix* (April 2017) available at: http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/Hemel%26Nielson_Appendix_IC.pdf.

19 Order Granting the Motions to Dismiss, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Sept. 17, 2019).

Second, the judicial risk EPA is taking indicates that it is seeking a ruling from the D.C. Circuit, or the Supreme Court, that finds the Clean Air Act confers only limited authority on the agency to mandate CO_2 emissions reductions from coal-fired power plants. If EPA wins such an outcome, future administrations will be saddled with a decision that as a matter of law excludes generation-shifting, emissions trading, and similar beyond-the-fenceline measures from EPA's 111(d) authority. In contrast, if EPA relied and prevailed on the argument that its interpretation is one possible, reasonable interpretation, then a future administration could offer an alternative interpretation to promulgate a more ambitious rule involving generation-shifting or emissions trading.

Third, EPA may have concluded that it was too difficult to make the case that its interpretation was reasonable. Extensive comments submitted to the rulemaking record show that EPA's interpretation is not reasonable. Those comments, from states, utilities, experts, and advocates, make a strong case that shifting generation from high-emitting to low-emitting sources is the best way to reduce power plant CO_2 emissions. EPA's approach allowed it to avoid the record.

Finally, if EPA had tried and failed to overcome the record, its failure would have underscored ACE's unreasonableness. EPA would have shown the court that its interpretation results in an unreasonable conclusion: that Congress barred EPA from considering the most effective ways to reduce power plant pollution when implementing subsection 111(d).

IV. Vulnerabilities in EPA's "Unambiguous" Argument

A. The CPP and CAMR Counterexamples

The upcoming litigation will hinge on EPA's assertion that the language of section 111 is unambiguous. The challengers' task will be to show that the language is, in fact, ambiguous and that other interpretations are available. In light of the D.C. Circuit's long-standing "*Chevron* Step 1.5" approach,[20] that could be all they need to show to secure a remand.

EPA has assisted the challengers by acknowledging that the Repeal interpretation is the third of three possible interpretations of subsection 111(d) and BSER. The CPP interpreted subsection 111(d) and BSER to encompass generation shifting. The 2005 Clean Air Mercury Rule (CAMR) interpreted subsection 111(d) and BSER to encompass emissions trading, similar to the CPP interpretation. While settled case law[21] allows regulatory agencies to reverse themselves on positions they have taken in earlier rules, both CAMR and the CPP offer *prima facie* evidence that subsections (a)(1) and (d) invite

20 It is worth noting that not all DC Circuit judges necessarily support the *Prill* line of cases. Among its skeptics is now-Chief Justice John Roberts. See n. 15 at 759. However, *Prill* is still persistent and stable. See nn. 14 & 17.

21 *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

more than one interpretation.

Issued in 2005, CAMR established requirements for power plant mercury emissions.[22] Parsing the exact same language of subsections (a)(1) and (d), EPA concluded that the "best system of emission reduction" for power plant mercury emissions was a cap and trade program. In the final rule, EPA explained that it

> interprets the term ''standard of performance,'' as applied to existing sources, to include a cap-and-trade program. This interpretation is supported by a careful reading of the section 111(a) definition of the term, quoted above: A requirement for a cap and-trade program (i) constitutes a ''standard for emissions of air pollutants'' (i.e., a rule for air emissions), (ii) ''which reflects the degree of emission limitation achievable'' (i.e., which requires an amount of emissions reductions that can be achieved), (iii) ''through *application* of (a) * * * system of emission reduction'' (i.e., in this case, a cap-and trade program that caps allowances at a level lower than current emissions).[23]

In the CPP, EPA interpreted subsections (a)(1) and (d) to encompass generation-shifting from high CO_2 emitting sources to lower CO_2 emitting sources as the BSER and found that states could "establish a standard of performance for any existing source"[24] reflecting a BSER based on generation-shifting.

CAMR and the CPP present a critical contrast to the Repeal. The Repeal's interpretation centers on the argument that while subsection 111(a)(1) itself might be broad enough to include generation-shifting or trading, the language of subsection (d) cuts off that breadth.

In CAMR and the CPP, in contrast, EPA did not find that the phrases "establishes standards of performance for any existing source" or "the application of the best system of emission reduction" limited the scope of the BSER determination. Rather, the CPP and CAMR distinguished between EPA's determination of the BSER and the states' role in applying a standard of performance intended for individual sources that reflected the BSER. By recognizing that distinction, CAMR and the CPP harmonized the BSER and the language of subsection (d) so that EPA could consider a wide range of measures to reduce emissions from the power sector.

B. EPA's Strained "Plain Meaning" Interpretation of Section 111

To narrow the scope of its "considerable discretion," EPA must try to show that the Clean Air Act reads clearly and that Congress spoke directly in section

22 The Clean Air Mercury Rule was vacated due to a flawed CAA section 112 delisting rule, and the D.C. Circuit did not reach the merits of the EPA's BSER and interpretation of CAA subsection 111(d). Since it was vacated on unrelated grounds, CAMR can still be considered a model for how subsection 111(d) can be interpreted to support a cap-and-trade program. New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008).

