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Case No. 15-1381 (and consolidated cases)

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

State of North Dakota,

Petitioner,

v.

United States Environmental Protection Agency,

Respondent.

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

Brief for State Respondent-Intervenors in Support of Respondent by the States of California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington, the District of Columbia, and the City of New York

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ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
BETHANY A. DAVIS NOLL
Assistant Solicitor General
MICHAEL J. MYERS
ANDREW G. FRANK
Assistant Attorneys General

MAURA HEALEY
Attorney General of Massachusetts
MELISSA A. HOFFER
CHRISTOPHE COURCHESNE
TRACY L. TRIPLETT
JILLIAN M. RILEY
Assistant Attorneys General

XAVIER BECERRA
Attorney General of California
GAVIN G. MCCABE
DAVID A. ZONANA
Supervising Deputy Attorneys General
TIMOTHY E. SULLIVAN
JONATHAN WIENER
ELIZABETH B. RUMSEY
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612
(510) 879-0987
Attorneys for the State of California, by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Xavier Becerra

Additional counsel on signature pages

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), the undersigned State and Municipal Respondent-Intervenors adopt the certificate as to parties, rulings, and related cases in Respondent EPA's Brief.

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GLOSSARY OF ABBREVIATIONS

CCS	Carbon Capture and Storage
CO_2	Carbon Dioxide
Enviro. Interv. Br.	Brief of Respondent-Intervenor Environmental and Public Health Organizations
EPA	Environmental Protection Agency
EPA Br.	Respondent EPA's Brief
EPAct	2005 Energy Policy Act
JA	Joint Appendix
Non-State Pet. Br.	Brief of Non-State Petitioners
Power Interv. Br.	Brief of Respondent-Intervenor Power Companies
State Pet. Br.	Brief of Petitioner West Virginia, et al.

PRELIMINARY STATEMENT

The undersigned State and Municipal Respondent-Intervenors ("State Respondent-Intervenors") submit this brief in support of the Environmental Protection Agency's "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units" ("Rule"). 80 Fed. Reg. 64,510 (Oct. 23, 2015). Power plants have been listed as an air pollution source category under section 111(b) of the Clean Air Act ("Act") since the 1970s, and they emit enormous quantities of carbon dioxide (CO_2), a greenhouse gas. EPA determined years ago that greenhouse gases endanger public health and welfare.[1] Thus, EPA is required to set performance standards for those emissions under section 111. *See* 42 U.S.C. § 7411(b); *see also Am. Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*") (discussing listing sources and establishing standards under section 111).

Our states are already experiencing harms from climate change, such as flooding from rising seas, increasingly severe storms, and prolonged droughts. Unless greenhouse gas emissions are significantly reduced,

[1] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009), JA4674.

climate change threatens to worsen these harms. Many State Respondent-Intervenors have already acted to reduce CO_2 emissions from existing and future power plants within their borders. For example, through the Regional Greenhouse Gas Initiative, nine State Respondent-Intervenors limit these emissions under a trading program. Also, State Respondent-Intervenors California, Illinois, New York, Oregon, and Washington impose CO_2 emission limits on new fossil-fueled power plants that are even more stringent than the Rule. Further, half of the states in the country have established permitting and monitoring standards for carbon capture or storage or have provided regulatory or financial incentives to promote those technologies. California Comments, Exh. 6, EPA-HQ-OAR-2013-0495-10881, JA1200. Absent the meaningful federal regulation required by the Act, however, State Respondent-Intervenors' efforts to protect their citizens from the dangers of climate change may be frustrated by unnecessarily high emissions from new power plants built in other states.

In conformance with its statutory obligation, EPA's section 111(b) Rule will control these emissions for the benefit of the residents of all states. The Rule, which has now been in effect for over a year, sets numerical limits on CO_2 emissions from fossil-fuel fired power plants constructed after

January 8, 2014. The standard for new steam units (generally coal-fired power plants) is based on the amount of CO_2, per unit of electricity, that would be emitted by a new highly efficient plant capturing a portion of its CO_2 emissions for underground storage (i.e., partial carbon capture and storage, or "CCS").

