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U.S. CHAMBER OF COMMERCE

June 25, 2012

U.S. Environmental Protection Agency  
Attention Docket ID No. EPA –HQ–OAR–2011–0660  
Air and Radiation Docket and Information Center  
Mailcode: 2822T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources:  
Electric Utility Generating Units, Docket ID No. EPA –HQ–OAR–2011–0660; FRL–  
9654–7, 77 Fed. Reg. 22,392 (April 13, 2012)

Dear Sir or Madam:

The National Association of Manufacturers, the American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, American Wood Council, Brick Industry Association, Corn Refiners Association, Council of Industrial Boiler Owners, National Oilseed Processors Association, Portland Cement Association, The Fertilizer Institute, and the U.S. Chamber of Commerce, (collectively, the “Associations”) appreciate the opportunity to submit the following comments in response to the Environmental Protection Agency’s (“the EPA’s”) proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA –HQ–OAR–2011–0660; FRL–9654–7, 77 Fed. Reg. 22,392 (April 13, 2012) (hereinafter, the “proposed NSPS GHG rule” or “proposed rule”).

The **National Association of Manufacturers** (“NAM”) is the largest industrial trade organization in the United States, representing over 13,000 small, medium, and large manufacturers in all 50 states. The NAM is the leading voice in Washington, D.C. for the manufacturing economy, which provides millions of high-wage jobs in the U.S. and generates

more than \$1.7 trillion in GDP. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The **American Chemistry Council** (“ACC”) is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a \$720 billion enterprise and a key element of the nation’s economy.

The **American Forest & Paper Association** (“AF&PA”) is the national trade association of the paper and wood products industry, which accounts for approximately 5 percent of the total U.S. manufacturing GDP. The industry makes products essential for everyday life from renewable and recyclable resources, producing about \$190 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately \$50 billion.

**American Fuel & Petrochemical Manufacturers** (“AFPM”) (formerly known as NPRA, the National Petrochemical & Refiners Association) is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM’s members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Iron and Steel Institute** (“AISI”) serves as the voice of the North American steel industry and represents member companies accounting for over three quarters of U.S. steelmaking capacity with facilities located in forty-three states.

**American Petroleum Institute** (“API”) is a national trade association representing more than 500 member companies involved in all aspects of the oil and natural gas industry. API members are dedicated to meeting environmental requirements while developing and economically supplying the energy resources needed by consumers. API members provide the fuels that keep America running.

The **American Wood Council** (“AWC”) is the voice of North American traditional and engineered wood products, representing over 60% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs approximately one-third of a million men and women in well-paying jobs.

The **Brick Industry Association** (“BIA”), founded in 1934, is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states.

The **Corn Refiners Association** (“CRA”) is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Council of Industrial Boiler Owners** (“CIBO”) is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and university affiliates with members representing 20 major industrial sectors. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and government relating to energy and environmental equipment, technology, operations, policies, law and regulations affecting industrial boilers.

The **National Oilseed Processors Association** (“NOPA”) is a national trade association comprised of 12 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA’s member companies process more than 1.7 billion bushels of oilseeds annually at 62 plants located throughout the country, including 57 plants which process soybeans.

Based in Skokie, Illinois, the **Portland Cement Association** (“PCA”) represents cement companies in the United States and Canada. PCA conducts market development, engineering, research, education, and public affairs programs for the portland cement industry.

**The Fertilizer Institute** (“TFI”) represents the nation’s fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. Its membership is served by a full-time Washington, D.C. staff in various legislative, educational and technical areas as well as with information and public relations programs.

The **U.S. Chamber of Commerce** is the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions.

