April 26, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW, 1101A
Washington, D.C. 20460

Re: Repeal of the Clean Power Plan, EPA-HQ-OAR-2017-0355

Dear Administrator Pruitt:

We applaud the Environmental Protection Agency's (EPA) plans to repeal the Clean Power Plan (CPP) and review the related New Source Performance Standard (NSPS).[1] Texas has opposed these intertwined rules since their inception and continues to oppose them now.[2] Vestiges of President Obama's growth-killing agenda, the CPP and the NSPS impose unprecedented costs on Texas businesses and consumers for little or no environmental benefit.

More than a year ago, President Trump ordered EPA to review both the CPP and the NSPS to determine whether they "comply with the law." Presidential Executive Order on Promoting Energy Independence and Economic Growth §§ 1(c), 4 (Mar. 28, 2017). The CPP and the NSPS do not comply with federal law, and EPA should repeal them.

Under the Clean Air Act (CAA), neither rule is valid absent a finding that greenhouse gas emissions from electric generating units (EGUs) "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). EPA has never properly made such a finding. Instead, it claimed the power to regulate even harmless and insignificant emissions. By disregarding the statutory limits on its authority, EPA undermined the separation of powers.

Nor could EPA properly find that EGUs "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* EGUs emit only

[1] *See* Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017); Review of the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 82 Fed. Reg. 16,330 (Apr. 4, 2017).

[2] *See, e.g.*, *State of North Dakota, et al. v. EPA*, No. 15-1381 (D.C. Cir.); Comments of TCEQ, PUC, and RRC, Docket No. EPA-HQ-OAR-2013-0495 (May 8, 2014), https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0495-10669.

5 percent of global greenhouse gases, and based on EPA's own data, the rules would have only *de minimis* effects on the climate. EPA should repeal both the CPP and the NSPS.

I. Neither Rule Can Stand without a Pollutant-Specific Endangerment Finding

In the CPP and the NSPS, EPA claimed authority to regulate greenhouse gas emissions from EGUs without first finding that EGUs "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). This prerequisite, known as an "endangerment finding," is a crucial component of the regulatory scheme established in Section 111 of the CAA. Without a valid endangerment finding for EGU emissions of greenhouse gases, EPA must repeal both the CPP and the NSPS.

A. The Validity of the CPP Depends on the Lawfulness of the NSPS

Section 111 governs EPA's regulation of pollutants from stationary sources. Under that section, EPA cannot regulate existing sources through the CPP unless it first regulates new sources through a valid NSPS. We begin with the text of Section 111:

> (b)(1)(A) The Administrator shall . . . publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it *causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare*.
>
> (B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category.
>
> . . .
>
> (d)(1) The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which [] establishes standards of performance for any existing source for any air pollutant . . . to which a standard of performance under this section would apply if such existing source were a new source . . . .

42 U.S.C. § 7411 (emphasis added). The resulting four-step framework is as follows:

1. **Endangerment Finding**: The Administrator determines which "categories of stationary sources" "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

2. **Listing**: The Administrator then publishes "a list of categories of stationary sources" that he found to be dangerous. 42 U.S.C. § 7411(b)(1)(A).

3. **New Source Performance Standard**: Next, the Administrator promulgates "regulations[] establishing Federal standards of performance for new sources within" "a category of stationary sources in a list." *Id.* § 7411(b)(1)(B).

4. **Existing Source Performance Standard**: Last, the Administrator "prescribe[s] regulations" under which States "establish[] standards of performance for" existing sources that would be subject to a federal standard of performance if they were new sources." *Id.* § 7411(d)(1). The CPP governs existing source performance standards.

Each step builds upon the previous one. EPA cannot list a category of sources until it has issued an endangerment finding, and it cannot create a new source performance standard until "after the inclusion of a category of stationary sources in a list." *Id.* § 7411(b)(1). Similarly, EPA cannot create an existing source performance standard until after there is a new source performance standard that "would apply" if the relevant "existing source were a new source." *Id.* § 7411(d)(1). As a result, any flaw that undermines a new source performance standard, like the NSPS, also undermines an existing source performance standard, like the CPP.