23 U.S. EPA, Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,616–17 (May 18, 2005).

24 42 U.S.C. § 7411(d) (2012).

111 to limit EPA from considering measures beyond the fenceline. While EPA insists its legal interpretation renders the "plain meaning" of the statute, it teases out this plain meaning through complex and dubious arguments that only serve to highlight the ambiguity in section 111.

EPA's reading of subsection (a)(1) in conjunction with (d) is the foundation for its argument that the BSER can only encompass inside-the-fenceline measures. EPA inserts the standard of performance definition from (a)(1) into (d) to demonstrate how the provisions should be read together. According to EPA in ACE, "the plain meaning of CAA section 111(d), therefore is that states shall submit a plan which 'establishes [a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the [BSER] …] for any existing source.'"[25]

After noting that there is no statutory definition for "application," the Repeal supplies a definition and concludes that the verb "to apply" needs a direct object and indirect object. EPA asserts that "…the direct object is the BSER" and "…the indirect object is the 'existing source'" per subsection (d).[26] Then: "Consequently, CAA section 111 unambiguously limits the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation."[27]

But this interpretation cannot be squared with the text. States do not apply BSER to existing sources under subsection (d), as EPA contends. Subsection (d) requires states to apply a "standard of performance" to existing sources via state plans, "which provide[] for *the implementation and enforcement of such standards of performance*."[28]

While EPA insists its legal interpretation renders the "plain meaning" of the statute, it teases out this plain meaning through complex and dubious arguments that only serve to highlight the ambiguity in section 111.

EPA's new interpretation ignores what the agency reasonably saw in the CPP explicitly and in CAMR implicitly: that the states' role in implementing standards of performance encompassed enough flexibility to accommodate a BSER based on more than just inside-the-fenceline measures, such as generation shifting, or emissions trading in the case of CAMR.

Also, EPA harmonized subsections (a)(1) and (d) in CAMR and the CPP to give meaning to the terms "emission reduction" and "degree of emission limitation achievable," as the courts require.[29] EPA

25 *Id.* at 32,523–24.

26 *Id.* at 32,524.

27 *Id.* (emphasis in original).

28 *Id.* at 32,532 (emphasis added).

29 Sierra Club v. Costle, 657 F.2d 298, 326 (D.C. Cir. 1981) ("We

considered "emission reductions" specifically when making BSER determinations in the CPP and CAMR, and both were designed to achieve signification reductions.

The Repeal's reading of subsection (d) curtails EPA's investigation of the best system of emission reduction as described in subsection (a)(1). EPA renounces the discretion granted by subsection (a)(1) in favor of its limited reading of (d), claiming that it can only consider a narrow range of inside-the-fenceline measures. EPA has established the exact situation that the D.C. Circuit has identified as problematic and worthy of remand according to *Chevron* Step 1.5.[30] However, the rulemaking record shows that inside-the-fenceline measures produce negligible emissions reductions. The discord EPA creates between the broad language of subsection (a)(1) and the purported limits drawn by (d) is troublesome to EPA's "plain meaning" argument because inside-the-fenceline measures cannot produce significant reductions and alternative measures are available.

EPA's "plain meaning" arguments lead it to an untenable position: that Congress clearly intended to prevent EPA from considering how power plants operate in reality and how they can achieve substantial, cost-effective reductions in CO_2.

C. History Contradicts EPA's Arguments against Generation-Shifting

EPA argues that the CPP's reliance on generation-shifting was flawed:

> This was *the first time* the EPA interpreted the BSER to authorize measures *wholly outside a particular source*. The EPA reached this determination by *interpreting the statutory term ''application'' as if it instead read ''implementation''* (without pointing to any legal basis for equating those terms), and interpreting the phrase ''system of emission reduction'' broadly as ''a set of measures that work together to reduce emissions and that are implementable by the sources themselves.'' ''As a practical matter,'' the Agency continued, *''the 'source' includes the 'owner or operator'* of any building, structure, facility, or installation for which a standard of performance is applicable.'' The EPA then concluded that the breadth of a dictionary definition of the word ''system'' established the bounds of its statutory authority, finding that the phrase '''system of emission reduction' . . . means a set of measures that source owners or operators can implement to achieve an emission limitation applicable to their existing source.[31]

can think of no sensible interpretation of the statutory words ''best . . . system'' which would not incorporate the amount of air pollution as a relevant factor to be weighed when determining the optimal standard for controlling...emissions").

30 *See, e.g.*, Prill v. NLRB, 755 F.2d 941, 947–948 (D.C. Cir. 1985).

31 U.S. EPA, 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, 32,526–27 (July 8, 2019) (emphasis added).

These two lines of argument simply do not work. The CPP was not the first time EPA determined that BSER included "measures wholly outside a particular source." In CAMR, EPA determined that the transfer of emissions allowances between sources – cap and trade – was BSER. These transactions occur "wholly outside a particular source." Contrary to the Repeal's assertion, "source" necessarily included the owner or operator under both CAMR and the CPP. The CPP interpretation of BSER is not unprecedented, but the Repeal's distinction between "source" and "owner and operator" is.

Two more considerations contradict EPA's arguments against generation-shifting.

