Joint Comments of Environmental and Public Health Organizations on EPA's Proposed "Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units" Pertaining to EPA's Basis for Regulating Carbon Pollution from Electric Generating Units Under Section 111 of the Clean Air Act.	**Docket No. EPA-HQ-OAR-2013-0495** *Submitted via regulations.gov* *March 18, 2019*

Environmental and public health organizations Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Air Task Force, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Minnesota Center for Environmental Advocacy, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists hereby submit the following comments on EPA's proposed rule "Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Unit," 83 Fed. Reg. 65,424 (Dec. 20, 2018).[1] These comments focus on EPA's basis for regulating carbon pollution from electric generating units under Section 111 of the Clean Air Act.

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I. Introduction

The Clean Air Act requires the Environmental Protection Agency ("EPA" or "agency") to issue standards of performance for air pollution emitted by source categories listed under Section 111.[2] In 2015, EPA issued emission standards for CO_2 emitted by power plants, a listed source category ("2015 Final Rule").[3] In doing so, EPA formally determined that (1) once EPA has listed a source category under Section 111 because it significantly contributes to air pollution reasonably anticipated to endanger public health or welfare, no endangerment or significant contribution finding is required to regulate additional particular pollutants from that source category; (2) EPA had a rational basis to regulate carbon pollution from fossil fuel-fired power plants; and (3) that rationale and its factual underpinnings supported the determination that in any event, carbon pollution from the power plant source category meets §111(b)(1)(A)'s endangerment and contribution test.

Each of these interpretations and determinations in the New Source Performance Standards ("NSPS") for carbon pollution from fossil fuel-fired power plants is legally correct and factually indisputable. EPA determined that new endangerment and contribution findings to regulate CO_2 emissions from power plants are not required. It explained why it had a rational basis for issuing CO_2 emission standards, drawing upon the robust research and analysis informing the 2009 Endangerment Finding for greenhouse gases and carefully considering new and alarming scientific findings from subsequent years. EPA also set forth why, even if endangerment and contribution findings were required, the factual findings underlying EPA's rational basis showing unquestionably meet that test. EPA thoroughly detailed the facts and analysis supporting its interpretations and determinations in a proposal ("2014 Proposal")[4] and allowed the public a full opportunity to comment on the agency's course. EPA fully responded to the comments it received and issued the 2015 Final Rule, including these determinations, based on a careful analysis and a voluminous factual record.[5]

As EPA states repeatedly in the current Proposal, the agency is *not* proposing to revisit those conclusions. After describing the 2015 Final Rule's holdings, the Proposal states: "The EPA is proposing to retain the statutory interpretations and record determinations described in this paragraph."[6] We agree with EPA's Proposal on this issue. Nonetheless, noting that some have argued against such an approach, a footnote in the Proposal solicits views on those very issues. Should EPA decide to adopt a different interpretation, it would have to issue a new proposal because the footnote does not provide proper notice of any change to the 2015 interpretations and determinations, and any such change would not be a logical outgrowth of the Proposal.

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[2] 42 U.S.C. § 7411(b)(1)(B).
[3] EPA, "Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule," 80 Fed. Reg. 64,510 (Oct. 23, 2015).
[4] EPA, "Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units; Proposed Rule," 79 Fed. Reg. 1430 (Jan. 8, 2014).
[5] EPA, Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, Response to Comments on January 8, 2014 Proposed Rule (Aug. 3, 2015).
[6] EPA, "Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 83 Fed. Reg. 65,424, 65,432 n.25 (Dec. 20, 2018).

Moreover, any such alteration would be unlawful and arbitrary, because EPA's 2015 approach remains procedurally proper, legally sound, and factually unassailable, and the Proposal does not offer any reason for changing that approach.

As we explain below, the need to regulate CO_2 from power plants has become even more urgent as climate science has continued to advance, and as the devastating consequences of climate change have continued to unfold. The most recent, peer-reviewed scientific reports conclude that emissions must be steeply reduced within the next decade to avoid temperature increases beyond 1.5 °C, and that overall CO_2 emissions cannot exceed a net zero balance by mid-century at the latest.[7] A report issued by this administration reiterates that "[m]eeting any climate stabilization goal . . . necessitates that there be a physical upper limit on the cumulative amount of CO_2 that can be added to the atmosphere" and that "[e]arly and substantial mitigation offers a greater chance for achieving a long-term goal."[8] Without mitigating CO_2 emissions from power plants and other industrial source categories, no plausible pathways exist that can achieve those crucial objectives and avoid catastrophic consequences. As such, power plant emissions unquestionably contribute significantly to the problem. Any attempt to remove power plant CO_2 emissions from regulation under Section 111 would be unlawful, arbitrary and capricious.

II. EPA Properly Reaffirms Its Prior Interpretation of Section 111's Requirements for Regulating an Additional Pollutant from a Listed Source Category.

In its Proposal, EPA properly reaffirms its prior interpretation of Section 111's requirements for regulating an additional pollutant from a listed source category. Any change to that interpretation would require a new proposal. Both Clean Air Act ("CAA") Section 307(d) and the Administrative Procedure Act ("APA") require EPA to provide notice of a regulatory proposal,[9] including any changes to prior rulemakings or their rationale, or proposed revisions of existing standards of performance under Clean Air Act Section 111.[10] The D.C. Circuit "has held, both under the APA and under Clean Air Act § 307(d), that the final rule must be a 'logical outgrowth' of the proposed rule."[11]

This Proposal reaffirms EPA's legal interpretation of the relevant language of Section 111(b)(1)(A) governing its authority to regulate additional pollutants from listed source categories, as enunciated in its prior rulemakings on this subject. Specifically, after EPA summarizes the 2015 Final Rule's discussion of the agency's authority to regulate CO_2 from fossil fuel-fired electric generating units ("EGUs" or "power plants"), EPA states that it "is not

[7] IPCC [Intergovernmental Panel on Climate Change], Global Warming of 1.5°C, Summary for Policymakers at 14 (Oct. 2018, rev. Jan. 2019), http://www.ipcc.ch/report/sr15/.
[8] Martinich, J., B.J. DeAngelo, D. Diaz, B. Ekwurzel, G. Franco, C. Frisch, J. McFarland, and B. O'Neill, 2018: Reducing Risks Through Emissions Mitigation. In Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, p. 1351. doi: 10.7930/NCA4.2018.CH29.
[9] 42 U.S.C. § 7607(d)(3); 5 U.S.C. § 553(b).
[10] 42 U.S.C. § 7607(d)(1)(C).
[11] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

re-opening any of the issues discussed."[12] Earlier in the Proposal, EPA states that "[i]n this proposal, in some instances, the EPA identifies an issue that the Agency has previously addressed, and states that the Agency is not reopening that issue in this proposal. The EPA will not consider such an issue as relevant to this proposal."[13] Thus, the agency has expressly excluded these issues from consideration.