B. Without an Endangerment Finding for Greenhouse Gases from EGUs, the NSPS Is Unlawful

The NSPS cannot stand without a foundational endangerment finding. No one doubts that. The issue here boils down to what kind of endangerment finding Section 111 requires.

According to well-established principles of statutory interpretation, Section 111 requires an endangerment finding that is specific to the pollutant at issue. In other words, if EPA wants to regulate emissions of a particular pollutant from a source, it must first find that the source's emissions of that pollutant "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(B). Section 111 uses "source" as a pollutant-specific term. As a result, endangerment findings, listings, and performance standards, which are all done for "sources," must be done on a pollutant-specific basis.

By contrast, in promulgating the NSPS and the CPP, EPA asserted that Section 111 required only a finding that EGUs contribute significantly to at least one dangerous pollutant, even if they do not contribute significantly to the type of pollution EPA seeks to regulate. EPA claimed discretion to regulate *any* emissions from a listed source, including emissions that cannot "reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A); *see also* NSPS, 80 Fed. Reg. at 64,530 (asserting that "the CAA does not specify what pollutants should be the subject of standards from [a listed] source category"). That is, EPA denied that Section 111 uses "source" on a pollutant-specific basis. *See* NSPS, 80 Fed. Reg. at 64,530 (arguing that "that the endangerment finding is made with respect to the source category," not "specific pollutants"). Thus, EPA implausibly asserted authority to regulate emissions that (1) do not threaten public health or welfare and (2) do not constitute significant contributions to air pollution.

As a matter of statutory interpretation, EPA was wrong to claim that authority. First, requiring a pollutant-specific endangerment finding is the only interpretation that advances the statute's textually and structurally derived purpose. In fact, a contrary interpretation would lead to absurd results that Congress could not have intended. Second, the more limited reading of Section 111 complies with well-established rules of statutory interpretation: ambiguous statutory text cannot support the grant of sweeping and unfettered regulatory authority, and statutes should be interpreted to avoid such constitutional problems. Third, other provisions of the CAA support an interpretation of Section 111 that requires a pollutant-specific endangerment finding. Fourth, EPA's regulations implementing Section 111 demonstrate that endangerment findings must be specific to a particular pollutant.

1. The NSPS's Interpretation of Section 111 Renders the Statutory Structure Nonsensical and Contradicts the Purpose of the CAA

An endangerment finding is necessarily conducted with regard to one or more specific pollutants. The only way to determine whether a stationary source "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" is to evaluate the specific emissions from that source. 42 U.S.C. § 7411(b)(1)(A). Because listing a source category depends on the endangerment finding, the listing is also necessarily justified with reference to one or more specific pollutants. *See id.*

If Section 111 requires a pollutant-specific endangerment finding, this structure makes perfect sense. Congress required EPA to make a pollutant-specific endangerment finding before regulating that pollutant because it wanted EPA "to promote the public health and welfare"—the statute's textually declared purpose. *Id.* § 7401(b)(1). EPA accomplishes that purpose by regulating significant emissions of pollutants that "may reasonably be anticipated to endanger public health or welfare" but no others. *Id.* § 7411(b)(1)(A).

This structure makes so much sense that Congress has used it repeatedly throughout the CAA, as EPA itself conceded. *See* NSPS, 80 Fed. Reg. at 64,530 (acknowledging that other "endangerment finding" provisions of the CAA "require the EPA to make endangerment findings for each particular pollutant that the EPA regulates under those provisions").

To support the NSPS, by contrast, EPA asserted that endangerment findings and listings under Section 111 are not "made as to specific pollutants" and that "once a source category is listed, the CAA does not specify what pollutants should be the subject of standards from that source category." NSPS, 80 Fed. Reg. at 64,530. This unfounded view of EPA's authority would lead to at least three absurd results:

1. EPA would be permitted to regulate harmless and insignificant emissions.
2. EPA would not be required to regulate dangerous and significant emissions.
3. The endangerment finding, a key component of the statutory scheme, would be rendered arbitrary and nonsensical.