All of the steps involved in CCS—capture of some CO_2 from a gas stream, transportation via pipeline, and permanent storage underground—have been demonstrated and are currently in use. CCS is already in full-scale, integrated operation in the energy and chemical industries. Given EPA's extensive record showing the availability of CCS, Petitioners' assertion that the Rule's standards are "impossibly high" for steam units is unfounded.[2] Indeed, outside of this proceeding, many State Petitioners appear to agree and assert that CCS is an established emission control system.[3] Finally, it is important to note that plants are not required to employ

[2] Petitioners are not challenging EPA's conclusion that the emission limit for gas-fired power plants is achievable.

[3] State CO_2-EOR Deployment Workgroup, *Putting the Puzzle Together: State & Federal Policy Drivers for Growing America's Carbon Capture & CO_2-EOR Industry* (Dec. 2016) 7, 27, *available at* http://www.betterenergy.org/sites/default/files/PolicyDriversCO2_EOR_0.pdf, JA5302, JA5322.

CCS, but may instead choose to meet the standard through other cost-effective measures analyzed by EPA, such as co-firing with natural gas or employing integrated gasification.

ISSUES PRESENTED, STATUTES, AND REGULATIONS

The issues presented are set forth in EPA's brief. Except for the regulation in the Addendum, all applicable statutes and regulations are attached to EPA's brief.

STATEMENT OF THE CASE

State Respondent-Intervenors adopt EPA's Statement of the Case and emphasize the following:

State Respondent-Intervenors have pursued more than a decade of litigation and regulatory efforts to limit CO_2 emissions. For instance, certain State Respondent-Intervenors' lawsuit to compel EPA to limit greenhouse gas emissions led the Supreme Court to rule that EPA was obliged "to regulate emissions of the deleterious pollutant" if it found that the emissions endanger public health or welfare. *Massachusetts v. EPA*, 549 U.S. 497, 528-29, 533 (2007). EPA subsequently found that greenhouse gases, including CO_2, endanger public health and welfare by causing more intense, frequent, and long-lasting heat waves; worse smog in cities; longer and more severe droughts; more intense storms, hurricanes, and floods; the spread of

disease; and a rise in sea levels. 74 Fed. Reg. at 66,497, 66,524-25, 66,532-33, JA4675, JA4702-JA4703, JA4710-JA4711.

While *Massachusetts* was still pending, in the *AEP* case certain State Respondent-Intervenors also brought common law public nuisance claims directly against power plants, seeking reductions in the CO_2 pollution that was harming the health and welfare of their citizens. 564 U.S. at 418. When *AEP* reached the Supreme Court (after *Massachusetts*), the Court held that the Act "directly" authorized EPA to regulate CO_2 from power plants under section 111. *Id.* at 424.

In the seven years since EPA found that greenhouse gas pollution endangers public health and welfare, the evidence that these emissions harm this nation's people—including particularly vulnerable populations—has only grown stronger. 80 Fed. Reg. at 64,517-22 (detailing more recent evidence of effects of greenhouse gas emissions), JA9-JA14; California Comments, Exhs. 1 & 2, JA924-JA1199; New York, et al. Comments, 2-4, EPA-HQ-OAR-2013-0495-9660, JA1452-JA1454. While many states have made substantial progress in curbing greenhouse gas emissions, this progress does not render federal action unnecessary.

SUMMARY OF ARGUMENT

After analyzing an exhaustive technical record, EPA appropriately determined that CCS was the best system of emission reduction for CO_2 pollution from steam units that has been adequately demonstrated. Petitioners lack support for their claim that a new source standard can be based only on technology found at facilities that never received any public economic support. Indeed, this unfounded claim appears designed solely to preclude EPA from considering the successful integration of CCS at the Boundary Dam steam unit. Similarly baseless is Petitioners' argument that EPA must ignore emission controls unless they are now available for purchase as a single package. Nor does the possibility that the cost of CCS will vary across the country distinguish the Rule from previous section 111(b) standards applied to steam units or preclude EPA's economically reasonable standard here. The Rule is a valid, careful, and necessary exercise of EPA's mandate in section 111(b) to regulate harmful CO_2 emissions from new sources.[4]

[4] State Respondent-Intervenors also support the Rule's standards for modified and reconstructed steam units. *See* EPA Br. 92-101.