Nonetheless, the Proposal states in a footnote that although "EPA is proposing to retain the statutory interpretations and record determinations" related to EPA's authority to regulate CO_2 emissions from power plants as set forth in the 2015 Final Rule,

> EPA is aware that various stakeholders have in the past made arguments opposing our views on these points, and the Agency sees value to allowing them to comment on these views in this rulemaking. Accordingly, the Agency will consider comments on the correctness of the EPA's interpretations and determinations and whether there are alternative interpretations that may be permissible, either as a general matter or specifically as applied to GHG emissions.[14]

Given that EPA has stated expressly that it is not reopening these issues and has not proposed any alternate interpretation, its consideration of any comments on these issues cannot lawfully result in a final rule that changes the agency's prior interpretation. The D.C. Circuit "has made it clear that an agency may not turn the provision of notice into a bureaucratic game of hide and seek"—as the Proposal's conflicting statements do—and that the placement of notice in a footnote is "just the sort of obscuration that the APA abjures."[15]

Even if others were to suggest changes to that interpretation, it would be unreasonable and unlawful to expect commenters to anticipate and comment on any "views" that "various stakeholders" might raise in comments, while EPA simultaneously disclaims their relevance.[16] When the agency has not provided adequate notice, "EPA's consideration of the comments received in response thereto, no matter how careful, cannot cure the defect."[17] Thus, should EPA issue a final rule that changes its prior interpretation, our comments on these topics could not cure EPA's failure to provide adequate notice.[18] We submit them here out of an abundance of caution and without waiving objections to any notice and comment violations that arise.

In keeping with EPA's own declaration in the Proposal that the agency is not proposing to change its 2015 approach to this issue, EPA should not finalize any such change. If EPA decides

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[12] Proposal, 83 Fed. Reg. at 65,434.
[13] *Id.* at 65,426 n.1.
[14] *Id.* at 65,432 n.25.
[15] *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995).
[16] *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) ("A rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).
[17] *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (internal citation omitted).
[18] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("EPA must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.").

to change its position, it must publish a new proposal and give actual notice and opportunity to comment on it.

III. EPA Has Not Articulated or Provided an Explanation for Any Change to Its Prior Interpretation of Section 111's Requirements for Regulating an Additional Pollutant from a Listed Source Category.

EPA has articulated no new proposals concerning how to interpret Section 111's requirements, and has provided no explanations or reasons for any about-face. EPA's musings in footnote 25 of the Proposal that stakeholders' "views" on certain matters might be valuable do not satisfy the requirements for a legally defensible proposal, much less one to reverse existing agency policy. Both the Clean Air Act and the Administrative Procedure Act prohibit EPA from taking actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[19]

As the Supreme Court has repeatedly held, an agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[20] The agency's decision must be "justified by the rulemaking record."[21] And, because declining to regulate CO_2 from power plants would reverse the 2015 Final Rule, "a reasoned explanation [would be] needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[22]

Here, any effort to reverse EPA's decision to regulate CO_2 from power plants would require, among other things, that EPA fully contend with each step of the statutory and legal analysis of Section 111 it undertook in the 2015 Final Rule, and explain why each of them has become invalid. EPA would also have to discuss the voluminous body of scientific evidence concerning the present and future harms caused by climate change and explain why that evidence must now be discarded, and how truly dire consequences could be avoided without reducing emissions from power plants. But EPA does not—and could not—do any of this. Promulgating a final rule contrary to the 2015 Final Rule without the requisite record-based, factual analysis and reasoned explanation would yield "an unexplained inconsistency in agency policy" that is arbitrary, capricious, and unlawful.[23]

IV. It Would Be Arbitrary and Unlawful for EPA to Reverse Its Determination that It Has the Authority to Limit Carbon Pollution from Fossil Fuel-Fired EGUs.

In the footnote, EPA invites views about whether regulation of a pollutant from a source category already listed under Section 111 might require a new endangerment finding for that pollutant, and "whether it would have a rational basis for declining to [regulate CO_2 emissions from new coal-fired power plants] . . . at this time, in light of, among other things, the following:

[19] 42 U.S.C. § 7607(d)(9)(A); 5 U.S.C. § 706(2)(A) (specifically covering "agency actions, findings, and conclusions").
[20] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).
[21] *Id.*
[22] *Fed. Commc'ns Comm'n v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009).
[23] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citations omitted).

(i) Ongoing and projected power sector trends that have reduced CO_2 emissions from the power sector . . . and (ii) . . . no more than a few new coal-fired EGUs can be expected to be built, which raises questions about whether new coal-fired EGUs contribute significantly to atmospheric CO_2 levels."[24] Neither of EPA's assertions is legally or factually sound, and neither provides a valid reason not to regulate GHGs from fossil fuel-fired EGUs under Section 111. Thus, if EPA articulated them in a proposed rationale, neither one would provide reasonable grounds for declining to regulate carbon pollution from fossil fuel-fired EGUs.

A. EPA Is Not Required to Make a Pollutant-Specific Endangerment Finding When Regulating a Pollutant Emitted by a Listed Source Category Like Power Plants.

Section 111(b) requires that the Administrator "shall" determine whether a "category of stationary sources" in "[her] judgment . . . causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[25] The statute focuses on a "category of stationary sources," and calls for EPA's judgment about whether "it" (namely, the category) causes or significantly contributes to air pollution that may reasonably be anticipated to endanger. Thus, the endangerment finding operates *at the category level*, and looks at whether *the sources* in that category *collectively* cause or significantly contribute to endangering "pollution." Once EPA makes that determination, the category is included in "a list of categories" and must be regulated via "standards of performance for new sources within such category."[26] The statute neither provides for nor authorizes withholding regulation based on the absence of a *pollutant-specific* endangerment finding. On the contrary, Section 111(b)(1)(A)'s focus on words that are not pollutant-specific—"category," "source" (i.e., "any building, structure, facility, or installation *which emits or may emit any air pollutant*"[27]), and "pollution"—precludes such an approach.[28]