First, EPA's claimed power to regulate any pollutant would really be the power to regulate any emissions at all. The CAA defines "air pollutant" to include "any physical, chemical, [or] biological . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). *See also Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007) (describing this "sweeping definition" as "embrac[ing] all airborne compounds of whatever stripe").

There is no reason that Congress would have empowered EPA to regulate admittedly harmless and insignificant emissions. Regulating pollutants that cannot "reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7411(b)(1)(A), does not "promote the public health and welfare." 42 U.S.C. § 7401(b)(1).

Second, if the NSPS were correct, EPA would have no statutory obligation to regulate indisputably dangerous pollutants. If, as EPA claimed, "the CAA does not specify what pollutants should be the subject of standards," NSPS, 80 Fed. Reg. at 64,530, then EPA is free to ignore dangerous emissions, including the very emissions that caused it to issue an endangerment finding in the first place. That is, EPA could disregard "air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

Such a result would undermine Congress' "comprehensive scheme to regulate air pollutants with 'no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.'" CPP, 80 Fed. Reg. at 64,711 (quoting S. Rep. No. 91–1196, at 20 (1970)). "The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012), and here it requires rejecting EPA's previous interpretation.

Third, under EPA's previous interpretation, Section 111's endangerment finding requirement would become an arbitrary regulatory hurdle rather than a sensible check on EPA's discretion. It is undisputed that EPA cannot regulate any emissions from a source category until after it concludes that the source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). If Congress wanted EPA to have discretion to regulate harmless or insignificant emissions while ignoring dangerous and significant ones, there would have been no reason to limit EPA to source categories that emit dangerous pollutants. If EPA's mandate were to regulate whatever emissions it wants, including those that cannot support an endangerment finding, then Congress would have empowered EPA to regulate all sources, not just sources that emit significant amounts of dangerous pollutants. But Congress did not give EPA that power, and even EPA has never claimed otherwise.

Any reasonable interpretation of Section 111 must further the statute's purpose, make sense of its structure, and avoid these absurd results. Because the interpretation underlying the NSPS does not, EPA should reject it. Scalia & Garner, *Reading Law* 234 ("The oddity or anomaly of certain consequences may be a perfectly valid reason for choosing one textually permissible interpretation over another . . . .").

2. EPA Should Not Assume that Congress Delegated Vast, Discretionary Authority that Would Violate the Constitution

The CAA clearly forecloses EPA's previous interpretation, but even if the statute were ambiguous, EPA could not infer a far-reaching grant of power to regulate harmless and insignificant emissions. "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

In a similar case, the Supreme Court rejected the Occupational Safety and Health Administration's (OSHA) assertion of power to regulate toxic substances without making a threshold finding "that the toxic substance in question poses a significant health risk in the workplace." *Indus. Union Dep't v. Am. Petrol. Inst.*, 448 U.S. 607, 614–15 (1980) (plurality). OSHA claimed that the statute, rather than requiring an endangerment finding, imposed only a "minimal requirement of rationality." *Id.* at 641. Justice Stevens' plurality opinion characterized OSHA's assertion of authority as "unprecedented." *Id.* at 645. "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [OSHA] the unprecedented power over American industry that would result" if OSHA did not have to first identify a significant health risk. *Id.* at 645.

Further, if the statute were interpreted to not "require[] that the risk from a toxic substance be quantified sufficiently to enable [OSHA] to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the [non-delegation doctrine]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.* at 646. Writing separately, Justice Rehnquist concluded that the statute violated the non-delegation doctrine. *Id.* at 672 (Rehnquist, J., concurring in the judgment).