First, Congress added the current definition of "standard of performance" in the Clean Air Act Amendments of 1990 to replace the definition it had enacted in the Clean Air Act Amendments of 1977. In so doing, it removed more prescriptive language that had explicitly contemplated source-specific measures in a way that subsection (a)(1) does not.

The 1990 Amendments' definition of "standard of performance" removed the specification that "a standard of performance shall reflect the degree of emission limitation *and the percentage reduction* achievable through the application of the *best technological system of continuous emission reduction…*"[32] The removal of these terms shows that Congress saw EPA's job as making "reasonable policy choices pursuant to *Chevron* Step Two as to what is the best system to reduce emissions of a particular pollutant from a particular type of source."[33] The Repeal even acknowledges this EPA task.

Second, as EPA noted in the CPP, the 1990 Amendments also added subsection 407(b)(2). Like subsection 111(d), subsection 407(b)(2) targets pollution reductions from existing sources, requiring the EPA to set standards for oxides of nitrogen (NOx) emissions from existing power plants. The contrast between the amended, broader language in subsection 111(a)(1) and subsection 407(b)(2) is telling. Subsection 407(b)(2) states that EPA regulations must be based on "the degree of reduction achievable through the *retrofit* application of the best system of continuous emission reduction…."[34] Remember, subsection 111(a)(1) defines "standard of performance" as a standard reflecting "the degree of emission limitation achievable through the application of the best system of emission reduction…."[35]

The NOx program targeted reductions from the existing fleet of coal-fired power plants through the installation of "retrofit" technology at each covered source. Subsection 407(b)(2) shows how Congress writes a provision when it intends for emission reductions to be achieved solely by means of technology retrofitted to each individual source in a category. Congress could have used similar language

32 Clean Air Act Amendments of 1977, 91 STAT. 685, 700, PL 95-95 (Aug. 7, 1977) (emphasis added).

33 U.S. EPA, 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, 32,532 (July 8, 2019).

34 42 U.S.C. § 7651f (2012) (emphasis added).

35 *Id.* at § 7411(a)(1).

when it amended subsection 111(a)(1) or subsection (d), but it did not. Instead, as Congress was using the word "retrofit" to create NOx control requirements for the existing power plant fleet, it was rewriting the "standard of performance" definition that subsection 111(d) uses for existing sources with much broader language to give EPA a broad remit in determining BSER.

D. EPA Fails to Distinguish Subsection 111(b) from Subsection 111(d)

EPA argues that the definition of "standard of performance" and BSER must be applied the same way in determining the BSER to set standards under subsection 111(b) and guidelines under subsection 111(d). EPA undercuts its arguments by failing to acknowledge the textual and contextual differences between subsections (b) and (d), which are stark and significant.

Subsection (b) directs EPA to set standards of performance for new and modified sources. The standards apply uniformly across the country and they become immediately and directly effective. A source complies with the standards on an individual basis at the time it installs pollution control equipment during the building or re-building process, then operates the equipment continuously in order to meet the standards. Since they apply to new or modified sources, standards set under subsection (b) cannot result in emissions reductions, only in limits on the additional pollution a new or modified source emits.

Under subsection (d), states establish a standard of performance, informed by guidelines EPA issues after determining the BSER for the source category. The standard of performance here applies to all sources in the category already in operation. To comply, sources must adopt the technologies, processes, or actions needed to meet the standard. Compliance by the group of sources can go beyond limits on emissions increases, as under (b), and also result in overall emissions reductions. The best system for emission reduction functions as the best system for reducing the emissions of an entire fleet of existing sources from current pollution levels. As in CAMR and CPP, EPA determined the BSER by taking account of the measures that would be most effective in reducing emissions from the entire fleet of existing sources.

In tasking states with setting standards of performance, Congress recognized the difference between setting standards for individual new or modified sources and setting standards for groups of sources already in operation. Subsection (d) includes provisions reflecting that difference. Subsection (d) specifically directs states, when setting the standard of performance, to "…take into consideration, among *other factors*, the *remaining useful life of the existing source* to which such standard applies."[36]

When EPA is issuing a federal plan in lieu of a state plan, subsection (d) uses the same language to direct EPA to "…take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."[37] In both

36 42 U.S.C. § 7411(d)(1) (2012) (emphasis added).

37 42 U.S.C. § 7411(d)(2)(b) (2012).

cases, the language and context of subsection (d) modify *de facto* the meaning of "standard of performance" by allowing states and EPA to modify the standard of performance they may otherwise establish, when an individual source's remaining useful life justifies it. Subsection (b) includes no such language; nor does it include any other language that changes the meaning of "standard of performance" from subsection (a)(1).

The difference between subsections (b) and (d) should be clear. Setting the BSER is the beginning of the process in (d). The BSER must be translated by the states into standards of performance, a process where states have latitude to create standards that reflect the features and reality of their existing sources. Under (b), the BSER and standard of performance are the same thing and both are set by EPA.