In the 2015 Final Rule, EPA carefully analyzed the language, structure and intent of Section 111 and, based on this analysis, correctly concluded that, because it was not listing a new category of sources, it was not required to make a new endangerment or contribution finding to set standards of performance for CO_2 emissions from those sources: "Under the plain language of CAA section 111(b)(1)(A), an endangerment finding is required only to list a source category."[29] EPA further found that Section 111 "does not provide that an endangerment finding is made as to specific pollutants."[30] The agency contrasted Section 111(b)(1)(A) with other provisions of the Clean Air Act, which do require endangerment findings for each particular pollutant EPA determines to regulate under those provisions, a mandate absent here.[31] Indeed, the comparison

[24] Proposal, 83 Fed. Reg. at 65,432 n.25
[25] 42 U.S.C. § 7411(b)(1)(A).
[26] *Id.* § 7411(b)(1)(B).
[27] *Id.* § 7411(a)(3) (emphasis added).
[28] This category-oriented approach contrasts with other sections of the CAA, which direct EPA to regulate only those pollutants that Congress or the agency has listed. *See* 42 U.S.C. § 7408(a)(1); *id.* § 7412(b)(2).
[29] 2015 Final Rule, 80 Fed. Reg. 64,510, 530.
[30] *Id.*
[31] EPA compared Section 111(b)(1)(A) with 42 U.S.C. § 7521(a)(1) (requiring an endangerment finding for "any air pollutant" from motor vehicles); 42 U.S.C. § 7545(c)(1) (requiring the finding for "any fuel or fuel additive or any

of Section 111 to other Clean Air Act sections demonstrates that when Congress meant to mandate endangerment findings for specific pollutants emitted by a source, it knew precisely how to do so—and here, it did not.[32] Under the plain language of the statute it is the source category's causation of or significant contribution to air pollution—and not any particular air pollutant that may be a component of that overall contribution—that is the focus of the endangerment finding.

EPA concluded in the 2015 Final Rule that decisions about whether to regulate additional pollutants from an already-listed category should be governed by a rational basis test rather than an endangerment and contribution test. [33] In the 2014 Proposal and in the 2015 Final Rule, EPA provided a rational basis for its decisions about whether to regulate a pollutant from a listed source category.[34] In the instant Proposal, EPA has summarized its own 2015 analysis, finding no fault with its prior reasoning and citing no grounds for any change.[35] In light of this failure to justify any departure from its prior determinations, EPA may not promulgate a different outcome if it finalizes the Proposal.[36] Source categories the emissions of which endanger public health and welfare may emit a large number of pollutants, and the statute does not mandate an endangerment finding for each pollutant. Nothing in the language, structure or purpose of the statute supports a contrary conclusion, and EPA has no basis for changing its interpretation.

B. EPA's Conclusion that It Has a Rational Basis to Regulate Greenhouse Gas Pollution from this Source Category Is Incontrovertible.

In the 2015 Final Rule, EPA determined that it has a rational basis for concluding that CO_2 emissions from fossil fuel-fired power plants merit regulation under Section 111. Any contrary decision would be arbitrary, capricious, and unlawful. And, as we discuss below, even if pollutant-specific endangerment and significance findings were required, EPA's determinations in the 2015 Final Rule that it had made the equivalent of such findings would be incontrovertibly correct. In fact, in light of the scale of GHG emissions from power plants and the copious evidence of climate change harm, EPA could not lawfully or rationally refuse to address this pollution under Section 111.

EPA supported its conclusion that it had a rational basis[37] for regulating CO_2 emissions from fossil fuel-fired power plants with compelling evidence. In both the 2014 Proposal and the 2015 Final Rule, EPA thoroughly analyzed the harms CO_2 emissions from fossil fuel-fired power plants inflict on human health and welfare and the environment, and based that analysis on an

emission product" of a vehicle); and 42 U.S.C. § 7571(a)(2)(A) (requiring the finding for "any air pollutant" emitted by aircraft).

[32] *Nat. Res. Def. Council v. EPA*, 777 F.3d 456, 468-69 (D.C. Cir. 2014); *New York v. EPA*, 413 F.3d 3, 40 (D.C. Cir. 2005); *see also Henson v. Santander Consumer USA*, 137 S. Ct. 1718, 1723 (2017).

[33] 2015 Final Rule, 80 Fed. Reg. at 64,530; *National Lime Assoc. v. EPA*, 627 F.2d 416, 426 & n.27 (D.C. Cir. 1980); 73 Fed. Reg. 35,838 (June 24, 2008) (providing reasons why EPA did not set GHG standards).

[34] 2015 Final Rule, 80 Fed. Reg. at 64,530.

[35] Proposal, 83 Fed. Reg. at 65,431-32.

[36] *Encino Motorcars*, 136 S. Ct. at 2126; *Fox Television Stations*, 556 U.S. at 515-16.

[37] Courts have acceded to EPA's reliance on a rational basis when deciding whether to regulate a pollutant emitted by a source category in the past. *See, e.g., Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 426 & n.27 (D.C. Cir. 1980).

overwhelming scientific record.[38] EPA described and evaluated this record, assembled over many years, including its separate 2009 Endangerment Finding showing that GHGs endanger public health and welfare; observed that the D.C. Circuit upheld that determination in 2012; and cited the newest scientific studies since 2009 that added even more evidence to an already conclusive record. The agency also determined that case law supported EPA's reliance on its previous, separate Endangerment Finding for greenhouse gases as a rational basis for its decision to regulate CO_2 from power plants.[39] In the 2014 Proposal and the 2015 Final Rule, EPA also fully responded to numerous comments on the scientific record and the undoubtedly significant contribution of power plant CO_2 emissions to that endangerment.[40] Power plants are by far the nation's largest stationary CO_2 source, amounting to 27 percent of total national GHG emissions in 2017,[41] and their significant contribution to climate change is incontestable. As EPA observed, "the fact that affected EGUs emit almost one-third of all U.S. greenhouse gases ("GHGs") and comprise by far the largest stationary source category of GHG emissions, along with the fact that the CO_2 emissions from even a single new coal-fired power plant may amount to millions of tons each year, provide a rational basis for regulating CO_2 emissions from affected EGUs."[42]

Since then, the evidence supporting the regulation of CO_2 pollution from this source category has become even more compelling. As we discuss in more detail in separate comments on climate change submitted to this docket, a 2018 study reviewed the scientific evidence that has emerged since 2009 and concluded that it "lends increased support" for EPA's Endangerment Finding.[43] And, as we also discuss in those separate comments, comprehensive, current reports from numerous U.S. agencies and from the Intergovernmental Panel on Climate Change demonstrate not only that climate change is already costing many tens of billions of dollars in damages and many lives annually in the U.S., but also that steep reductions from all sectors of the U.S. economy are required *within the next decade* if truly catastrophic damage is to be avoided.