So too here. EPA claimed authority to regulate greenhouse gas emissions from EGUs without first finding that they "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(B). EPA acknowledged no statutory limit on its discretion at all. EPA noted that it "ha[d] in the past provided a rational basis for its decisions" but did not characterize that past practice as legally required. NSPS, 80 Fed. Reg. at 64,530. Such boundless discretion would give EPA the kind of "unprecedented power," subject only to the "minimal requirement of rationality," that it would be "unreasonable to assume that Congress intended to give." *Indus. Union Dep't*, 448 U.S.at 641, 645.

Had Congress granted EPA such unfettered discretion, it would violate the Constitution. "All legislative Power" granted by the Constitution is "vested in a Congress of the United States," not the executive branch. U.S. Const. art. I § 1. On EPA's previous reading, Section 111 "establishes no criteria to govern [the Agency's] course" and grants "an unlimited authority" to promulgate a standard of performance or not, "as [EPA] may see fit." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935). If EPA were correct that "Congress has declared no policy, has established no standard, has laid down no rule" regarding which emissions to regulate, then

Section 111 would violate "the constitutional processes of legislation which are an essential part of our system of government." *Id.* at 430. *See also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (disapproving "virtually unfettered" executive discretion as "an unconstitutional delegation of legislative power"). The NSPS and the CPP, as the results of an unconstitutional delegation, would be void.

These constitutional objections are reason enough to reject EPA's previous interpretation of the statute and limit EPA's regulatory authority to pollutants that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). EPA's previous interpretation would lead to constitutional invalidity, and "[a]n interpretation that validates outweighs one that invalidates." Scalia & Garner, *Reading Law* 66. In any event, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." *Id.* at 247. As the Supreme Court has held, the canon of constitutional avoidance "has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, and has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (citations omitted).

3. Related Statutory Provisions Demonstrate that EPA Must Issue an Endangerment Finding before Regulating a Pollutant

Interpreting Section 111(b) to require a pollutant-specific endangerment finding coheres with the rest of Section 111 and analogous provisions of the CAA. The NSPS's interpretation, by contrast, wrenched Section 111(b)(1) from context and failed to consider the section as a whole. "[R]easonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp.*, 134 S. Ct. at 2442; *see also* Scalia & Garner, *Reading Law* 167 ("The text must be construed as a whole.").

First, EPA failed to consider the rest of Section 111, specifically subsection (f). Section 111(f) provides criteria for EPA to consider when "determining priorities for promulgating standards [of performance] for categories of major stationary sources." 42 U.S.C. § 7411(f)(2). Those criteria include both "the quantity of air pollutant emissions which each such category will emit" and "the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare." *Id.* EPA must consider "the extent to which" a pollutant endangers public health or welfare, not "whether" a pollutant endangers public health or welfare. Thus, Section 111(f) assumes that each pollutant for which EPA issues a standard of performance "may reasonably be anticipated to endanger public health or welfare." *Id.* Of course, the only reason for Section 111(f) to so assume is that Section 111(b) so requires.

Second, EPA failed to interpret Section 111 consistently with analogous provisions of the CAA. As EPA acknowledged, other "endangerment finding" provisions of the CAA "require the EPA to make endangerment findings for each particular pollutant that the EPA regulates under those provisions." NSPS, 80 Fed. Reg. at 64,530. EPA did not explain why Congress would have deviated from that well-established approach in Section 111.

In fact, the rationale underlying the NSPS, if applied consistently across the CAA, would conflict with binding Supreme Court precedent. In Section 202 of the Act, Congress directed EPA to issue "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Applying the reasoning of the NSPS, EPA could argue that a Section 202 endangerment finding applies to a "class or classes of new motor vehicles," *id.*, and is not "made as to specific pollutants." NSPS, 80 Fed. Reg. at 64,530. As a result, EPA would be able to regulate any emissions from a class of new motor vehicles if the class posed a danger. But that approach would contradict the Supreme Court's holding in *Massachusetts v. EPA* that EPA's "judgment must relate to whether *an air pollutant* 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" 549 U.S. 497, 532–33 (2007) (emphasis added). As the Supreme Court recognized, endangerment findings are necessarily specific to the pollutant at issue and justify regulation of only that pollutant.