Both CAMR and the CPP weighed the differences in the respective texts and applications of subsections (b) and (d). As a result, EPA founded both rules on interpretations that allowed the agency to base its BSER determinations on all the options available to power plants to achieve substantial and affordable emissions reductions. Then, following the mandatory language and logic of subsection (d), both rules treated setting standards of performance as a separate, flexible exercise for states, informed by the BSER determination.[38]

The Repeal ignores the distinctions between (b) and (d) to set the stage for its argument about the relationship between sections 111 and 165. The Repeal resorts to comparing section 111 and section 165 as a way to argue that the definition of "standard of performance" and BSER must be applied in the exact same way in determining the BSER to set standards under subsection (b) and guidelines under subsection (d). For the same reasons that interpreting "standard of performance" and BSER without acknowledging the differences between subsections (b) and (d) is wrong, merging subsection 111(d) and section 165 is wrong.

E. EPA's Misguided Attempt to Link Sections 111 and 165

EPA tries to provide additional support for its interpretation with arguments about the location of section 111 in the statutory scheme of the Clean Air Act and attempts to assimilate section 111 to section 165.

Section 165 governs the requirements for individual sources when they are first built or undergo major modification. Section 165 sources must obtain preconstruction permits specifying limitations on their emissions, which are based on an analysis of the appropriate emissions control technologies or measures suitable for the source. The emissions limitations under section 165 must be at least as stringent as New Source Performance Standards (NSPS) established under subsection 111(b) and applicable to the source. Subsection 111(b) NSPS are set by the EPA, apply on a nationwide basis, and are directly binding on covered sources at the time they are built or modified. The permitting authority

38 CAMR's inclusion of emissions trading in its BSER determination and the CPP's inclusion of generation-shifting reflected the distinctive feature of subsection (d) that affected sources were a group that would be achieving the required reductions at the same time. Both trading and generation-shifting are methods of collective action to reduce emissions uniquely suited to grid through which power plants operate.

identifies options for more stringent controls with NSPS serving as the "floor" or minimum level of stringency.

EPA argues that because section 165 and BACT apply to controls at individual sources and because the statute refers to "any applicable standard" under section 111, BSER and standards of performance under subsection 111(d) must be confined to measures applicable at a particular source.

> Congress tied CAA section 111 to the Best Available Control Technology (''BACT'') provisions in CAA section 165. ... In no event, Congress specified, can application of BACT result in greater emissions than allowed by ''any applicable standard established pursuant to section [1]11 or [1]12....'' To ensure such an exceedance does not occur, NSPS serve as the base upon which BACT determinations are made and are commonly viewed as the BACT ''floor.'' However, because Congress refers to ''any applicable standard established pursuant to section [1]11,'' without reference to either subsection (b) or (d), any applicable existing source standard would also function as a BACT ''floor.''[39]

This argument misrepresents section 111 and its link to sections 165 and 169(3) and the BACT floor.

Subsection 111(d) and section 165 are mutually irrelevant to each other. Subsection 111(d) standards of performance are *set by states* for cohorts of existing sources following the criteria in subsection (d) and EPA guidelines. Subsection (d) alone authorizes states to take into account the remaining useful life of existing sources when setting standards of performance; thus, the effective state-wide standard may vary from state to state as each state potentially accounts for the remaining useful life of individual plants within its respective fleet.

EPA has issued dozens of NSPS under subsection 111(b), and only these 111(b) standards have served as the floor for BACT in innumerable individual source permits under section 165. Standards of performance set by states for their cohorts of existing sources under 111(d) cannot serve as a national floor for the level of stringency appropriate for new or modified individual sources.

EPA cites the legislative history of section 111 in defense of its assimilation of subsection 111(d) with sections 165 and 169(3). The agency correctly observes that in the 1990 Amendments, Congress replaced the separate terms used in section 111 with a single term, "emissions standards," and a single definition.[40] According to EPA, this demonstrates Congressional intent for the term to mean the same thing in both subsections. However, in practice only subsection 111(b) standards operate within the definition of "best available control technology" in section 169(3).

39 U.S. EPA, 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, 32,524–25 (July 8, 2019).

40 *Id*. at 32,525 & n. 50.

F. The "Major Question" Foil: Generation Shifting is Not of Vast Economic and Political Significance

EPA cites the "major question doctrine" when concluding that Congress would have had to authorize generation-shifting explicitly, "As the Supreme Court has stated, 'We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[41] EPA's regulatory impact analysis for ACE negates its claims that the CPP's generation-shifting BSER would cause "vast economic" impact: "It is the EPA's consideration of the weight of the evidence, taking into account the totality of the available information, as presented below, that leads to *the finding and conclusion that there is likely to be no difference between a world where the CPP is implemented and one where it is not.*"[42] By its own calculation, EPA admits the economic impact of the CPP had it been implemented was not vast; it was nil.

In addition, *Utility Air Regulatory Group* (*UARG*) *v. EPA* sets up a contrast with generation-shifting in the CPP, which undercuts the Repeal argument. The Court in *UARG* prohibited agency interpretations that "would … bring about an enormous and transformative expansion of [its] regulatory authority without congressional authorization."[43] To the *UARG* majority, the EPA rule in question was invalidated by an agency interpretation that amounted to a claim "to discover in a long-extant statute an unheralded power to regulate a 'significant portion of the American economy'…."[44]

By its own calculation, EPA admits the economic impact of the CPP had it been implemented was not vast; it was nil.