Based on the record before it, EPA here has much more than a rational basis for the regulation of CO_2 emissions from fossil fuel-fired EGUs. In fact, its duty to protect human health and welfare from the five-alarm fire that climate change constitutes compels it to do so. Any other conclusion would be unlawful, arbitrary and capricious.

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[38] 2014 Proposal, 79 Fed. Reg. at 1452-1455; 2015 Final Rule, 80 Fed. Reg. at 64,530.
[39] 2014 Proposal, 79 Fed. Reg. at 1455; 2015 Final Rule, 80 Fed. Reg. at 64,530.
[40] *See generally* EPA, Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, Response to Comments on January 8, 2014 Proposed Rule, Ch. 4: Climate Science, Rational Basis Analysis and Endangerment, Doc. ID EPA-HQ-OAR-2013-0495-11863 (Aug. 3, 2015). *See also* 2014 Proposal, 79 Fed. Reg. at 1445 (describing stakeholder engagement); 2015 Final Rule, 80 Fed. Reg. at 64,528-29 (same).
[41] EPA, Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017, at 2-3 to 2-4, Table 2-1 (2019), https://www.epa.gov/sites/production/files/2019-02/documents/us-ghg-inventory-2019-main-text.pdf.
[42] 2014 Proposed Rule, 79 Red. Reg. at 1455 (footnote omitted); *see also* 2015 Final Rule, 80 Fed. Reg. at 64,529-531.
[43] Duffy, Philip B. et al., Strengthened Scientific Support for the Endangerment Finding for Atmospheric Greenhouse Gases, 363 Science doi: 10.1126/science.aat5982 (2018) at 1. *See* Joint Comments of Environmental and Public Health Organizations on Climate Science and Climate Change As They Pertain to EPA's Proposed Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (Mar. 18, 2019).

C. The Legal Framework for Deciding Whether to Regulate a Pollutant from a Listed Source Category Under Section 111 Strongly Supports the Regulation of GHGs.

EPA also states that it will "consider comments on the issue of whether GHG emissions are different in salient respects from traditional emissions such that it would be appropriate to conduct a new 'endangerment finding' with respect to GHG emissions from a previously listed source category."[44] The agency does not, however, explain what it means by "traditional emissions," does not indicate in what "salient respects" GHGs differ from other pollutants, and offers no legal basis for treating GHGs differently under Section 111 by requiring a new endangerment finding for an already-listed source category. In any event, the Supreme Court already addressed key assumptions underlying these canards years ago by finding that GHGs fall squarely within the CAA's definition of "air pollutant," which "embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any,'"[45] and that Section 111, which applies to stationary sources that emit "any air pollutant," "plainly" encompasses GHGs emitted by power plants.[46] Whatever the agency's rationale, it is unquestionable that EPA has no authority under the statute to subject GHGs to a less protective test than other pollutants.

The language and structure of Section 111 provide the same regulatory pathway for all pollutants, and therefore EPA must assess the need to protect against endangerment from GHGs—an existential threat demanding urgent attention—under the same framework as applies to other pollutants. Section 111 straightforwardly requires EPA to list a source category that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[47] EPA must then identify the "best system of emission reduction" and establish standards of performance for new and modified sources within the source category, meaning "standard[s] for emissions of air pollutants," reflecting the emission limitations achievable under the best system of emission reduction.[48] The agency then identifies the "best system of emission reduction" for "any air pollutant" from existing sources that is regulated under a new source standard, except for those pollutants that are regulated from that source category under other sections of the CAA.[49] Thereafter, states establish standards of performance for those sources.[50] At no point along this clearly delineated sequence does the statute authorize a deviation from this process or a refusal to regulate based on EPA's desire to afford less protection against some pollutants. To the contrary, the language is "air pollution" and "air pollutant"—which the Supreme Court has found incorporates greenhouse gas emissions: "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'"[51] GHGs thus fall within the scope of Section 111, and their emissions must be reduced according to its provisions—which, as noted above, do not contemplate a separate endangerment finding before regulating an additional pollutant from a source category.

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[44] Proposal, 83 Fed. Reg. at 65,432 n.25 (Dec. 20, 2018).
[45] *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007).
[46] *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011); 42 U.S.C. § 7411(a)(4).
[47] 42 U.S.C. § 7411(b)(1)(A).
[48] *Id.* § 7411(a)(1).
[49] *Id.* § 7411(d)(1).
[50] *Id.*
[51] *Massachusetts*, 549 U.S. at 532.

Applying the statute's required process delineated above to GHGs leads inexorably to a requirement that GHG emissions be regulated under Section 111—and there is no justification for treating greenhouse gases differently than any other air pollutant. The structure of Section 111 ensures that although it applies across air pollutants and sectors, the regulatory design of the standards of performance is adapted as applied in each situation according to the statutory factors Congress specified for EPA to follow in identifying the best system of emission reduction that is adequately demonstrated: emission reductions, cost, energy impacts, and other health and environmental impacts. Standards under Section 111 apply to source categories that contribute significantly to pollution problems that may be anticipated to endanger health or welfare.[52] And under both Section 111(b) and (d) EPA must identify the best system of emission reduction that is adequately demonstrated, taking into account quantities of emissions eliminated and costs, among other considerations—which allows EPA to provide a regulatory approach that is adaptable to different types of pollutants and sources and addresses any relevant characteristics of source or pollutant. Emission limitations implemented under Section 111 will reflect this BSER, consistent with the CAA's "structure and design."[53] Given the fact that the structure of Section 111 provides this adaptable regulatory approach for sources and pollutants, allowing any relevant characteristics of the source or the pollutant to be taken into account in the identification of the best system of emission reduction, a reading of the term "air pollutant" in Section 111 to encompass GHGs—no less than other pollutants—is the only "reasonable, context-appropriate meaning."[54] Any interpretation of Section 111 that would exclude or partially exempt power plant GHG emissions from regulation would not only run afoul of *Massachusetts v. EPA* and *AEP v. Connecticut*, but would also fail to address the nation's largest stationary source of GHGs. The scale of climate impacts and urgent need to address GHG pollution only underscore the imperative to implement fully Congress's carefully crafted regulatory scheme, as discussed in greater detail below.