4. EPA's Historical Implementation of Section 111(d) Assumed the Necessity of a Pollutant-Specific Endangerment Finding

The regulatory framework governing EPA's enforcement of Section 111(d) assumes that standards of performance apply only to pollutants found to be dangerous. This assumption is justified only if Section 111(b) requires a pollutant-specific endangerment finding.

Under Section 111(d), EPA publishes "guideline documents" to guide States issuing performance standards for existing sources. Those documents must include "[i]nformation concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant." 40 C.F.R. § 60.22(b). Of course, there would not be any such information for a pollutant that was not the subject of an endangerment finding.

By definition, "designated pollutants" are subject to not only existing source performance standards under Section 111(d) but also new source performance standards under Section 111(b). 40 C.F.R. § 60.21(a). Thus, in promulgating Section 60.22(b), EPA revealed its understanding that all standards of performance must be supported by a pollutant-specific endangerment finding.

Similarly, EPA's regulations divide designated pollutants into two groups: (1) those that "cause or contribute to endangerment of public health," and are subject to more stringent regulation, and (2) those that "may cause or contribute to endangerment of public welfare but [for which] adverse effects on public health have not been demonstrated," and are therefore subject to less stringent regulation. 40 C.F.R. § 60.24(c), (d). There is no third group for emissions that do not endanger either public health or public welfare. If EPA could regulate emissions that are not the subject of an endangerment finding, surely it would have created a regulatory category for pollutants that do not affect public health or welfare.

Moreover, EPA's historical enforcement of Section 111 has assumed that source listings are pollutant specific. When EPA promulgates standards of performance for two different pollutants

at different times, a source that emits both pollutants may be "new" for purposes of one pollutant and "existing" for purposes of another pollutant.

For example, because EPA previously issued performance standards for nitrogen oxides and sulfur dioxide from "stationary combustion turbines that commenced construction, modification or reconstruction after February 18, 2005," turbines built after 2005 are *new* sources of nitrogen oxides and sulfur dioxide. 40 C.F.R. § 60.4300. The NSPS promulgated performance standards for greenhouse gases from "stationary combustion turbine[s] that commenced construction after January 8, 2014," so turbines built before 2014 are *existing* sources of greenhouse gases. 40 C.F.R. § 60.5508. Thus, EPA itself has recognized that a single source, like a turbine built between 2005 and 2014, can be "new" for purposes of some emissions and "existing" for purposes of other emissions.

That eminently sensible result can be explained only by the fact that the CAA uses "source" as a pollutant-specific term. The CAA defines a "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. § 7411(a)(2). An "existing source" is "any stationary source other than a new source." *Id.* § 7411(a)(6).

In the NSPS, EPA contended that "source" refers to a turbine, regardless of the pollutant at issue. *See* NSPS, 80 Fed. Reg. at 64,530 (arguing that "that the endangerment finding is made with respect to the source category," not "specific pollutants"). If that were true, then all turbines built after 2005 would be considered "new sources" for purposes of all pollutants because they were built "after the publication of regulations . . . prescribing a standard of performance." *Id.* § 7411(a)(2). But that result would upend CAA enforcement, and it is not what EPA has traditionally done.

In practice, EPA treats "source" as a pollutant-specific term. If the word "source," as used in Section 111(b)(1)(A), can be understood only with respect to a particular pollutant, then endangerment findings and listings must also be made on a pollutant-specific basis. *See* 42 U.S.C. § 7411(b)(1)(A) (requiring endangerment findings and listings of "categories of stationary sources"). For this additional reason, Section 111 requires a pollutant-specific endangerment finding.

II. EPA Has Not Made and Cannot Reasonably Make an Endangerment Finding for Greenhouse Gas Emissions from EGUs

Upon receiving comments explaining the need for a pollutant-specific endangerment finding, EPA responded, in the alternative, that it could make a pollutant-specific endangerment finding based on the information already before it. *See* 80 Fed. Reg. at 64,530. EPA's attempted post-hoc fix is insufficient for two reasons.