In *UARG,* the Court was confronting an EPA interpretation that expanded Clean Air Act permitting authority over thousands, even millions, of entities that had never been subject to permitting requirements before. In contrast, the CPP set standards for existing sources that have long been subject to extensive Clean Air Act regulation via the Mercury and Air Toxics Standards and the Cross State Air Pollution Rule (CSAPR), for example. In addition, the CPP only "moderately increas[ed] the demands EPA … ma[d]e of entities already subject to its regulation."[45] EPA's extensive analysis of the CPP showed that implementation would not disrupt

41 Utility Air Regulatory Group v. EPA ("*UARG*"), 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp. ("*Brown & Williamson*"), 529 U.S. 120, 160 (2000)).

42 Office of Air Quality Planning and Standards, U.S. EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, EPA-452/R-19-003, 2-1 (June 2019).

43 *UARG*, 573 U.S. at 324 (citing Brown & Williamson, 529 U.S. at 160).

44 *Id*.

45 *Id*. at 332.

the reliability of the electricity system and estimated costs well in line with those of other power plant air pollution regulations. EPA also exhaustively demonstrated that its BSER determination encompassed only actions that were already in widespread use by the utility industry.

The Repeal mistakenly relies on *UARG* to claim that section 111 of the Clean Air Act bars consideration of generation-shifting. *UARG* is not relevant to the question of whether EPA, in determining BSER for a sector of the economy already extensively regulated under the Clean Air Act, can consider one set of measures as opposed to any other set of measures.

Because the CPP BSER determination did not require "extreme measures" that conflicted with the statutory scheme, EPA's reliance on *Brown & Williamson* here to justify its proposed interpretation is also misplaced. In contrast to the facts in *Brown & Williamson,* the CPP relies not on an implicit or speculative delegation of authority; rather, Congress, using broad language, explicitly delegated to the EPA the task of determining what constitutes the BSER for specific source category and pollutant.[46] EPA did precisely that and no more in determining BSER in the CPP.

Moreover, neither the CPP overall nor generation-shifting specifically extend EPA's Clean Air Act authority in any way.

First, the Clean Air Act programs and EPA regulations covering existing power plants in effect prior to the CPP contemplated generation-shifting. CSAPR relied in part on generation-shifting, as did the sulfur dioxide emissions reduction requirements for existing power plants of Title IV of the Clean Air Act. Both programs identified the use of emissions trading as the best way to facilitate one of the most cost-effective compliance paths for power plants – shifting generation from high- to low-emitting sources.

Second, EPA recognizes that power plant operations are determined in part by the needs of the interconnected network, and the plant owner/operator may have to follow operational instructions issued by third parties: "Commenters further stated that oftentimes the operation of a designated facility is not in the control of the owner/operator when it goes to load and cycling...."[47]

Third, the Repeal's "major question" argument mistakenly equates the inclusion of generation-shifting in BSER with states' formulation of standards of performance. The CPP determined that BSER was the replacement of higher-emitting generation with specific, quantified increments of lower-emitting generation. The CPP translated BSER into category-wide emissions rates. The separate emission rates for coal and natural gas plants serve as accounting mechanisms, allowing states to frame their state plans in consistent numerical terms and providing EPA with metrics for evaluating the adequacy of those plans. The rates were not required to serve as performance standards for particular units.

46 Brown & Williamson, 529 U.S. 120 (2000).

47 U.S. EPA, 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, 32,552 (July 8, 2019).

The fact that the CPP BSER included generation-shifting did not diminish the states' role in establishing performance standards. The CPP, following subsection 111(d), left it to the states to determine the applicable performance standards for sources. States were free to formulate performance standards according to their own policies, practices, regulations, and laws, and they could select from a wide variety of compliance options. The Repeal also mistakenly equates BSER with the ways power plants can comply with the standards of performance set by the states. The BSER did not dictate how power plants could comply or require them to use generation-shifting.

Ignoring this, the Repeal incorrectly asserts that including generation-shifting runs afoul of the "major question" doctrine because the CPP "would have disturbed the state-federal and inter-federal jurisdictional scheme."[48] Specifically, the Repeal states:

> The CPP, however, included a BSER that was based largely on measures and subjects exclusively left to FERC and the states, rather than inflicting only permissible, incidental effects on those domains … By including generation-shifting measures within the states' and FERC's purview in the BSER, rather than relying on traditional controls within the EPA's purview, the EPA established a rule predicated largely upon actions in the power sector outside of the scope of the Agency's authority to compel. Some generation shifting may be an incidental effect of implementing a properly established BSER (e.g., due to higher operation costs), but basing the BSER itself on generation shifting improperly encroaches on FERC and state authorities.[49]

As reflected in the CPP record, EPA consulted extensively with FERC and Regional Transmission Organizations that operate the interstate network. These consultations mostly focused on questions of reliability. In a formal letter to EPA, the FERC Commissioners offered specific suggestions for addressing reliability but did not identify any areas in which the pending CPP intruded on the Commission's jurisdiction, authorities, or prerogatives.[50]

Contrary to the Repeal's assertion, the CPP did not curtail states' authority to "determine generation mix." The CPP affected dispatch procedures to no greater extent than any other air pollution regulation for power plants. As a commenter cited in the Responses to Comments document explained:

> The fact that the CPP would encourage cleaner generation by requiring that the cost of carbon pollution reduction be factored into the cost of generating electricity is hardly unique. Rather, this is a common feature of power plant regulations under the CAA, such as those requiring power plants to reduce

48 *Id*. at 32,529.