## **INTRODUCTION AND SUMMARY OF COMMENTS**

The Associations represent the nation’s leading manufacturing sectors which form the backbone of the nation’s industrial ability to grow our economy and provide jobs in an environmentally sustainable and energy efficient manner. Although the EPA’s proposed New Source Performance Standard (“NSPS”) addresses specifically the utility sector, we collectively have significant concerns regarding the EPA’s first-ever regulation of greenhouse gas (“GHG”) emissions from a source category under Section 111, both because of the impact these regulations will have on energy prices and reliability, as well as the potential precedent-setting nature of the approach on manufacturing sectors in the future. It is also possible that the proposed rule may directly apply to future projects of the Associations’ members, including, for example, cogeneration plants owned, operated, or co-located at their facilities. The Associations are key stakeholders on any regulation that impacts energy and which may impact manufacturers directly in the future. For the reasons described below, we urge the EPA to withdraw this proposal given the already significant adverse consequences of the proposal on industry, and to engage instead—if at all—in a process with all interested stakeholders as to whether and how the EPA should approach GHG regulation through NSPS before proposing rules that have an immediate and harmful impact.

As discussed below, the EPA’s NSPS proposal is unprecedented not only in its policy reach, but in the significant number of compounding errors that exceed the EPA’s authority under the Clean Air Act. At the outset, we have an overarching concern that the NSPS proposal crosses

a line by expanding the EPA's 40-year mandate as the preeminent regulator of the environment to become a regulator of energy. In this environmental regulation the EPA is controlling not merely the emissions of air pollutants, but the choice of fuel and energy that a project must utilize if it is to be constructed or operated. The EPA's approach to force one type of fuel to be switched for another arises out of the proposal's effort to combine two independent and distinct source categories and regulate them together under a single standard of performance that simply cannot be attained by one of the source categories. In doing so, the EPA is effectively dictating both fuel choice and design choice for new electric utility generating units ("EGUs"), contrary to Congressional intent and the EPA's authority as a regulator of the environment, not energy. This action will have far-reaching effects, not only for the EGUs themselves, but also for the many other industries that depend upon the energy that they provide and may one day become subject to the same types of regulations.

Until now, the EPA has not dictated the manner in which performance standards must be met. Instead, consistent with Section 111's plain language and intent, the EPA has allowed regulated entities the flexibility to meet the standards in any way that satisfies the limitations. Here, for the first time, the EPA has proposed not only to set an emission limit, but it has left no choice regarding the precise technology that each facility must employ to meet that limit. In doing so, the EPA has acted arbitrarily, capriciously, and unlawfully, ignoring both the limits of its delegated authority from Congress and its own past practice. The Associations share an interest in ensuring a level regulatory playing field for all potential energy choices. While the Associations support the EPA's environmental mission, we feel strongly that it should not expand its organic authority by attempting to give preference to one type of fuel over another or—as it has done in this case—entirely phase out a source of energy. At most, such policies are the domain of Congress, not a regulatory agency charged with implementing laws that establish environmental performance standards.

Furthermore, the NSPS program is not intended to be a technology-forcing program. Instead, the EPA is required to identify and apply technologies that are "adequately demonstrated" in practice. Rather than speculating about the future development of unproven technologies, the NSPS program requires the EPA to conduct periodic reviews of its NSPS requirements, which allow it consider new technologies after they have been successfully implemented on an industrial scale. Thus, an initial proposal is never the EPA's only opportunity to regulate emissions from a source category. Rather than attempting to force the development of carbon capture and storage ("CCS") technology, the EPA should rely on subsequent reviews to determine when, if ever, CCS technology has become adequately demonstrated and could be incorporated into NSPS regulations.

As the EPA recognizes, the unique nature of Section 111 results in a proposal that is having an immediate on-the-ground impact on new facilities and, we believe, creates significant uncertainty for "transitional," modified, and reconstructed facilities despite the EPA's efforts to carve them out of the immediate impact of the proposal. Given the precedent-setting magnitude of this proposal and its immediate impact, the EPA should not proceed to propose such a rule until it first provides a full opportunity for all interested stakeholders to understand and comment on the approach. Thus, the Associations urge the EPA to withdraw the proposed rule as soon as possible. Because of the immediate impacts of the proposal, merely leaving it unaddressed indefinitely will cause ongoing harm to the energy sector and the economy. Following a

withdrawal, if the EPA wishes to consider GHG regulations under NSPS over the objections of the Associations, the Agency should proceed with an advanced notice of proposed rulemaking (“ANPR”) so that the EPA may first solicit comments from all interested stakeholders and take time to fully understand the repercussions of its actions before imposing any previously unannounced obligations on the regulated community at the time of the proposal.