As an initial matter, EPA did not actually make a pollutant-specific endangerment finding. Rather than accepting the need for such a finding and then carefully applying the proper standard to the relevant evidence, EPA summarily asserted that "even if CAA section 111 required" such

a finding, "the information and conclusions described above should be considered to constitute the requisite finding." *Id.* Such a conclusory assertion does not constitute a reasoned endangerment finding, especially given EPA's failure to consider the facts most relevant to an endangerment finding.[3]

Moreover, neither the information before EPA at the time nor the information available now supports the conclusion that EGUs "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

Greenhouse gases are a global issue, as EPA itself has recognized. Greenhouse gas emissions "are sufficiently long-lived to be well mixed globally in the atmosphere." 2009 Endangerment Finding, 74 Fed. Reg. at 66,499. As a result, greenhouse gas emissions from any "region of the world" are equally relevant to climate change. *Id.* at 66,517.

Multitudes of sources emit greenhouse gases worldwide:

> [B]ecause climate change is a global problem that results from global greenhouse gas emissions, there are more sources emitting greenhouse gases (in terms both of absolute numbers of sources and types of sources) than EPA typically encounters when analyzing contribution towards a more localized air pollution problem. From a percentage perspective, there are no dominating sources and fewer sources that would even be considered to be close to dominating. The global problem is much more the result of numerous and varied sources each of which emit what might seem to be smaller percentage amounts when compared to the total.

2009 Endangerment Finding, 74 Fed. Reg. at 66,543.

EGUs subject to the NSPS and the CPP do not contribute significantly to global greenhouse gases. In fact, they constitute only about 5 percent of greenhouse gas emissions.[4] Remarkably, EPA never considered this statistic in alternatively making its purported endangerment finding. *See* NSPS, 80 Fed. Reg. at 64,522–23 (discussing "GHG Emissions From Fossil-Fuel Fired

[3] Of course, the 2009 Endangerment Finding under Section 202 does not satisfy the endangemrent-finding requirement under Section 111. First, it applied a different legal standard. Section 202 requires only that an engine "contribute" to pollution. 42 U.S.C. § 7521(a)(1). It does not require that a source "contribute[] *significantly*," as Section 111 does. *Id.* § 7411(b)(1)(A) (emphasis added). Indeed, EPA specifically relied on the lower standard to justify its endangerment finding. *See* 2009 Endangerment Finding, 74 Fed. Reg. at 66,506 ("[T]he statutory language in CAA section 202(a) does not contain a modifier on its use of the term contribute. Unlike other CAA provisions, it does not require 'significant' contribution." (citing Section 111(b))). Second, the 2009 finidng considered different facts. It was limited to "greenhouse gases from new motor vehicles," 2009 Endangerment Finding, 74 Fed. Reg. at 66,537, but the issue at hand is emissions from EGUs.

[4] *See* NSPS, 80 Fed. Reg. at 64,523 Table 5 (showing greenhouse gas emissions for "Fossil Fuel-Fired EGUs" in 2013 as 2,039.8 MMT); 2009 Endangerment Finding, 74 Fed. Reg. at 66,539 Table 1 (showing "All global GHG emissions" in 2005 as 38,726 MMT).

EGUs" without comparing those emissions to global emissions). EPA's omission is telling. Treating 5 percent as a significant contribution for purposes of Section 111 would be arbitrary and capricious.

EPA's own projections underscore the insignificant contribution that EGUs make to global greenhouse gases. As EPA has admitted, "the emission reductions achieved by the [NSPS] are projected to be minor." NSPS, 80 Fed. Reg. at 64,641. The CPP would have similarly minimal environmental effects. A study of the CPP revealed that the rule would reduce concentrations of carbon dioxide by only 0.2 percent, avert an increase in temperature of only 0.01 degrees Fahrenheit, and prevent the sea level from rising only 0.2 millimeters. These conclusions are not the result of scientific disagreement with EPA. Instead, the study "assume[d], solely for the sake of argument, that EPA's climate modeling is accurate."[5] These *de minimis* benefits of regulating greenhouse gas emissions from EGUs undermine any claim that EGUs contribute significantly to climate change.

