

Oral Arguments Not Yet Scheduled

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

ENERGY & ENVIRONMENT)
LEGAL INSTITUTE)

Petitioner,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY)

Respondent.)

Case No.15-1397
and consolidated cases

Petitioner Statement of Issues to Be Raised

In accordance with this Court's Order of November 2, 2015 and D.C. Circuit Rules 15(c)(3) and 28(a)(1), Petitioner Energy & Environment Legal Institute submits this non-binding statement of issues to be raised in this case.

- 1) Whether the Final Rule violates Section 111(b) of the Clean Air Act (CAA) by establishing emission standards of performance for new and modified and reconstructed Electric Generating Units (EGUs) based on a technology or technologies that have not been adequately demonstrated and are not achievable, as required by CAA Section 111(b)?

- 2) Whether EPA's reliance in the Final Rule on separate alleged "demonstrations" of the individual components of the technology or technologies on which the agency purports to rely violates CAA Section 111(b) or whether EPA has abused the agency's discretion by relying on such component demonstrations?
- 3) Whether EPA has properly defined the "best system of emission reduction" for new fossil fuel-fired electric generating units as required by Section 111(b) of the CAA.
- 4) Whether the Final Rule violates the Energy Policy Act of 2005?
- 5) Whether EPA properly placed into the public docket and agency record during the Notice of Proposed Rulemaking all relevant and necessary material as required by 5 U.S. Code § 553?
- 6) Whether EPA engaged in improper ex parte communications prior to the Notice of Proposed Rulemaking which formed the basis of the agency action and were undisclosed during the notice-and-comment process?
- 7) Whether EPA allowed personnel with conflicts of interest to draft the rule and failed to recuse decisionmakers with "unalterably closed minds" from reaching the determination to implement the Final Rule?
- 8) Whether EPA failed to respond to substantial issues raised in comments to the Notice of Proposed Rulemaking?

9) Whether the Final Rule creates an unconstitutional taking of property interests that can be avoided by an interpretation that is more consistent with the plain text of the rule and more consistent with past practice?

Petitioner reserves the right to present and argue any other issues that have been preserved for judicial review or that arise during these proceedings.

Dated: December 2, 2015

Respectfully Submitted

ENERGY AND ENVIRONMENT
LEGAL INSTITUTE

By Counsel: *Chaim Mandelbaum*

Chaim Mandelbaum
Free Market Environmental
Law Clinic
Litigation Manager
D.C. Circuit Bar No. 56152
726 N. Nelson St, Suite 9
Arlington, VA 22203
(703) 577-9973
Chaim12@gmail.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on this 2nd day of December, 2015, a copy of the foregoing *Petitioner Statement of Issues to be Raised* was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Chaim Mandelbaum
Chaim Mandelbaum