Aside from the plain language and structure of Section 111, contrasting approaches under other provisions confirm that there is no statutory justification for regulating GHGs less protectively than any other pollutant regulated under Section 111. The CAA does differentiate between pollutants with different characteristics, but not in deciding whether to list a sector and regulate a pollutant under Section 111(b): Congress instructed EPA to list some pollutants as criteria pollutants in Section 108, for which health-based standards are required,[55] and classified other pollutants as hazardous pollutants in Section 112, for which maximum available control technologies are required.[56] Because of the tailored regulatory approaches provided under those sections for specific types of pollutant, existing sources emitting criteria or hazardous pollutants that are regulated under those sections for those pollutants are not regulated for the same emissions under Section 111(d).[57] In Section 111(b), however, Congress provided a generally applicable approach to deciding whether to list source categories and regulate pollutants from new and modified sources within those categories, and tasked EPA with identifying the best

[52] 42 U.S.C. § 7411(b)(1).
[53] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321-22 (2014).
[54] *Id.* at 317.
[55] 42 U.S.C. § 7408.
[56] *Id.* § 7412.
[57] *Id.* § 7411(d)(1)(A).

system of emission reduction, a term that is intentionally flexible and readily adapted to the mitigation of all varieties of air pollution. EPA's suggestion that it might establish a special procedure for pollutants that it deems different in "salient respects" therefore flouts Congress's prescribed approach. Similarly, Section 111(d) applies the same approach to all pollutants that are regulated under Section 111(d).[58]

D. The Characteristics of GHGs Compel the Conclusion that CO_2 Emissions from Power Plants Must Be Regulated Under Section 111.

EPA's inquiry in 2015 accounted for the relevant aspects of GHG pollution and not only constitutes a rational basis for regulation, but compels that result. Because of the incremental nature of the contributions by numerous large and small emission sources to the damage wrought by climate change, it is essential to reduce emissions from industrial source categories like power plants. The contribution of power plants to GHG pollution is unquestionably significant—indeed, total GHG pollution simply cannot be reduced sufficiently to avoid calamitous outcomes if power plant emissions remain unregulated. Any contrary conclusion is unlawful, arbitrary and capricious.

In the 2015 Final Rule, the agency relied in part on its 2009 Endangerment Finding,[59] which described the "salient" aspects of GHG pollution in detail. For example, EPA noted that GHGs are "long-lived"[60]—that is, that present-day emissions stay in the atmosphere for hundreds of years or more means that global atmospheric concentrations increase on an essentially permanent basis except on geologic timescales. In addition to documenting the serious air quality effects associated with climate change,[61] EPA concluded that "the Administrator is not limited to only considering whether there are any direct health effects such as respiratory or toxic effects associated with exposure to greenhouse gases"[62] and that "the effects on peoples' health from changes to climate can and should be included in EPA's evaluation of whether the air pollution at issue endangers public health."[63] As EPA stated when concluding that GHGs affect health, "[i]f air pollution causes sickness or death, then these health effects should be considered when evaluating whether the air pollution endangers public health . . . . This focuses on the actual effect on people, as compared to ignoring that and focusing on the pathway from the air pollution to the effect."[64] Moreover, CAA Section 302(h) expressly confirms that statutorily cognizable harms to welfare include effects on "weather" and "climate."[65] EPA pointed to many serious welfare harms from GHGs.[66] These aspects of GHGs were fully accounted for in 2009 and only strengthen the Endangerment Finding that underpins EPA's decision to regulate GHGs from fossil fuel-fired EGUs.

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[58] *Id.*
[59] 2015 Final Rule, 80 Fed. Reg. at 64,530.
[60] EPA, "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 66,496, 66,517 n.18 (Dec. 15, 2009).
[61] *Id.* at 66,525.
[62] *Id.* at 66,526.
[63] *Id.* at 66,527.
[64] *Id.*
[65] 42 U.S.C. § 7602(h).
[66] 74 Fed. Reg. at 66,530-36.

Scientific reports issued since 2015 demonstrate that GHG emissions must be steeply reduced within the next decade to avoid the dire consequences caused by temperature increases beyond 1.5 °C.[67] But the incremental nature of all GHG sources' contributions to climate change means that even relatively small quantities of emissions from a source category may contribute significantly to endangerment, relative to global or national emissions, and must be reduced.[68] The Supreme Court recognized the importance of taking action to address global problems piece-by-piece when considering emissions from the U.S. transportation sector, which at the time emitted less than the power sector.[69] In *Massachusetts v. EPA*, the Court noted that emissions of carbon dioxide by the U.S. transportation sector, while a small share of global CO_2 emissions, nonetheless represented "an enormous quantity . . . . Judged by any standard, U. S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations."[70] Along these lines, in its 2009 Endangerment Finding, EPA explained that the Section 202(a) source categories "are responsible for about 4 percent of total global well-mixed greenhouse gas emissions and just over 23 percent of total U.S. well-mixed greenhouse gas emissions. The Administrator found that these comparisons, independently and together, clearly establish that these emissions contribute to greenhouse gas concentrations."[71] Similarly, in its 2016 contribution finding for aircraft, EPA "review[ed] emissions data on the contribution of covered aircraft under CAA section 231(a) relative to both U.S. GHG and global GHG emissions inventories."[72] EPA determined that the emissions, which represented 2.8% and 0.4% of U.S. and global GHG emissions, respectively, "clearly contribute to endangering GHG pollution."[73]

Those final rules underscore the reality that numerous sources around the globe exacerbate the climate crisis, and that even small components of total global (or domestic) emissions constitute a significant contribution to dangerous climate pollution. As EPA pointed out in the 2009 Endangerment Finding:

> no single greenhouse gas source category dominates on the global scale, and many (if not all) individual greenhouse gas source categories could appear small in comparison to the total, when, in fact, they could be very important contributors in terms of both absolute emissions or in comparison to other source categories, globally or within the United States. 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. The [opposite] approach, if used globally, would effectively lead to a tragedy of the commons, whereby no country or source category would be accountable for contributing to the global problem of climate

[67] IPCC, Global Warming of 1.5°C, Summary for Policymakers at 14 (Oct. 2018, rev. Jan. 2019), http://www.ipcc.ch/report/sr15/.
[68] *See* 2015 Final Rule, 80 Fed. Reg. at 64,530 ("EGUs emit almost one-third of all U.S. GHGs.").
[69] *Massachusetts v. EPA*, 549 U.S. 497, 524-25 (2007).
[70] *Id.*
[71] 74 Fed. Reg. at 66,499; *see also id.* at 66,537 (similar).
[72] EPA, "Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare," 81 Fed. Reg. 54,422, 54,461 (Aug. 15, 2016).
[73] *Id.*

> change, and nobody would take action as the problem persists and worsens. The Administrator's approach, on the contrary, avoids this kind of approach, and is a reasonable exercise of her discretion to determine contribution in the global context in which this issue arises.[74]

Thus, the special characteristics of greenhouse gas pollution lead even more inexorably to the conclusion that GHG emissions from EGUs must be limited under Section 111.