EPA has previously recognized that "many (if not all) individual greenhouse gas source categories could appear small in comparison to the total" global greenhouse gas emissions. 2009 Endangerment Finding, 74 Fed. Reg. at 66,543. EPA justified addressing these small contributions under Section 202 as follows: "If the United States and the rest of the world are to combat the risks associated with global climate change, contributors must do their part even if their contributions to the global problem, measured in terms of percentage, are smaller than typically encountered when tackling solely regional or local environmental issues." 2009 Endangerment Finding, 74 Fed. Reg. at 66,543. Regardless of whether that approach is appropriate under Section 202's contribution requirement, it cannot justify a finding of *significant* contribution under Section 111.

First, Congress has addressed and can continue to address greenhouse gases. That Section 111 does not empower EPA to regulate greenhouse gas emissions from EGUs does not mean that nothing can be done. In any event, fear that Congress will not act as EPA desires cannot justify departing from existing statutory requirements.

Second, the significance requirement clearly reflects Congress' decision to prohibit EPA from regulating small contributors, even if much of the relevant pollution is emitted by small contributors. When necessary, Congress knows how to authorize EPA to regulate small contributors, as evidenced by other provisions of the Act.

For example, Section 213, which governs regulations of nonroad engines and does not apply to the CPP or the NSPS, creates a two-part framework for regulating numerous small contributors. *See* 42 U.S.C. § 7547(a). "Under § 213's multi-step scheme, EPA must first complete a study to determine whether emissions from nonroad engines 'cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Bluewater Network v. EPA*, 370 F.3d 1, 7 (D.C. Cir. 2004). "If EPA makes a finding of

[5] *See* American Coalition for Clean Coal Electricity, "Climate Effects" of EPA's Final Clean Power Plan at 1, 2, http://www.americaspower.org/wp-content/uploads/2015/09/Climate-Effects-Paper-August-6-2015.pdf.

significant contribution for nonroad engines," then it must "promulgate standards for those individual 'classes or categories' of new nonroad engines whose emissions, in EPA's judgment, 'cause, or contribute to' " the relevant pollution. *Id.* at 8.

Thus, in Section 213, Congress limited the significance requirement to the "threshold determination that the overall regulatory program is justified" and then allowed regulation of individual categories based on contributions that did not rise to the level of significant contributions. *Id.* at 14. That is the approach that EPA tried to follow for the CPP and the NSPS, but it is not the approach that Congress authorized in Section 111. Unlike Section 213, Section 111 prohibits EPA from regulating any source category that does not itself "contribute[ ] significantly."

As the D.C. Circuit has explained, "unlike bologna, which remains bologna no matter how thin you slice it, significant contribution may disappear if emissions activity is sliced too thinly." *Id.* (quoting *Michigan v. EPA*, 213 F.3d 663, 684 (D.C. Cir. 2000)). Given the numerous sources of greenhouse gases worldwide, the contributions from individual source categories are "sliced too thinly" to be significant. As a result, Section 111 cannot support the CPP and the NSPS.

III. EPA Should Repeal the CPP and the NSPS

The CPP and the NSPS have burdened Americans for too long already. They do not comply with the law, and EPA should repeal them. Without a pollutant-specific endangerment finding, EPA lacks authority to regulate greenhouse gas emissions from EGUs through either the NSPS or the CPP.

This fatal flaw would also undermine any replacement rule for the CPP. For that reason, EPA should decline to issue a replacement rule.

In the alternative, if EPA promulgates a replacement rule for the CPP, it should expressly note that the validity of that replacement rule is contingent on the existence of a valid NSPS and endangerment finding. EPA should then reconsider the NSPS and expressly decide whether EGUs "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

Sincerely,

Greg Abbott
Governor

Dan Patrick
Lieutenant Governor

Ken Paxton
Attorney General

cc: Bryan W. Shaw, Chairman of the Texas Commission on Environmental Quality