ARGUMENT

I. PETITIONERS' UNPRECEDENTED INTERPRETATION OF SECTION 111 SHOULD BE REJECTED.

Section 111(b) directs EPA to establish "standards of performance" for air pollutants emitted from new sources, including CO_2 emitted by power plants. *See AEP*, 564 U.S. at 424. In setting those standards, EPA first must "identify the emission levels that are 'achievable' with 'adequately demonstrated technology.'" *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981). Next, EPA must "choose an achievable emission level which represents the best balance of economic, environmental, and energy considerations." *Id.* This balancing includes "consideration of technological innovation." *Id.* at 346-47. Section 111(b) is forward-looking, and resulting standards need not be constrained by the current state of the art. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973).

During the more than four decades EPA has applied section 111(b) to control power plant pollution, courts have never adopted the constricted view of the Act Petitioners seek here. Section 111(b) requires "achievable" results based on "adequately demonstrated" controls. Petitioners' attempt to rewrite the Act so that it would instead authorize limits based only on those

practices already developed at steam units, solely through private investment, must be rejected.

A. Petitioners' Proposal to Limit "Adequately Demonstrated" Systems to Those Used at Facilities Funded Solely by Private Commercial Investment Is Contrary to the Purposes of Section 111 and Decades of Precedent.

According to Petitioners, if a facility has ever been supported by public funding or incentives (from any level of government), technology used there is not "commercially available"—a new legal standard invented by Petitioners—and it therefore cannot be considered "adequately demonstrated." State Pet. Br. 16, 27. This interpretation is not supported by statutory text or this Court's decisions.

When Congress added section 111(b) to the Act in 1970, its intent was to ensure "that new plants be controlled to the 'maximum possible degree.'" *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427, 437 (D.C. Cir. 1973) (quoting legislative history). Congress did not intend that EPA should look only to the status quo in determining which systems have been "adequately demonstrated" for the control of emissions by future sources. Instead, EPA may "hold the industry to a standard of improved design and operational advances, so long as there is substantial evidence that such improvements are feasible." *Sierra Club*, 657 F.2d at 364. Thus, when EPA issued

standards that "postpone[d] the time when the best technology must be employed and at best maintain[ed] the present level of emissions," this Court rejected the rule as too lenient on the ground that it "would undercut Section 111." *ASARCO Inc. v. EPA*, 578 F.2d 319, 328 (D.C. Cir. 1978).

Petitioners ask the Court to disregard Congress's intent that EPA require maximum possible controls on new sources and to instead apply their new criterion: when developing a section 111(b) performance standard, EPA may only consider emission control systems already in use at facilities that have never received any form of public economic support. State Pet. Br. 16, 27. This argument appears aimed at forbidding EPA from considering the successful use of fully integrated CCS at the Boundary Dam coal-fired power plant in Canada. Given the robust record of adequate demonstration of CCS at Boundary Dam (EPA Br. 20-26), Petitioners appear to realize that the success of Boundary Dam alone is fatal to their case.

There is no statutory basis to restrict EPA in this way. Granted, when Congress provided money to promote the use of CCS in the 2005 Energy Policy Act ("EPAct"), it placed a narrow limitation on the conclusion that could be drawn from the success of domestic facilities receiving those U.S. government funds. EPA Br. 51-56. But Petitioners ask the Court to apply a

much broader restriction to what is "adequately demonstrated," requiring EPA to categorically exclude any technology in use at any facility—not just power plants—that has received any sort of public financial support. Petitioners do not argue that their new restriction originates in the text of EPAct, but instead that it has always silently existed in section 111 and that EPAct only confirmed it, "if anything." State Pet. Br. 16. This interpretation is contrary to Congress's intent to limit harmful emissions from new sources to the maximum possible degree, and to encourage the development and deployment of new technology, and Petitioners cite no authority supporting their novel proposition.

Given the ubiquity of subsidies from federal and state governments, Petitioners' interpretation could extend well beyond this case to hamstring EPA's ability to use section 111 to achieve emission reductions from new and existing sources. For example, municipal solid waste landfills—often owned by public utilities—have historically received a variety of state tax credits and other incentives to capture methane and other gases, leading to

controls that have long formed the basis of the best system of emission reduction for that source category.[5]

Moreover, Petitioners' new interpretation would limit the benefits of state efforts to support emerging control measures, thus reducing opportunities for federal action to amplify the benefits of successful state innovation. For example, state efforts to achieve greater use of CCS through tax exemptions and financial assistance[6] can lead to much greater climate benefits if those technologies ultimately inform nationwide standards. Petitioners' new test of "commercial availability" would diminish the value of these state efforts. Petitioners provide no reason to believe that Congress intended this perverse result.