49 *Id*. at 32,530.

50 Letter from Federal Energy Regulatory Commission to Janet G. McCabe, Acting Assistant Administrator, Office of Air and Radiation, U.S. EPA (May 15, 2015), https://www.ferc.gov/media/headlines/2015/ferc-letter-epa.pdf.

> emissions of nitrogen oxides, sulfur dioxide, and mercury. Those regulations—such as CSAPR and the Mercury Air Toxics Standards—have been adjudged under the traditional *Chevron* standard, despite their incidental effects on the cost of generating electricity. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); Michigan v. EPA, 135 S. Ct. 702 (2014). … The generation shifting aspect of the CPP does not make it a "transformative" regulation requiring further delegation of authority from Congress. The EPA's consideration of generation-shifting as a "system of emission reduction" is well supported by the statute and the administrative record.[51]

The CPP RIA projected that generation-shifting would play a major role in compliance because the model identified it as the most cost-effective compliance path, but the CPP guidelines did not mandate generation-shifting. The CPP RIA did not project a change in the electricity sector's fuel and generation mix that was drastically different from business as usual.

> Similarly, under the mass-based scenario, coal-fired generation is projected to decline 15 percent in 2025, and natural-gas-fired generation from existing combined cycle capacity is projected to increase 2 percent relative to the base case. The coal-fired fleet in 2030 generates 22 percent less than in the base case, while natural-gas-fired generation from existing combined cycles increases 5 percent relative to the base case. Gas-fired generation from new combined cycle capacity decreases 8 percent and 36 percent relative to the base case in 2025 and 2030, respectively. Relative to the base case, generation from non-hydro renewables decreases 3 percent in 2025 and increases 8 percent in 2030.[52]

Thus, the CPP and its generation-shifting BSER contrast the underlying *UARG* application of the "major question" doctrine. The Repeal's claims that the CPP would have significant economic impacts or would disrupt the boundary between state and federal authorities in the electricity sector are false and do not support the interpretation the Repeal relied on to claim that the CPP BSER was illegal.

G. EPA's Interpretation Does Not Give Meaning to "Emission Reduction"

EPA's claim that its interpretation reflects the plain meaning of subsections (a)(1) and (d) fails because it does not account for all the terms in the subsections. In ACE, EPA gives little attention to the terms "emission reduction" and "emission limitation achievable" and does not explain how it accounts for those terms.

51 EPA's Responses to Public Comments on the EPA's Repeal of Carbon Dioxide Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Chapter 4: Broader Policy Concerns, p. 13 (June 2019).

52 *See* Office of Air Quality Planning and Standards, U.S. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule at 3-26, EPA-452/R-15-003 (Aug. 2015).

In the CPP, in contrast, EPA focused its interpretation specifically on those terms. EPA cited the D.C. Circuit which held that a reasonable interpretation of subsection (a)(1) must define "emission reduction."

> "We can think of no sensible interpretation of the statutory words ''best...system'' which would not incorporate the amount of air pollution as a relevant factor to be weighed when determining the optimal standard for controlling... emissions."[53]

EPA then acknowledged:

> The fact that the purpose of a ''system of emission reduction'' is to reduce emissions, and that the term itself explicitly incorporates the concept of reducing emissions, supports the Court's view that in determining whether a ''system of emission reduction'' is the ''best,'' the EPA must consider the amount of emission reductions that the system would yield.[54]

EPA does not explain in ACE how considerations of emission reduction affect its interpretation. Meanwhile, the comment record has information, analyses, and arguments proposing alternative interpretations including measures such as generation-shifting that would yield significant reductions. The comments highlight the importance of the terms "emission reduction" and "emission limitation achievable." EPA does not address those comments, instead it offers a circular argument. EPA asserts that since its interpretation restricts its authority, the agency cannot define those terms and should not include them in its interpretation.

> The EPA does not deny that, if it were validly within the Agency's authority under the statute, regulations that can only be complied with through widespread implementation of generation shifting might be a workable policy for achieving sector-wide carbon-intensity reduction goals. But what is not legal cannot be workable. The CPP's reliance on generation shifting as the basis of the BSER is simply not within the grant of statutory authority to the Agency. *The text of CAA section 111 is clear, leaving no interpretive room on which the EPA could seek deference for the CPP's grid-wide management approach.* Accordingly, EPA is obliged to repeal the CPP to avoid acting unlawfully.[55]

According to the EPA the "text ... is clear" except on the question of how the EPA must account for "emission reduction" in determining the BSER and the "emission limitation achievable."