Beyond the EPA’s proposed approach to EGUs, we urge the EPA to avoid repeating the errors in this approach for other manufacturing sectors in the future. As described below, there are differences between the utility and manufacturing sectors that warrant fundamentally different considerations and approaches to regulating these other sectors. The GHG emissions associated with other source categories are often many orders of magnitude lower than those from EGUs, the technologies and processes utilized are typically more complex, and the ability to switch fuels and designs is more constrained. Furthermore, most manufacturing sectors, unlike EGUs, are trade exposed. Thus, should the EPA consider potential regulation of other sectors in the future, we urge it first to involve the Associations and other stakeholders at the earliest outset prior to a proposal through an ANPR and other outreach to avoid the immediate irreparable harm a similar proposal would cause to our industries and facilities and our ability to grow the economy and jobs.

The Associations’ specific comments are summarized below:

- The EPA is under no obligation to issue NSPS regulations for GHGs and should withdraw the proposed rule and proceed, if at all, with an ANPR.
- The EPA cannot regulate a source category under NSPS until it has first made a specific endangerment determination and significance finding, which it has not done here.
- The EPA may not use Section 111 to regulate a fuel type or design type out of existence, which its proposed rule will effectively accomplish.
- The EPA may not use Section 111(b)(1) to create an aggregate “mega” source category in order to impose a standard that only a subcategory of sources can achieve.
- The standard of performance selected by the EPA was not based on a proper analysis of best system of emissions reduction (“BSER”).
- The EPA is not authorized to mandate the use of specific control equipment under NSPS, which it has done by requiring the use of gas-fired EGUs or CCS.
- The “alternative compliance option” the EPA proposes for coal-fired EGUs is inconsistent with best available control technology (“BACT”) decisions made pursuant to regulations that require emissions limits that are no less stringent than NSPS standards.
- CCS cannot constitute BSER because it is not an adequately demonstrated technology.

- The EPA cannot use a 30-year averaging period to bridge the gap between currently demonstrate technology and CCS.
- The EPA’s exemption for “transitional sources” appears to be inconsistent with the Clean Air Act and is otherwise unlawful and discriminatory.
- The EPA provides no rational justification for failing to address modified and reconstructed sources.
- The EPA has not engaged in an appropriate cost-benefit or economic impact analysis to justify the proposed rule.
- The EPA has violated Executive Order 13211 by failing to consider the energy effects of the proposed rule.
- The EPA is not authorized to expand the proposed rule to include existing sources under Section 111(d) because EGUs are already subject to standards under Section 112.
- The EPA must not expand the NSPS GHG regulations to any other source category.
- The EPA should not revisit, and must maintain, the NSPS exemption for pollution control projects.
- The proposed rule threatens to undercut the Tailoring Rule by, arguably, independently triggering applicability of the Prevention of Significant Deterioration (“PSD”) and Title V rules at the statutory, rather than Tailoring Rule, thresholds.

For all of the above reasons, and as set forth in greater detail below, the EPA should immediately withdraw the proposed rule and proceed, if at all, by way of an ANPR.

### COMMENTS

#### **I. IF THE EPA CHOOSES TO REGULATE GHGs UNDER NSPS, THE AGENCY SHOULD BEGIN BY ISSUING AN ANPR.**

The Associations urge the EPA to immediately withdraw the proposed rule and proceed, if at all, by way of an ANPR. Such an approach is fully justified given the harm already being caused by the proposed rule and the lack of any legal deadline or other compelling reason to proceed at this time, as described below.

First, the EPA is under no obligation to regulate GHG emissions under NSPS. Instead, the Agency has discretion regarding the timing and content of its rules. The Supreme Court’s decision in *Massachusetts v. EPA* is not controlling in this instance, as that case addressed the EPA’s obligations under Section 202 of the Clean Air Act, not Section 111. More importantly, the case addressed the EPA’s obligations regarding an endangerment determination under Section 202, not its obligations with respect to GHG regulations. 549 U.S. 497 (2007). Instead, the Court confirmed that the EPA has “significant latitude as to the manner, timing, [and] content” of its

regulations. *Id.* at 553; *see also Center for Biological Diversity v. EPA*, 794 F. Supp. 2d 141, 159 (D.D.C. 2011) (affirming the EPA’s discretion regarding timing of GHG regulations); *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, No. 07-4935, 2008 U.S. Dist. LEXIS 27794, at \*10-11 (N.D. Cal. Mar. 28, 2008) (same).