B. The Act Does Not Limit "Adequately Demonstrated" to Fully Integrated Systems Currently on the Shelf.

Petitioners ask the Court to impose another artificial and unsupported condition on EPA's determination of the best system of emission reduction:

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[5] *See* 40 C.F.R. pt. 60, subpt. WWW (2016), JA4643; Standards of Performance for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,332 (Aug. 29, 2016) (to be codified at 40 C.F.R. § 60.760), JA5241.

[6] Petitioner States Indiana, Kansas, Kentucky, Montana, North Dakota, Oklahoma, and West Virginia, and Respondent-Intervenor States Illinois and Iowa, offer incentives to boost CCS technology. California Comments, Exh. 6, JA1200-JA1217.

only technology that is available for purchase as an "integrated system" may be considered. Non-State Pet. Br. 22; State Pet. Br. 3, 18. But that argument is based on the misleading premise that EPA had no evidence of an integrated system before it. In fact, EPA relied on the Boundary Dam steam unit's integration of all of the components of CCS. EPA Br. 40. There, post-combustion capture has been applied, and saline storage is used as a back-up to storage via enhanced oil recovery. EPA Br. 20-26. In addition, EPA appropriately relied on evidence showing that the technology supporting each step in the CCS process has been adequately demonstrated at power plants and in other industries that EPA concluded were comparable. *See* EPA Br. 26-33.

EPA's approach here is consistent with this Court's previous interpretations of section 111(b). From the early days of the Act, the Court has "reject[ed] the suggestion of [industry] that the Act's requirement that emission limitations be 'adequately demonstrated' necessarily implies that any . . . plant now in existence be able to meet the proposed standards." *Portland Cement Ass'n*, 486 F.2d at 391. In *Sierra Club v. Costle*, electric utilities claimed that EPA had failed to show its section 111 particulate standard was achievable because the performance of small-scale plants was

not representative of full-scale utilities. Rejecting that argument, this Court determined that EPA acted reasonably in concluding that the control technology could be scaled up to full-sized utilities. *Sierra Club*, 657 F.2d at 381-82. Similarly, in *Lignite Energy Council v. EPA*, 198 F.3d 930, 933-34 (D.C. Cir. 1990), this Court held that EPA reasonably set a performance standard for coal-fired industrial boilers by extrapolating from the performance of technology used on utility boilers. The absence of data for industrial boilers was "not surprising" because of the newness of the technology; as such, EPA could compensate for the lack of data by using other qualitative methods, "including the reasonable extrapolation of a technology's performance in other industries." *Id.* at 934.

Despite this precedent, Petitioners nonetheless argue that EPA must ignore evidence from any existing source that employs fewer than each and every step in CCS, and they attempt to obscure the sequential nature of CCS. Non-State Pet. Br. 23. But the record EPA relies on shows that each of the *sequential* steps in CCS is adequately demonstrated: carbon can be separated from a coal-fired emission stream, it can then be compressed and transported long distances via pipeline, and it can then safely be stored underground in geological formations. 80 Fed. Reg. at 64,548-51, 64,575-88, JA40-JA43,

JA67-JA80. In fact, CCS is substantially analogous to the decades-old sequence of sulfur dioxide controls section 111 has required at coal-fired power plants: sulfur is captured from the emission stream by a scrubber, the sludge generated by the scrubber is collected and then transported off-site, and it is ultimately disposed of elsewhere. *See Essex Chemical*, 486 F.2d at 440-41 (describing sludge disposal resulting from sulfur dioxide controls); 80 Fed. Reg. at 64,555, JA47 (describing components of control technologies for other pollutants at steam units).

And, significantly, the Boundary Dam coal-fired plant has successfully integrated *all* of these steps, disproving Petitioners' assertion that such integration is purely speculative. EPA was not required to do more.

