ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the District of Columbia Circuit

NO. 12-1100 AND CONSOLIDATED CASES

WHITE STALLION ENERGY CENTER, LLC, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

CORRECTED
OPENING BRIEF FOR PETITIONER JULANDER ENERGY COMPANY
(Petitioner in No. 12-1174)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Julander Energy Company certifies as follows:

I. Parties and Amici

Petitioner in this action (No. 12-1174) is Julander Energy Company, respondent in this action, and in the consolidated actions, is the United States Environmental Protection Agency. The petitioners in actions which have been consolidated with this one are:

White Stallion Energy Center, LLC, No. 12-1100
National Mining Association, No. 12-1101
National Black Chamber of Commerce and Institute for Liberty, No. 12-1102
Utility Air Regulatory Group (National Emissions Standards for Hazardous Air Pollutants), No. 12-1147
Utility Air Regulatory Group (New Source Performance Standards), No. 12-1166
Midwest Ozone Group, No. 12-1172
American Public Power Association, No. 12-1173
Peabody Energy Corporation, No. 12-1175
Deseret Power Electric Cooperative, No. 12-1176
Sunflower Electric Power Corporation, No. 12-1177
Tri-State Generation and Transmission Association, Inc., No. 12-1178
Tenaska Trailblazer Partners, LLC, No. 12-1180
ARIPPA, No. 12-1181
West Virginia Chamber of Commerce, Inc., Georgia Association of Manufacturers, Inc., Indiana Chamber of Commerce, Inc., Indiana Coal Council, Inc., Kentucky Chamber of Commerce, Inc., Kentucky Coal Association, Inc., North Carolina Chamber, Ohio Chamber of Commerce, Pennsylvania Coal Association, South Carolina Chamber of Commerce, The Virginia Chamber of Commerce, The Virginia Coal Association, Incorporated, West Virginia Coal Association, Inc., and Wisconsin Industrial Energy Group, Inc., No. 12-1182
United Mine Workers of America, No. 12-1183
Power4Georgians, LLC, No. 12-1184
State of Texas, Texas Commission on Environmental Quality, Texas Public Utility
Commission, and Railroad Commission of Texas, No. 12-1185

Oak Grove Management Company LLC, No. 12-1187
Gulf Coast Lignite Coalition, No. 12-1188
Puerto Rico Electric Power Authority, No. 12-1189
State of Arkansas, ex rel. Dustin McDaniel, Attorney General, No. 12-1190
Chase Power Development, LLC, No. 12-1191
Edgecombe Genco, LLC and Spruance Genco, LLC, No. 12-1193
Chesapeake Climate Action Network, Conservation Law Foundation, Environmental Integrity Project, and Sierra Club, No. 12-1194
Wolverine Power Supply Cooperative, Inc., No. 12-1195
States of Michigan, Alabama, Alaska, Arizona, Florida, Idaho, Indiana, Kansas, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Commonwealth of Pennsylvania, South Carolina, Utah, Commonwealth of Virginia, West Virginia, and Wyoming, and Terry E. Branstad, Governor of the State of Iowa on behalf of the People of Iowa, and Jack Conway, Attorney General of Kentucky, No. 12-1196

The following parties have intervened in one or more of the consolidated cases:

American Academy of Pediatrics
American Lung Association
American Nurses Association
American Public Health Association
Calpine Corporation
Chase Power Development, LLC
Chesapeake Bay Foundation
Citizens for Pennsylvania's Future
City of Baltimore
City of Chicago
City of New York
Clean Air Council
Commonwealth of Massachusetts
Conservation Law Foundation
County of Erie, New York
District of Columbia
Eco Power Solutions (USA) Corporation
Environment America
Environmental Defense Fund
Exelon Corporation
Gulf Coast Lignite Coalition

Institute for Liberty
Izaak Walton League of America
Lignite Energy Council
National Association for the Advancement of Colored People
National Black Chamber of Commerce
National Grid Generation LLC
National Mining Association
National Resources Council of Maine
Natural Resources Defense Council
Oak Grove Management Company LLC
Ohio Environmental Council
Peabody Energy Corporation
Physicians for Social Responsibility
Public Service Enterprise Group, Inc.
Sierra Club
State of California
State of Connecticut
State of Delaware
State of Illinois
State of Iowa
State of Maine
State of Maryland
State of Massachusetts
State of Minnesota
State of New Hampshire
State of New Mexico
State of New York
State of North Carolina
State of Oregon
State of Rhode Island
State of Vermont
Sunflower Electric Power Corporation
UARG
Waterkeeper Alliance

Amici Curiae

Institute for Policy Integrity (in support of Respondent)
U.S. Chamber of Commerce (in support of Industry Petitioners)

II. Rulings Under Review

The ruling under review is a final action promulgated by EPA, entitled "National Emissions Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, " 77 Fed. Reg. 9,304 (Feb. 16,
2012).