Second, Section 111 does not require the EPA to regulate GHG emissions at this time. The EPA’s substantial discretion regarding the timing and content of NSPS regulations has been consistently recognized by the courts. *See, e.g. Portland Cement Ass’n v. EPA*, 665 F.3d 177, 193 (D.C. Cir. 2011); *Nat’l Assoc. of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228-30 (D.C. Cir. 2007). Likewise, the EPA has previously asserted that it has discretion to determine what pollutants to regulate under NSPS. *See* Section 111(b)(1)(B); 73 Fed. Reg. 35,838, 35,838 (June 24, 2008) (the EPA has discretion to determine the pollutants it “deems appropriate” for regulation). The EPA’s discretion applies equally here.

Third, the EPA is unfairly and unnecessarily subjecting the new source category (and other members of the regulated community that rely on EGUs for energy) to a substantial risk of harm. Section 111 is different than other Clean Air Act provisions because it imposes obligations on “new sources” at the date of *proposal*. Section 111(a)(2). Thus, merely proposing a rule has immediate ramifications because new sources, as well as modified or reconstructed sources, are legally required to comply with the proposed standard even if it has not been finalized. Because legal obligations are triggered by the proposed rule, new sources face considerable uncertainty, as the terms of the proposal are subject to change when a final rule is issued. This uncertainty is particularly acute in situations such as this, where the proposed rule differs dramatically from anything the Agency has done in the past and, thus, the Agency is more likely to make significant changes before issuing a final rule. Furthermore, while the proposed rule will have a direct effect on facilities that would be subject to regulation under the new source category, the indirect effects will ripple throughout the electricity distribution system and may also have a significant effect on energy-intensive industries who may face price increases or supply shortages as a result of the compliance costs and uncertainty that the proposed rule creates. Moreover, the effects of a proposed rule can last indefinitely until the EPA finalizes the rule or withdraws it, meaning that the EPA cannot merely leave the proposal in place while it considers the many issues being raised during the comment period.

Fourth, despite the EPA’s attempt to mitigate some harm by creating an exception for “transition sources” and omitting modifications and reconstruction, significant risks remain. The EPA has never used exemptions such as these to avoid the legal effect of proposed NSPS regulations in the past and, as a result, the regulated community lacks certainty that these provisions will withstand judicial scrutiny in the likely event that they are challenged. Thus, even with these additional safeguards, the regulatory uncertainty caused by the proposed rule may disrupt or even halt certain projects. Also, the EPA’s failure to address “transitional sources,” modifications, and reconstruction has allowed the Agency to artificially limit the scope of its inquiry into the regulatory burdens of the proposed rule.

To avoid these risks, the EPA should withdraw the proposed rule and proceed instead with an ANPR on the appropriateness of regulating GHGs under the NSPS program at all. Such an approach would allow the EPA to determine which NSPS regulations (if any) are needed for EGUs without introducing regulatory uncertainty and compliance risks for the regulated

community. It would also allow the EPA to consider whether alternate approaches to GHG reductions may be more appropriate. For example, energy efficiency can also deliver emissions reductions without the high costs associated with large abatement devices or fuel switching, providing EGUs with greater flexibility in achieving emissions reduction goals. Likewise, fuel flexibility in electricity generation provides important benefits and should be promoted, rather than discouraged. The benefits of proceeding first with an ANPR are heightened here because the EPA has never before regulated GHG emissions under the NSPS program. An ANPR would allow the EPA to gain important information from all stakeholders, including the regulated community, early in the rulemaking process before the EPA has committed to a particular course of action, not just for EGUs, but also for other source categories for which the Agency has already indicated an intent to impose GHG standards under NSPS.<sup>1</sup> Such an approach would also minimize the likelihood of substantial changes between the proposal and final rule and reduce the risk that facilities will comply with proposed requirements that are ultimately abandoned in the final rule.