C. CCS Technology Is Adequately Demonstrated to Control CO_2 Emissions.

EPA reasonably concluded that CCS is adequately demonstrated to control CO_2 emissions and that the Rule's standard is achievable. (EPA Br. 20-51, 57-64; Enviro. Interv. Br. 2-9, 11-15.) The actions of numerous states, Petitioners among them, support EPA's determination that CCS is a demonstrated system of emission reduction and not mere "'crystal ball' speculation." Non-State Pet. Br. 65. Over the last 15 years, at least 25 states, including many Petitioner States, have adopted laws that encourage and

accommodate CCS. These state actions include permitting and monitoring rules, recognition of renewable energy credits for power plants using CCS, and allowance of cost recovery from ratepayers for deployment of CCS. California Comments, Exhs. 6 & 7, JA1200-JA1230. In contrast to their briefing to this Court, elsewhere many State Petitioners are actively vouching for the soundness of CCS. Earlier this month Petitioner States Montana and Wyoming released a report (on behalf of a workgroup of 14 states, 10 of them Petitioners) promoting the use of CCS for enhanced oil recovery, explaining that, "we have nearly a half century of successful commercial-scale carbon capture technology deployment to build on that spans myriad industry sectors" and that "vast" underground capacity exists to store CO_2.[7]

[7] State CO_2-EOR Deployment Workgroup, *supra* note 3, at 7, 24, 27, JA5302, JA5319, JA5322. ("Contrary to common misconceptions, carbon capture is not a new technology . . . . Actually, carbon capture has been commercially deployed for decades and is widespread in certain industrial sectors.").

II. THE RULE IS VALID EVEN IF THE ECONOMIC IMPACT OF MEETING THE STANDARD WILL VARY DEPENDING ON THE LOCATION OF THE NEW STEAM UNIT.

Petitioners argue that the Rule is invalid because a new steam unit choosing to meet the performance standard by using CCS would find doing so more difficult in those few areas of the country without known CO_2 storage capacity, from which the CO_2 would have to be piped relatively longer distances. State Pet. Br. 28-29. Petitioners greatly overstate the difficulty of finding CO_2 storage capacity. EPA Br. 31-34. Further, the existence of geographical siting constraints that impact costs does not distinguish the Rule's standard from other valid performance standards for the energy sector EPA has issued in past decades.

A. The History of the Act and This Court's Precedent Allow a Power Plant Emission Standard That May Be More Expensive to Meet in Some Locations Than Others.

The new principle Petitioners purport to find in section 111(b), mandating that any performance standard provide steam plants an equal economic opportunity everywhere in the country, does not exist. Petitioners suggest that because a section 111(b) new source standard is applicable "nationwide" it can only be based on controls that would have the same economic effect on sources everywhere. State Pet. Br. 28; Non-State Pet. Br. 27. But section 111(b) was not intended to equalize compliance costs

nationwide so as to ensure that new sources could be built and operated in every conceivable location in the country for the same price. Instead, Congress designed section 111(b) so as to prevent states with cleaner air from using that to gain an advantage over other states and thereby allowing their own air quality to deteriorate. *ASARCO*, 578 F.2d at 328 n.25 (explaining that Congress sought to dis-incentivize "states with presently low levels of pollution [from] adopting lenient State Implementation Plans to attract industry until pollution reached the national limits" and to prevent industry from "forum shopping" on that basis). That is, Congress knew that section 111(b) standards would influence geographical patterns of industrial development.

From its inception, section 111(b) has allowed EPA to set emission standards that affect the relative cost of operating a new power plant in different areas of the country. *See Sierra Club*, 657 F.2d at 339 (discussing changes in economic incentives in different regions of the country due to evolution of section 111(b) controls on new coal plants); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 593 (7th Cir. 1995) (same). Congress has been fully aware that section 111(b) performance standards set by EPA affect economic incentives for where plants are built and what fuel they burn.

As Congress directed, EPA took costs into consideration in setting these standards. *See* 42 U.S.C. § 7411(a)(1). EPA performed this analysis and determined that the costs of meeting the standard will be reasonable and that the Rule will not cause adverse economic impacts. EPA Br. 65-76; 80 Fed. Reg. at 64,558-73, 64,592-94, JA50-JA65, JA84-JA86. The Act has always allowed for the possibility that the costs associated with the transition to new, lower-polluting sources may vary, but it requires the transition nonetheless when necessary to protect public health and welfare.

B. Scarcity of Identified Storage Capacity in Certain Areas Does Not Require Invalidation of the Rule.

Petitioners purport to represent the interests of those eleven states that have no currently proven geological storage capacity for CO_2, claiming that those states may be at a competitive disadvantage in attracting new development. Non-State Pet. Br. 27; State Pet. Br. 28. But eight of those states have joined this brief in support of the Rule. Our states recognize that, as the record shows, in the event that an electricity supplier chooses to meet future demand by building a new steam unit, the captured CO_2 can be sent out of state for storage; alternatively, economically reasonable compliance options besides CCS are available, such as co-firing with gas or employing integrated gasification. 80 Fed. Reg. at 64,545, JA37.