III. Related Cases

Julander Energy is unaware of any other related cases.

Respectfully submitted,

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Dated: October 23, 2012

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Cases

Statutes, Regulations, and Other Agency Action

Glossary

CO2: carbon dioxide

EGU: Electric Generating Unit

HAP: Hazardous Air Pollutant

PM: particulate matter

SO2: sulfur dioxide

Jurisdictional Statement

Pursuant to 42 U.S.C. 7607(b), Julander Energy Company ("Julander") timely petitioned this court on April 13, 2012 for review of final EPA action entitled "National Emission Standards for Hazardous Air Pollutants ["HAPs"] From Coal and Oil-Fired Electric Utility Steam Generating Units ["EGUs"], etc.", 77 FR 9304 (February 16, 2012) ("Rule").

Statement of Issues

1. In deciding not to adopt for new EGUs stricter emission standards achievable by fuel-switching from coal to natural gas ("fuel-switching"), was EPA's reliance on a non-statutory factor contrary to law?

2. In deciding not to adopt fuel-switching for new EGUs, was EPA's failure to consider a required statutory factor contrary to law?

3. In deciding not to adopt fuel-switching for new EGUs, were EPA's conclusions about natural gas supply and infrastructure arbitrary and capricious?

4. In deciding not to adopt fuel-switching for existing EGUs, was EPA's analysis of fuel-switching costs arbitrary and capricious?

Statement of Facts

Natural gas EGUs emit virtually no HAPs: "For natural gas-fired EGUs, EPA found that regulation of HAP emissions 'is not appropriate or necessary because

the impacts due to HAP emissions from such units are negligible.'" 76 FR 24985. EPA therefore determined that fuel-switching was a HAP control option: "Fuel switching to natural gas is a potential regulatory option beyond the new source floor level of control that would reduce HAP emissions." *Id*. at 25048.

Nevertheless, for new EGUs, EPA decided not to adopt the more protective standards achievable by fuel-switching, for two reasons: fuel-switching is "not reasonable" because it would prohibit construction of new coal-fired EGUs, and there isn't enough natural gas/infrastructure to supply new EGUs. JA XX.

For existing EGUs, EPA's "primary reason" for rejecting fuel-switching was cost (JA XX).

Summary of Argument

In concluding that fuel-switching is "not reasonable" because it would prohibit construction of new coal-fired EGUs, EPA strayed outside the criteria in CAA §112, 42 U.S.C. 7412. Conversely, EPA ignored §112's requirement to consider collateral benefits of control options by not acknowledging fuel-switching's significant reduction in carbon dioxide ("CO2") and other emissions. Finally, EPA offered no factual basis for concluding that there is not enough natural gas/infrastructure to supply new EGUs.

EPA rejected fuel-switching at existing EGUs primarily because of cost, but EPA's cost analysis contains assumptions pulled from thin air and analytical errors on a scale of an order of magnitude.

In *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), the Supreme Court noted that "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

The Rule is 4-for-4 with such errors, a *State Farm* superfecta.

Standing

Julander, an oil and natural gas development, exploration and production company, was injured when EPA did not adopt emission standards achievable by fuel-switching to natural gas.

Argument

I. EPA Erred By Not Adopting Fuel-Switching Standards for New EGUs

A. EPA Relied on Factors Congress Did Not Intend It to Consider

EPA's proposed rule said that it would not adopt fuel-switching for new EGUs because that would "effectively prohibit new construction of coal-fired EGUs and we do not think that is a reasonable approach." 76 FR 25048-49.

Julander commented that "whether or not fuel switching would 'effectively prohibit' new coal-fired EGUs is not a valid consideration under Section 112." JA XX. To no avail: EPA "continue[s] to believe that a final rule that expressly prohibits new coal construction is not reasonable." JA XX.

EPA's "reasons for action or inaction must conform to the authorizing statute", *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). For "beyond-the-floor" standards, §112(d)(2) requires EPA to "tak[e] into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." Nothing in §112 allows EPA to reject an otherwise appropriate control option simply because it would require new sources to use a particular fuel. Concluding that fuel-switching is "not reasonable" because it does so is "reasoning divorced from the statutory text." *Id.* at 532. *State Farm* error No. 1: "relyi[ng] on factors which Congress has not intended it to consider".

In fact, EPA agrees that the Clean Air Act does not preclude such a prohibition. Less than two months after concluding that it was "not reasonable" to prohibit new coal-fired EGUs because of their HAP emissions, EPA said it was reasonable to

prohibit them because of their CO2 emissions, and proposed doing just that. 77 FR 22392.