## **II. THE PROPOSED RULE IS UNLAWFUL UNDER THE CLEAN AIR ACT.**

The proposed rule marks the EPA's first attempt to regulate GHG emissions under NSPS and raises a number of difficult legal issues. Despite their differences in GHG emissions (as well as virtually everything else<sup>2</sup>), the proposed rule combines gas-fired and coal-fired EGUs into a single source category and then bases the proposed performance standards of 1,000 lbs CO<sub>2</sub>/MWh on the GHG emissions profile of the gas-fired EGUs. (In these comments, the Associations use "coal" broadly to include all grades of coal and petcoke; in some cases, it is also used to mean all non-natural gas fossil fuels.) As a result, coal-fired facilities will be unable to achieve the performance standards without applying CCS, a technology that is both commercially unproven and costly. The EPA does not have the authority under NSPS to dictate the use of specific fuels, yet the proposed rule would have that effect, as coal-fired EGUs would no longer be viable. Furthermore, the "alternative compliance option" cannot remedy this problem, as it is the *only* standard of performance available to coal-fired EGUs and, in any event, relies on unproven CCS technology. Thus, because there is no viable alternative, the "alternative compliance option" is essentially a mandate for coal-fired EGUs to comply with even more stringent emissions requirements of 600 lbs CO<sub>2</sub>/MWh instead of 1,000 lbs CO<sub>2</sub>/MWh.

### **A. The Clean Air Act Requires A Separate Significant Contribution And Endangerment Determination For The New Source Category.**

The Clean Air Act requires the EPA to make an endangerment determination that is *both* source category and pollutant specific before issuing an NSPS rule. Section 111(b)(1)(A)'s endangerment determination requires a different standard than that used under Section 202(a)

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<sup>1</sup> These source categories include portland cement plants, *see* 75 Fed. Reg. 54970, 54996-97 (Sept. 9, 2010), and nitric acid plants, *see* EPA Pre-Publication entitled "New Source Performance Standards Review for Nitric Acid Plants" at 40-41 (May 14, 2012).

<sup>2</sup> As discussed below, gas- and other fossil fuel-fired EGUs differ significantly in the manner in which they are designed and operated and in the types of emission control technology that could potentially be applied to them.



and other provisions of the Clean Air Act. Under Section 111(b)(1)(A), the EPA may only regulate “*a category of sources* ... if in [the Administrator’s] judgment it causes, or contributes *significantly* to, air pollution which may reasonably be anticipated to endanger public health or welfare.” (emphasis added). In contrast, Section 202(a) broadly includes all emissions sources for a given pollutant and permits the EPA to regulate emissions “which in [its] 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); *see also id.* § 7408(a)(1)(A). Thus, Section 111(b)(1)(A) applies a more demanding standard because the endangerment determination is source-specific and requires a higher “significance” threshold. The EPA did not make a new endangerment determination under Section 111(b)(1)(A) and, instead, offers a series of interpretations that would allow it to forego making a new endangerment determination. None of these alternatives gives meaning to the unique requirements included in Section 111(b)(1)(A).

First, the EPA proposes to rely on the endangerment determinations and findings of significance that it made for the two source categories that it combined into the new EGU source category. *See* 77 Fed. Reg. at 22,412. This interpretation fails for two reasons. First, those prior endangerment determinations did not address CO<sub>2</sub>, the pollutant that the EPA now seeks to regulate. *See, e.g.* 36 Fed. Reg. 5931 (Mar. 31, 1971). The endangerment determinations and significance determinations under Subparts Da and KKKK, respectively, were made decades ago, long before the EPA considered CO<sub>2</sub> to be a pollutant subject to regulation under the Clean Air Act. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). The purpose of the NSPS program is to regulate and reduce emissions of significant air pollutants that “endanger public health or welfare,” not every byproduct that is emitted from covered facilities. The EPA’s proposed interpretation would allow the Agency to regulate anything that is emitted from a facility once a generic endangerment determination is made, without regard to the risks (or lack thereof) that the pollutant poses. Thus, the requirement for a pollutant-specific endangerment determination and significance finding is an essential safeguard that prevents the EPA from imposing unnecessary requirements on the regulated community. Further, while Section 111(b)(1)(A) permits the EPA to define new source categories for stationary sources, that does not negate the requirement to make a source category-specific endangerment determination. By choosing to define a new source category in the proposed rule, the EPA obligated itself to make a new endangerment determination that is specific to this new source category.