Wisconsin is the only one of those eleven states lacking known storage capacity that opposes the Rule here, asserting that it has no sites for future coal plants. But Wisconsin has no coal resources itself.[8] A future developer of new electricity in Wisconsin thus has several options and would naturally evaluate whether it was more economical to first ship coal into the state for burning and then ship CO_2 back out for storage, or to co-fire the coal plant with gas to meet the standard, or to build a plant that is not powered by coal. These are the same choices that would be faced by a developer in the eight Respondent-Intervenor States lacking known storage capacity, and they are similar to location-specific considerations power plant developers always face. *See* Power Interv. Br. 17-18. The Rule is not an unusual application of section 111(b) just because it may affect the economic considerations of future developers.

[8] U.S. Energy Information Administration, State Energy Data 2014: Production, Table P2: Energy Production Estimates in Trillion Btu, 2014, https://www.eia.gov/state/seds/sep_prod/pdf/P2.pdf, JA4914.

C. Petitioners' Proposed "Clear Statement" Rule Does Not Require Adoption of Their Unfounded Interpretation of Section 111.

Unable to overcome the showing of adequate demonstration in EPA's record, Petitioners attempt to give their challenge a constitutional dimension. Petitioners say that, under *Bond v. United States*, 134 S. Ct. 2077 (2014), the Court must interpret any ambiguity (which they do not identify) in the Act so that EPA is authorized to base a standard only on technology that is "commercially available" (as Petitioners perceive it). Otherwise, Petitioners argue, the Rule would infringe on states' authority over energy generation, which they say would require a clear statement from Congress.

Bond has no bearing on this case. It simply sets out a principle of statutory interpretation: "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Bond*, 134 S. Ct. at 2090. The facts of *Bond* are unusual and wholly inapplicable to the Rule. In *Bond*, the federal government argued that the ambiguous term "chemical weapon," contained in a law implementing an international treaty, applied to a woman who caused a minor chemical burn on the thumb of her husband's lover. *Id.* at 2083. Because Congress had not "clearly indicated" in that statute that it intended to reach such an

"unremarkable local offense" (*id.*), the Court refused to interpret the term "chemical weapon" so broadly, as doing so would "intrude[] on the police power of the States" (*id.* at 2090).

Unlike the situation in *Bond*, Petitioners here have identified no alleged ambiguous statutory language in section 111. And, even if there were some relevant ambiguity, the Rule does not intrude into a traditional area of exclusive state control. Power plant emissions have been subject to federal environmental laws and other requirements for decades. *AEP*, 564 U.S. at 424; *cf. FERC. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016), *as revised* (Jan. 28, 2016) (noting that federally regulated wholesale electricity markets and state-regulated retail electricity market "are not hermetically sealed from each other"); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) ("platonic ideal" of "clear division between areas of state and federal authority in natural-gas regulation" does not exist). Indeed, it is Petitioners' interpretation of the Act that would upset basic, well-established principles of cooperative federalism by preventing EPA from setting minimum national emission standards for new power plants. *See*, *e.g.*, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593-94 (2014) (describing interstate pollution controls under the Act).

Plainly, Congress intended that plant location and fuel choice could be influenced by new source standards. *See supra* II.A.; *see also Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 64 (1975) (explaining that Congress reacted to the "disappointing" progress of states' air pollution control efforts by amending the Act in 1970, which "sharply increased federal authority and responsibility in the continuing effort to combat air pollution"); *ASARCO*, 578 F.2d at 321. Here, the effect is modest: the Rule does not prohibit coal-fired plants, and plants can choose to meet the standard by using means other than CCS. In this way, the Rule is an ordinary application of section 111(b) authorized by Congress long ago. *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 304 (3d Cir. 2015) (cautioning that "once an agency is operating in the weeds of a statute that obviously requires federal oversight of some state functions, we will not require subordinate clear statements of congressional intent every time an interpretation arguably varies the usual balance of responsibilities between federal and state sovereigns"), *cert. denied*, 136 S. Ct. 1246 (2016). The Court should reject Petitioners' attempt to create a constitutional dilemma out of a statutory provision that has been applied and interpreted to allow regulation of power plant emissions for over four decades.