B. EPA Failed to Consider a Mandatory Factor

EPA must consider "any non-air quality health and environmental impacts" in setting beyond-the-floor standards. Because coal-fired EGUs are the nation's largest source of CO2, Julander commented that "nowhere does EPA discuss the GHG emissions reductions that would result from [fuel-switching], as natural gas EGUs produce approximately 50% less CO2 emissions than comparable coal-fired EGUs." JA XX. Other commenters noted that fuel-switching also delivers significant emission reductions of PM, SO2, etc. JA XX.

EPA did not respond to any of these comments (JA XX; XX).

EPA failed to consider the substantial reduction in CO2 and other emissions fuel-switching provides, and thus "entirely failed to consider an important aspect of the problem", *State Farm* error No. 2.

C. EPA Gave No Basis For Its Conclusions About Natural Gas Supply

"For new EGUs, similar to that for existing EGUs, [EPA] determined that natural gas was not available in all parts of the country." JA XX. Yet nowhere in the 2,400 pages of the Rule, the Regulatory Impact Analysis ("RIA") or the Response to Comments does EPA give any basis for this conclusion. In fact, the

gas industry submitted reams of evidence that gas is available everywhere and in record amounts. JA XX.

EPA thus "offered an explanation for its decision that runs counter to the evidence before the agency". *State Farm*, 3-for-3. And in its subsequent proposal to prohibit new coal-fired EGUs, EPA noted that "utilities are likely to rely heavily on natural gas to meet new demand for electricity generation" (77 FR at 22413) and concluded that the only new fossil-fuel EGUs will be gas-fired, because "technological developments and discoveries of abundant natural gas reserves have caused natural gas prices to decline precipitously in recent years and have secured those relatively low prices for the near-future." *Id.* at 22394. Apparently there is enough gas for new EGUs.

II. EPA Erred by Not Adopting Fuel-Switching Standards for Existing EGUs

For existing EGUs, "[t]he primary basis for EPA's rejection of fuel switching to natural gas was that the switch would not be cost effective". JA XX. EPA calculated the cost of electricity ("COE") for fuel-switching at $44.5/MWh, four times the "Dry FGD" coal retrofit COE ($11.2/MWh), 22 times the "ACI" coal retrofit COE ($2/MWh) (JA XX), and thus concluded that fuel-switching is "4 to 22 times the cost of alternatives" (76 FR 25046).

Here are the errors in EPA's 2-page "analysis":

EPA cost analysis assumed an outmoded coal-to-gas boiler conversion that commenters noted no one would ever use; the only plausible conversion would be to a natural gas combined cycle ("NGCC") system, which is far cheaper than any coal retrofit option. JA XX. Elsewhere, EPA agreed with this: "it seems unlikely that utilities would choose a natural gas-fired boiler as the generation technology of choice when NGCC is a much more efficient, less expensive, and more widely used technology." 77 FR 22418.

EPA mistakenly compared its outmoded version of fuel-switching to each coal retrofit option individually, although the proper comparison is to "a combined retrofit with ACI and either DSI or FGD". 76 FR 25046.

EPA assumed the price of gas at $5.74/MMBtu, 20% above the Energy Information Administration's 2010 Annual Energy Outlook forecast (p.98) of $4.79/MMBtu (and referenced in the RIA). JA XX.

Finally, EPA overstated the cost of fuel-switching by an order of magnitude by failing to account for the fact that fuel-switching is both a control technology and also the fuel supply. JA XX.

Pace NGCC, simply correcting for the price of gas, combining the necessary retrofits and accounting for fuel-switching as the fuel supply (by adding the "base fuel cost" to both the fuel-switching and retrofit option costs, JA XX), fuel-switching is not "400-2200%" more expensive than retrofits, but only 65-97%

higher, and well within the realm of §112(d) beyond-the-floor cost consideration, *e.g.*, JA XX.

EPA's response was, "[t]he EPA incremental cost calculations are correct." JA XX.

EPA's cost analysis is Bernie Madoff math, a result "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Voilá: the *State Farm* superfecta.

Conclusion

This Court should remand the Rule to EPA to correct these deficiencies.

Respectfully submitted,

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Statutory Appendix

CAA Section 112(d)(1) – (3), 42 U.S.C. 7412(d)(1)-(3)

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which—

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than—

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

Rule 32(7)(C) Certificate of Compliance

I certify that, according to Microsoft Word, the foregoing brief for Petitioner Julander Energy Company contains 1,496 words.

s/*David Bookbinder*
David Bookbinder

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of October, 2012, a copy of the foregoing Corrected Opening Brief for Petitioner Julander Energy Company was served electronically through the court's CM/ECF system on all registered counsel.

s/David Bookbinder
David Bookbinder