As EPA has recognized, emissions of GHGs from the power sector comprise a huge portion of U.S. emissions.[75] As EPA explained in its 2009 Endangerment Finding, "A country or a source may be a large contributor, in comparison to other countries or sources, even though its percentage contribution may appear relatively small. . . . Thus, when analyzing whether a source category that emits well-mixed greenhouse gases in the United States contributes to the global problem, it is appropriate for the Administrator to consider how that source category fits into the larger picture of U.S. emissions."[76] Elsewhere in the same Endangerment Finding, EPA reiterated the flaws of excluding sources from regulation based on arbitrary percentage cutoffs: "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 . . . . [S]ource categories could appear small in comparison to the total, when, in fact, they could be very important contributors."[77]

Sharply reducing GHG pollution from power plants is integral to any plausible, rational strategy for addressing the threat to public health and welfare that GHG pollution poses. Zero net emissions of GHGs globally must be reached by mid-century to avoid calamitous climate impacts,[78] and it will be impossible to achieve this outcome without deep reductions in emissions from both EGUs and other industrial source categories. Partial measures will not eliminate the endangerment that GHGs present because these pollutants are emitted by many types of sources; they mix throughout the atmosphere, causing harm no matter where they are emitted; and they accumulate and persist over centuries, requiring immediate, across-the-board reductions. Therefore, EPA must address this problem on multiple fronts through simultaneous regulatory efforts, and EGUs' substantial GHG emissions warrant regulation by any measure.

If the number of contributors and their incremental contributions to a cumulative air pollution problem are ignored, a dangerous but widely emitted pollutant would escape regulation, contrary to congressional intent. Indeed, EPA has cautioned that "it is literally true that if fossil-fuel fired EGUs cannot be found to contribute significantly to GHG air pollution, then there is no source category in the U.S. that does contribute significantly to GHG air pollution, a result that would defeat the purposes of CAA section 111."[79] In sum, the cumulative nature of climate pollution, EGUs' unquestionably large contribution to the problem, and the lack of any plausible way to

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[74] 74 Fed. Reg. at 66,543.
[75] *See* 80 Fed. Reg. at 64,530 ("EGUs . . . comprise by far the largest stationary source category of GHG emissions.").
[76] 74 Fed. Reg. at 66,538-39.
[77] *Id.* at 66,534; *see also* Aircraft Endangerment Finding, 81 Fed. Reg. at 54,462, 54,464.
[78] IPCC, Global Warming of 1.5°C, Summary for Policymakers at 14 (Oct. 2018, rev. Jan. 2019), http://www.ipcc.ch/report/sr15/.
[79] *See* 2014 Proposal, 79 Fed. Reg. at 1456 n.110.

reduce emissions sufficiently without reducing emissions from industrial source categories like power plants mean that regulating the enormous GHG emissions from this sector is not only rational, but mandatory.

E. Even if an Endangerment and Significant Contribution Finding Were Required, EPA's 2015 Determination that Power Plant CO_2 Emissions Significantly Contribute to the Endangerment of Public Health and Welfare Has Fulfilled Such a Requirement and Is Plainly Correct.

As discussed above, in the 2014 Proposal and the 2015 Final Rule, EPA fully responded to and conclusively disposed of the same misplaced notions this Proposal now raises in footnote 25 about whether, in the sole case of GHGs, there might possibly be reasons to override the clear statutory language that EPA may regulate pollutants from listed source categories without a pollutant-specific endangerment finding. Alternatively, EPA also proposed in the 2014 Proposal and found in the 2015 Final Rule that even *if* an endangerment and significant contribution determination were required, such findings were fully supported. EPA found that "the information and conclusions" underlying its rational basis conclusion—including the enormous and growing record that CO_2 endangers public health currently and in the future as well as its separate 2009 Endangerment Finding that included this very pollutant, upheld by the D.C. Circuit[80]—"should be considered to constitute the requisite endangerment finding."[81] EPA likewise concluded that if the agency "were required to make a cause-or-contribute-significantly finding for CO_2 emissions from the fossil fuel-fired EGUs as a prerequisite to regulating such emissions under CAA section 111, the same facts that support our rational basis determination would support such a finding."[82]

As set forth above, EPA's alternative determinations are unassailable. The evidence of the havoc already caused by climate change and its exponentially increasing danger is even stronger today, and the urgent need to take action has become unavoidable. The CO_2 emitted by the power sector remains enormous by any comparison, and no effort to prevent truly calamitous consequences can succeed unless power plant emissions are reduced. Thus, EPA's 2015 determination that significant contribution to endangerment exists is axiomatic. It would be arbitrary and capricious for EPA to conclude anything other than that CO_2 emissions from fossil fuel-fired EGUs contribute significantly to endangerment of public health and welfare.

F. EPA's Suggested Alternative Interpretations of the Statute Are Contrary to Law, Arbitrary, and Unreasonable.

In the Proposal, the agency suggests that it may consider whether it would have a rational basis to decline to regulate given that "no more than a few new coal-fired EGUs can be expected to be built."[83] This statement seems to suggest that EPA might decide whether to regulate carbon pollution from the entire source category of fossil fuel-fired EGUs based exclusively on an assessment of pollution from new coal-fired EGUs. For reasons described earlier, the agency's

[80] *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 117-23 (D.C. Cir. 2012).
[81] 2015 Final Rule, 80 Fed. Reg. at 64,530-531; *see also* 2014 Proposal, 79 Fed. Reg. at 1455-56.
[82] 2015 Final Rule, 80 Fed. Reg. at 64,531.
[83] Proposal, 83 Fed. Reg. at 65,432 n.25.

offhand broaching of such a drastic new statutory interpretation does not constitute a proper proposal. Below, we explain why the interpretation EPA implies would contradict clear congressional intent and fail to survive judicial review.

The statute is unambiguous: EPA must consider pollution from both new and existing sources when deciding whether to regulate a pollutant within a source category. And to the extent that the statute contains any ambiguity, a decision not to regulate based solely on projected levels of emissions from new sources would be disallowed as an impermissible construction.