53 Sierra Club v. Costle, 657 F.2d 298, 326 (D.C. Cir. 1981).

54 U.S. EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662, 64,721 (Oct. 23, 2015).

55 U.S. EPA, 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, 32,532 (July 8, 2019) (emphasis added).

V. The Record Demonstrates that EPA's Interpretation is Unreasonable

EPA's silence on whether its interpretation is reasonable amounts to a confession that it is not – and may explain why the agency waived the chance to earn *Chevron* deference despite the vulnerability of its "plain meaning" position.

If ACE were to make a case for the reasonableness of its interpretation, it would stumble immediately over the fact that ACE barely reduces CO_2 emissions. EPA's current interpretation effectively eliminates any consideration of "the degree of emission limitation achievable" from the BSER determination process. ACE yields a less-than-1% reduction in CO_2 emissions. EPA projects that even without the rule, power sector CO_2 emissions will fall by more than 30% by 2030 thanks to a host of other factors.[56] Yet, EPA's interpretation bars it even from issuing guidelines that simply lock in these projected reductions or lay the groundwork for future reductions.

If judged solely by the emissions reduction results, EPA's interpretation would flunk any reasonableness test. EPA does not give meaning to the term "the degree of emission limitation achievable." Beyond that, ACE's failure to reduce CO_2 undermines any claim to reasonableness EPA might make.

The rulemaking record demonstrates that ACE does not represent a sound exercise of discretion to "make reasonable policy choices." Yet, the Responses to Comments (RTC) illustrates the strategic value of EPA's approach. A host of commenters submitted detailed information, analyses, and arguments showing that measures such as generation-shifting would meet the definition of "best system of emission reduction." Rather than address the comments on their merits point-by-point, the RTC repeatedly offers a stock response: "Because generation shifting exceeds the scope of measures that the EPA is authorized to include within BSER, the Clean Power Plan must be repealed."[57]

In a few places, the RTC adds:

> While the EPA agrees that the unique nature of the utility power sector may affect the Agency's evaluation of adequately demonstrated systems of emission reduction (indeed, see section III for the EPA's evaluation of the BSER), that does not change the scope of the Agency's authority as provided by CAA section 111 and indeed cannot confer authority where Congress has not so provided.[58]

56 Office of Air Quality Planning and Standards, U.S. EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, EPA-452/R-19-003, 2-26-27 (June 2019).

57 *See, e.g.*, EPA's Responses to Public Comments on the EPA's Repeal of Carbon Dioxide Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Chapter 2: Prior Agency Practice, p. 8, 11, 14, 15, 16, 18, 20 (June 2019).

58 *Id.* at 14.

Time after time, comment after comment, EPA avoids addressing the substantive comments on their merits, insisting, instead, that the Clean Air Act won't permit the agency to take the commenter's information into consideration. Because many of these comments present well-documented arguments they show how difficult it would have been for EPA to try to refute them in order to demonstrate that its statutory interpretation was reasonable.

The comments submitted by the Environmental Defense Fund (EDF) provide a good example. They encompass a number of those propositions and also include material from other sources. EDF notes that states and utilities have a long history of reducing air pollution by scaling back generation from higher emitting power plants. Generation shifting is a viable, effective approach that power companies explicitly supported as intervenors in the CPP litigation:

> Electricity providers have been shifting generation among affected units and to zero-emitting sources as a means of achieving emission reductions for decades, as these strategies achieve greater reductions at lower cost than by relying on control technology alone. . . . Comments of Calpine Corporation, Los Angeles Department of Water and Power, National Grid, Seattle City Light, et al., EPA-HQ-OAR-2013-0602-23167, at 9 (JA001405) ("EPA's approach . . . reflects the essence of the way the electric industry operates . . . fully consistent with our companies' successful practices."). In fact, generation shifting is itself "business-as-usual" within the power sector and the ordinary means by which supply and demand are instantaneously matched throughout the interconnected electricity grid and balancing authorities and utilities make dispatch decisions to deliver power at least-cost to consumers. . . . By largely following existing trends that are causing generation shifts towards lower-emitting sources and by requiring reductions at no greater pace than they are already being achieved by many states and power companies, the Rule's formulation of the best system of emission reduction is reasonable and consonant with the practical realities of how the electricity grid is operated today.[59]

EDF's comments also quoted from the State and Municipal Intervenors' brief in the same case:

> State Intervenors were uniquely positioned to inform EPA's [BSER] determination because they have years of direct experience reducing power-plant carbon-dioxide emissions. . . . Encouraging [generation] shifts, among other steps, helped [Regional Greenhouse Gas Initiative ("RGGI")] states reduce carbon pollution from the power sector by over forty percent between 2005 and 2012. Other programs in Minnesota and California have also led plants to make meaningful reductions to greenhouse-gas emissions through some of the same measures EPA included in the "best system" here.

59 Comments of Environmental Defense Fund on EPA's Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (Aug. 31, 2018) at 7–8 (citing Final Brief of Intervenors Calpine Corp. et al. at 2-3, West Virginia v. U.S. EPA (D.C. Cir. No. 15-1363) (filed Apr. 22, 2016)). Available at http://blogs.edf.org/climate411/files/2018/11/EDF-ACE-Comments.pdf.