CONCLUSION

The petitions for review must be denied.

Dated: February 6, 2017

Respectfully Submitted,

ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
BETHANY A. DAVIS NOLL
Assistant Solicitor General
MICHAEL J. MYERS
ANDREW G. FRANK
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2392

MAURA HEALEY
Attorney General of Massachusetts
MELISSA A. HOFFER
CHRISTOPHE COURCHESNE
TRACY L. TRIPLETT
JILLIAN M. RILEY
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2423

XAVIER BECERRA
Attorney General of California
ROBERT W. BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
GAVIN G. MCCABE
DAVID A. ZONANA
Supervising Deputy Attorneys General

/s/ Timothy E. Sullivan
TIMOTHY E. SULLIVAN
JONATHAN WIENER
ELIZABETH B. RUMSEY
Deputy Attorneys General
Attorneys for the State of California, by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Xavier Becerra
Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 879-0987
Timothy.Sullivan@doj.ca.gov

GEORGE JEPSEN
Attorney General of Connecticut
MATTHEW I. LEVINE
KIRSTEN S. P. RIGNEY
SCOTT N. KOSCHWITZ
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

MATTHEW P. DENN
Attorney General of Delaware
VALERIE S. EDGE
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3d Floor
Dover, DE 19904
(302) 739-4636

DOUGLAS S. CHIN
Attorney General of Hawai‘i
HEIDI M. RIAN
WILLIAM F. COOPER
Deputy Attorneys General
333 Queen Street, Rm. 905
Honolulu, HI 96813
(808) 586-4070

LISA MADIGAN
Attorney General of Illinois
MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660

TOM MILLER
Attorney General of Iowa
JACOB LARSON
Assistant Attorney General
Environmental Law Division
Hoover State Office Building
1305 E. Walnut St., 2nd Floor
Des Moines, Iowa 50319
(515) 281-5341

JANET T. MILLS
Attorney General of Maine
GERALD D. REID
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, ME 04333
(207) 626-8800

BRIAN E. FROSH
Attorney General of Maryland
ROBERTA R. JAMES
Assistant Attorney General
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, MD 21230
(410) 537-3748
Attorneys for State of Maryland, by and through Attorney General Brian E. Frosh

LORI SWANSON
Attorney General of Minnesota
KAREN D. OLSON
Deputy Attorney General
MAX KIELEY
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1244
Attorneys for State of Minnesota, by and through the Minnesota Pollution Control Agency

JOSEPH A. FOSTER
Attorney General of New Hampshire
K. ALLEN BROOKS
Senior Assistant Attorney General
Chief, Environmental Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3679

HECTOR BALDERAS
Attorney General of New Mexico
JOSEPH YAR (admission pending)
Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 827-6000

ELLEN F. ROSENBLUM
Attorney General of Oregon
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

PETER F. KILMARTIN
Attorney General of Rhode Island
GREGORY S. SCHULTZ
Special Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-6902

MARK HERRING
Attorney General of Virginia
JOHN W. DANIEL, II
Deputy Attorney General
DONALD D. ANDERSON
Senior Assistant Attorney General
and Chief
MATTHEW L. GOOCH
Assistant Attorney General
Environmental Section
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 225-3193

ROBERT W. FERGUSON
Attorney General of Washington
KATHARINE G. SHIREY
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769

KARL A. RACINE
Attorney General for the District
of Columbia
JAMES C. MCKAY, JR.
Senior Assistant Attorney General
Office of the Attorney General for
the District of Columbia
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

ZACHARY W. CARTER
Corporation Counsel of the City of
New York
CARRIE NOTEBOOM
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2319

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief for State Respondent-Intervenors in Support of Respondent, dated February 6, 2017, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's briefing order issued on August 30, 2016, which limited the briefs for Respondent-Intervenors to a total of 13,300 words in no more than three briefs. I certify that this brief contains 4,393 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and that when combined with the word court of the other Respondent-Intervenors, the total does not exceed 13,300 words.

/s/ Timothy E. Sullivan
TIMOTHY E. SULLIVAN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for State Respondent-Intervenors in Support of Respondent was filed on February 6, 2017, using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Timothy E. Sullivan
TIMOTHY E. SULLIVAN