Section 111(b) unambiguously expresses Congress's concern with pollution emitted from a source category as a whole, not just new sources. It directs the Administrator to base decisions about whether to list a source category on an analysis of the entire category, including existing sources. Section 111(b)(1)(A) provides:

> The Administrator shall, within 90 days after December 31, 1970, 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.[84]

This language does not distinguish between "new" and "existing" sources but rather conveys Congress's directive to address pollution across the source category.

Other aspects of the statute confirm this reading. Throughout Section 111, it is clear that Congress was fully capable of distinguishing between new and existing sources when it intended to do so. Indeed, the first sentence of Section 111(b)(1)(B)—which immediately follows the language quoted above—provides, "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*."[85] This provision expressly establishes "new sources" as a subset—not the entirety—of the sources whose pollution EPA assessed when determining whether to list the category. The source category itself must be broader than the new sources subject to regulation under Section 111(b). Again, EPA provides no explanation for why Congress would permit EPA, following a source category listing, to ignore pollution from existing sources when deciding whether to regulate a pollutant within a source category.

The speculation in footnote 25 does not acknowledge that the statute focuses on pollution from an entire source category when articulating which sources should be regulated under Section 111, and requires existing source emissions to be addressed unless addressed under other sections of the Act. Instead, the footnote raises the prospect that, on the question of regulating a pollutant from a listed source category, Congress inexplicably intended for EPA to consider pollution from new sources only, irrespective of the harm caused by pollution from existing

[84] 42 U.S.C. § 7411(a)(1)(A).
[85] *Id.* § 7411(a)(1)(B) (emphasis added); *cf. Russello v. United States*, 464 U.S. 16, 23, (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion." (alterations omitted)).

sources—and even though Congress directed EPA to consider the air pollution from the sector as a whole, that plain language should be ignored. EPA presents no support for this theory, which is contrary to both the clear terms and the evident objective of the statute.

Moreover, under the express terms of the statute, the decision to regulate a source category under Section 111(b) is a legal predicate for regulating existing sources from the source category under Section 111(d). Thus, the decision gives rise to pollution limits for both new *and existing* sources. Deciding whether to regulate a pollutant for a source category based only on pollution from new sources would make the regulation of pollution from existing sources implausibly incidental. Congress enacted—and repeatedly revised, reaffirming in various forms—Section 111(d), evincing a sustained concern with pollution from existing sources. Against that backdrop, it would be untenable to exclude existing sources' pollution from a decision whether to regulate.

Footnote 25's suggested interpretation disregards statutory language in other ways as well. For example, Section 111(b)(1) provides that the Administrator

> 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.[86]

Yet as of the date of when EPA determines to list a source category, there are no "new" sources in existence. Section 111(a)(2) provides:

> The term "new source" means 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.[87]

Under Section 111, listing *precedes* promulgation of standards. So when EPA decides whether to list a category, by definition it has not yet *proposed* Section 111 standards for that category. And because it has not proposed such standards, no sources qualify as "new" sources under Section 111(a)(2). Basing a decision not to list (and therefore not to regulate) a source category solely on the absence of emissions from as yet nonexistent "new" sources—while ignoring sources that already exist and are emitting pollutants that threaten harm to public health and welfare—is not a tenable reading of the above statutory language.

And for the same reasons that it is not a tenable reading as to an initial listing determination, it is also not a tenable approach when EPA determines whether to regulate additional pollutants from a previously listed category. As of the date when EPA makes that determination, there are not yet any new sources under Section 111(a)(2) with respect to that additional pollutant. The sources emitting the pollutant as of the date of the proposal are by definition existing sources, not new ones. It would flout the terms of Section 111 and reasoned decisonmaking to make a determination against regulating the additional pollutant solely on the basis that new sources may

[86] 42 U.S.C. § 7411(b)(1)(A) (emphasis added).
[87] *Id.* § 7411(a)(2) (emphasis added).

not be built, when the emissions from existing sources already contribute to endangerment of public health and welfare, and when the required further step would be to regulate those existing sources under Section 111(d).

The Supreme Court has warned that "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference."[88] There is simply no statutorily grounded reason that the threshold decision not to regulate a pollutant across an entire source category can focus solely on pollution from one, as yet nonexistent component of the category, ignoring huge pollution currently resulting from existing units within that same category. Deciding whether to regulate a pollutant from a source category while deliberately ignoring pollution from existing sources would flout the statute's express focus on the source category, and would severely undermine Congress's focus on protecting public health and welfare from endangerment, as well as other aspects of statutory design, structure, and substantive objectives.

EPA addressed this issue directly when making its 2015 rational basis determination. In that rulemaking, the agency expressly considered both the ongoing pollution from existing sources and the pollution caused by each new source.[89] EPA elaborated on its position in its Response to Comments on the 2015 Final Rule, expressly rejecting comments arguing that only pollution from new sources should factor into the decision whether to regulate:

> These comments mistakenly focus on the emissions and resulting endangerment arising only from sources that will become subject to the new source standard. EPA disagrees that the proper analysis under either a rational basis analysis or for an endangerment finding is based on subsets of the sources in the source category. First, the rational basis analysis is appropriately done with respect to the source category as a whole, because the issue is whether it is rational to regulate the emissions of a given pollutant from that source category and that encompasses both regulation of new sources under 111(b) and of existing sources under 111(d). . . . EPA reasonably considers emissions from both new and existing sources in determining what pollutants should be regulated under section 111 from listed source categories. Since endangerment determinations under section 111(b) must be made on the basis of the source category ("[h]e shall include a category of sources in such list if in his judgment *it causes*, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare"), it is rational to do so.[90]

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[88] *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citations omitted). *See also id.* ("A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citations omitted).

[89] 2015 Final Rule, 80 Fed. Reg. at 64,530 (observing both that "EGUs emit almost one-third of all U.S. GHGs" and that "the CO_2 emissions from even a single new coal-fired power plant may amount to millions of tons each year").

[90] EPA, Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, Response to Comments on January 8, 2014 Proposed Rule, Ch. 4: Climate Science, Rational Basis Analysis and Endangerment, Response 4.2-6, Doc. ID EPA-HQ-OAR-2013-0495-11863 (Aug. 3, 2015). *See also* 2014 Proposal, 79 Fed. Reg. at 1455 n.107 (Jan. 8, 2014) ("CAA section 111(b)(1)(A) is clear by its terms that the source category listing that is the prerequisite to regulation is based on the contribution of the 'category' to air

Since the agency has previously considered this matter and provided sound reasons for evaluating the source category as a whole, it would be obligated to directly address its prior rationale and fully justify any change in its interpretation.[91] But the statutory text and structure support the 2015 approach, and EPA would be unable to justify such a change.