> The experience of power plants in our States has shown that these reductions in carbon-dioxide emissions can be achieved without impeding economic growth or threatening grid reliability. Indeed, State Intervenors' carbon-reduction initiatives have delivered significant economic benefits. For example, in RGGI's first three years, participating States realized $1.6 billion in net economic benefits, largely from reduced energy bills for consumers.[60]

EDF concluded: "These statements by power companies and states support the conclusion that limiting generation at higher-emitting existing power plants is an adequately demonstrated means of achieving emission reductions."[61]

As reported in EPA's RTC, commenters presented a range of valid, important arguments. They highlighted the statutory requirement in 111(a) that the BSER must be "adequately demonstrated," meaning it should be "reasonably reliable, reasonably efficient, and … reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way."[62] EPA responded, as it did throughout the RTC, by directing the reader to section II.B of the preamble and claiming it was not authorized to include such measures in the BSER.[63] At certain points in the RTC, EPA acknowledges the merits of commenters' arguments, but still declines to address the substance of the comments.[64]

Commenters pointed to the unique nature of coal-fired power plants as a source category because of their integration and interconnection to each other, other sources, and customers through the grid.[65]

The RTC provided its stock response. EPA repeats this exchange frequently; detailed and well-reasoned comments are met with the same canned response about the Agency's understanding of its legal authority accompanied by EPA's silence on the reasonableness or merits of a statutory interpretation that precludes consideration of the commenter's arguments.[66]

States' and cities' comments discussed how power plants in their jurisdictions have successfully cut carbon dioxide emissions by shifting from coal to natural gas and renewables to affirm the effectiveness of generation-shifting as a demonstrated "system of emission reduction."[67]

60 *Id.* at 8.

61 *Id.*

62 EPA's Responses to Public Comments on the EPA's Repeal of Carbon Dioxide Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Chapter 2: Prior Agency Practice, p. 15 (June 2019).

63 *Id*. at 16.

64 *Id*. at 14.

65 *Id*. at 18.

66 *See, e.g., id.* at 4, 6, 8, 10, 11, 14, 15, 16, 18, 20, 21, 22, 23, 24, 26, 27, 28, 29, 31, 32, 33, 34, 36, 37, 38, 41, 46.

67 EPA's Responses to Public Comments on the EPA's Repeal of Carbon Dioxide Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Chapter 4: Broader Policy Concerns, p. 13 (June 2019).

Commenters also pointed out that EPA's interpretation sacrificed flexibility and cost-saving options for utilities. In addition, commenters cited the Rhodium Group's data showing both the cost-effectiveness and efficacy of achieving significant CO_2 emissions reductions with generation-shifting.[68]

Fundamentally, to merit the D.C. Circuit's deference, EPA would have to do the impossible: explain why the interpretation it selected was reasonable even though it excludes consideration of how power plants operate and control pollution.

Commenters noted that utilities are already engaging in the "generation-shifting" identified by the CPP and plan to continue to use generation-shifting in meeting pollution control requirements. Commenters stated that by refusing to consider the most common method sources use to reduce their CO_2 emissions, EPA has ignored "significant and viable and obvious alternatives to its proposed reinterpretation of 'system' and has thus engaged in arbitrary and capricious rulemaking."[69] Commenters asserted that "Agency analysis must exhibit a 'rational relationship' with 'known behavior.'"[70] The electricity system will continue to shift generation. EPA's failure to consider this is fatal to the proposed rulemaking.[71]

These comments are a small sample of a record that establishes a compelling case that the Repeal/ACE interpretation does not reflect an agency using its "discretion … to interpret the statute and make reasonable policy choices…."[72]

The comment record also includes support for the agency's interpretation. However, those comments would not be enough to support potential EPA arguments that its interpretation is reasonable and not an abuse of discretion.

Fundamentally, to merit the D.C. Circuit's deference, EPA would have to do the impossible: explain why the interpretation it selected was reasonable even though it excludes consideration of how power plants operate and control pollution. EPA's own analysis shows the consequences of its interpretation: the agency removing from subsection (a)(1) any meaning that would normally be given to "emission reduction."

68 *Id*. at 11.

69 EPA's Responses to Public Comments on the EPA's Repeal of Carbon Dioxide Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Chapter 6: Additional Legal Comments, p. 62 (June 2019).

70 *Id*.

71 *Id*.

72 U.S. EPA, 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, 32,532 (July 8, 2019).

Conclusion

Twenty-two states, seven cities, ten environmental organizations, and two public health organizations have filed challenges to the Repeal and ACE in the D.C. Circuit.[73] EPA has given the court no basis to defer to the agency. The court will have before it the comment record and the challengers' arguments based on the record, but will have nothing from EPA arguing that its interpretation is reasonable in light of the record and the challengers' arguments. If the court remains faithful to its *Chevron* Step 1.5 doctrine, it will send the Repeal and ACE back to the agency to explain why its interpretation reflects a sound exercise of its "discretion … to interpret the statute and make reasonable policy choices…." If the record on remand resembles the Repeal and ACE record, that task may be close to impossible.

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73 *Clean Power Plan / Carbon Pollution Emission Guidelines*, Harvard Law Sch. Envtl. & Energy Law Program: Regulatory Rollback Tracker, https://eelp.law.harvard.edu/2017/09/clean-power-plan-carbon-pollution-emission-guidelines/.