Beyond suggesting the unlawful consideration of only new sources when making a rational basis determination, footnote 25 contains a fatal factual deficiency: it suggests that the rational basis finding might be reversed because "no more than a few new coal-fired EGUs can be expected to be built, which raises questions about whether new coal-fired EGUs contribute significantly to atmospheric CO_2 levels."[92] Not only does this suggestion disregard EPA's 2015 acknowledgment that "the CO_2 emissions from even a single new coal-fired power plant may amount to millions of tons each year," but it entirely ignores natural gas-fired power plants, which are also included in the source category.[93] In making the 2015 determination, EPA specifically observed that "the CO_2 emissions from even a single NGCC unit may amount to one million or more tons per year." [94] Natural gas-fired power plants continue to be built at a steady clip. In the first ten months of 2018, 14.9 gigawatts of natural gas-fired EGU capacity was added to the grid.[95] New gas plants must be accounted for, even under an analysis that unlawfully focuses only on new sources. By failing to do so, EPA would forfeit any "rational connection between the facts found and the choice made,"[96] and would fail to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy."[97] Each of those flaws would render the decision arbitrary and capricious.

G. It Would Be Unlawful and Arbitrary for EPA to Use Declining Power Sector Emissions As An Excuse for Not Regulating.

Climate pollution from fossil fuel-fired EGUs poses a massive threat to public health and the environment. That threat is only growing. Absent deep and widespread emission reductions, the atmospheric concentration of CO_2 will continue to increase each year, and each incremental ton of emissions locks in even greater climate damages, hurtling us ever closer to the worst effects of climate change. Even if power sector emissions are declining—which is not at all clear—they are far higher than levels necessary to keep CO_2 concentrations from rising further, let alone to achieve the necessary net-zero balance. CO_2 pollution accumulates in the atmosphere, where it lingers for centuries, such that a year-to-year decline in emissions does not prevent atmospheric

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pollution, and therefore is not based on the contribution of only new sources in the category. The same reasoning applies to the rational basis determination.").

[91] *See Fox Television Stations*, 556 U.S. at 515 ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. . . . And of course the agency must show that there are good reasons for the new policy.").

[92] Proposal, 83 Fed. Reg. at 65,432 n.25.

[93] *See* 2015 Final Rule, 80 Fed. Reg. at 64,530 (explaining the 2015 rational basis finding for "fossil fuel-fired EGUs").

[94] *Id.*

[95] *See* Rhodium Grp., *Preliminary US Emissions Estimates for 2018* (Jan. 8, 2019), https://rhg.com/research/preliminary-us-emissions-estimates-for-2018/.

[96] *State Farm*, 463 U.S. at 43 (quotations omitted).

[97] *Fox Television Stations*, 556 U.S. at 516.

concentrations from continuing to rise, exacerbating the impacts of climate change. "[T]he urgency of reducing emissions now,"[98] which EPA acknowledged in 2015, has only increased in recent years.

Reliance on recent emission trends is even more unfounded because U.S. climate pollution significantly increased in 2018, including a 1.9% increase in power sector carbon pollution.[99] Even before the 2018 data were available, EIA had recognized long-term market and economic uncertainty, which could potentially drive some shift back to coal generation.[100] EIA projections now show that the general trend toward declining carbon pollution from the power sector is likely to flatten out in the early 2020s.[101] EPA noted the potential volatility of pollution levels in its proposal to replace the Clean Power Plan, acknowledging that "the uncertainties that have resulted in faster than projected emission reductions are also uncertain in the opposite direction."[102] And as we discuss above, enormous quantities of natural gas-fired capacity continue to come online; these plants are likely to pollute at significant levels for decades to come unless the U.S. takes aggressive, needed action to limit their pollution. EPA cannot idly rely on market trends as a substitute for promulgating pollution standards.

Even if pollution levels were declining more steadily, that would not authorize EPA to ignore its obligation to protect the public from what will continue to be a major threat to public health and the environment. The Clean Air Act is not concerned merely with whether pollution levels are currently below their historic peak. To the contrary, EPA must ensure that pollution is controlled to the degree the statute requires—i.e., in accordance with a standard of performance that reflects the best system of emission reduction.[103] Elsewhere in this docket, we demonstrate the availability of significant pollution reduction measures that a statutorily satisfactory standard of performance would reflect. The degree of pollution reduction associated with these measures exceeds what the market trends are expected to achieve, confirming that such trends are an ineffective and unlawful substitute.

Regardless, market trends are not a rational—or lawful—basis for EPA to decline to regulate a pollutant under Section 111. The critical question is whether the agency would have a rational basis not to regulate this pollution, or—assuming *arguendo* that the endangerment and contribution test separately applies here—whether GHGs emissions from the fossil fuel-fired EGU category meet that test. Fossil fuel-fired EGUs remain the nation's second largest source of climate pollution, and by far the largest stationary source category, emitting climate pollution in massive volumes. Given the enormous harm that this pollution is inflicting, a decision not to regulate it would be arbitrary, capricious, and unlawful.

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[98] 2015 Final Rule, 80 Fed. Reg. at 64,520.
[99] *See* Rhodium Grp., *Preliminary US Emissions Estimates for 2018*; *see also* EPA, 2018 CAMD Emissions Data, https://www.epa.gov/sites/production/files/2019-02/view_2018_camd_emissions_data_1.xlsx.
[100] EIA, *Annual Energy Outlook 2018*, High Economic Growth Side Case tbl. 18 (Feb. 2018), https://www.eia.gov/outlooks/aeo/excel/sidecases/hmacro/aeotab_18.xlsx; EIA, *Annual Energy Outlook 2018*, High Economic Growth with CPP Side Case tbl. 18 (Feb. 2018), https://www.eia.gov/outlooks/aeo/excel/sidecases/cpphm/aeotab_18.xlsx.
[101] EIA, *Annual Energy Outlook 2019*, at 113 (Jan. 2019), https://www.eia.gov/outlooks/aeo/pdf/aeo2019.pdf.
[102] ACE Proposal, 83 Fed. Reg. at 44,754.
[103] 42 U.S.C. § 7411(a)(1).

V. Conclusion

For the reasons described above, EPA's conclusion in the 2015 Final Rule that it has authority to regulate carbon pollution from fossil fuel-fired EGUs is unquestionably correct. Declining to regulate this pollution under Section 111 in a final rule would violate notice and comment provisions and would be arbitrary, capricious, and unlawful. It would also represent an unexplained departure from EPA's previous conclusion and would not be a logical outgrowth of the Proposal.

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