Second, the EPA proposes to rely on its prior Section 202(a) endangerment determination for GHGs, along with a subsequent finding “that CO<sub>2</sub> emissions from fossil fuel EGUs cause or contribute significantly to the GHG air pollution.” *Id.* at 22,412-13. However, the EPA cannot satisfy the requirements of Section 111(b)(1)(A) by importing a general endangerment determination that applied a different legal standard to an entire suite of GHGs from a different source of emissions.<sup>3</sup> The plain language of Section 111(b)(1)(A) requires the EPA to make an

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<sup>3</sup> The EPA’s Section 202(a) endangerment determination included nitrous oxide and other GHGs that are not included in the proposed rule. Those emissions played an essential role in the EPA’s endangerment determination under Section 202(a), and their absence here makes the prior endangerment determination inapplicable. Further, even as to NSPS source categories that emit nitrous oxide, the EPA’s Section 202(a) endangerment finding does not satisfy Section 111(b)(1)(A)’s requirement that the Agency first conclude an NSPS endangerment evaluation and

endangerment determination that is source category specific and includes a threshold significance finding for the air pollutant the EPA wishes to regulate. The EPA cannot simply read these unique provisions out of the statute. The EPA is not entitled to deference when it glosses over Congress' clear decision to use different language in the Section 111 endangerment determination by importing an endangerment determination from another section that applies a different standard. *See, e.g., Ohio Pub. Employees Retirement System v. Betts* 492 U.S. 158, 171 (1989) (“[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.”); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Third, the EPA proposes to find that CO<sub>2</sub> emissions from the new source category “cause or contribute significantly to the GHG air pollution,” asserting “that it is simply not necessary in this rulemaking to determine thresholds for when a contribution may be considered to be a ‘significant’ contribution” because the new source category emits “large amounts” of CO<sub>2</sub>. 77 Fed. Reg. at 22,413. In doing so, the EPA fails to identify a rational standard that can be applied to such findings of significance. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 43 (1983) (an agency must provide a reasoned basis for its actions); *Int’l Union, UAW v. NLRB*, 514 F.3d 574, 583 (6th Cir. 2008) (agency may not engage in “illogical or arbitrary” line drawing). Until the EPA articulates a reasonable standard to apply, it cannot make a significance finding for GHGs or any other pollutant.

Finally, the EPA asserts that it can provide a rational basis that is “something short of an endangerment and cause-or-contribute significantly finding” because the language of Section 111(b)(1)(A) is “ambiguous.” 77 Fed. Reg. at 22,213. However, the EPA is not entitled to *Chevron* deference when the statute is not ambiguous and plainly requires a significance finding that is source category and pollutant specific. But even if the statute were ambiguous, the EPA would not be entitled to deference here because its interpretation admittedly applies a standard with a lower threshold than is required by the statute. *See, e.g., Bluewater Network v. EPA*, 370 F.3d 11 (D.C. Cir. 2004) (requiring a *reasonable* interpretation of ambiguous statutory provisions).

Because the interpretations of Section 111(b)(1)(A) offered by the EPA in the proposed rule do not give meaning to the clear text of the statute, it would be arbitrary and capricious for the EPA to adopt them. Thus, before the EPA can proceed with the proposed NSPS GHG rule, it must make a new endangerment and significance determination that is consistent with the source category- and pollutant-specific requirements of Section 111.<sup>4</sup>

**B. Congress Did Not Grant The EPA Authority To Regulate One Type Of Fuel Or Plant Design Out Of Existence.**

As a practical matter, the proposed rule would prohibit the construction of new coal-fired EGUs because these units will be unable to achieve, through application of a best system of

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determination, as appropriate, prior to moving forward with an NSPS GHG rulemaking for any source category.

<sup>4</sup> This requirement would apply equally should the EPA later decide to regulate GHG emissions from other new or existing source categories under NSPS.

emissions reduction, the proposed 1,000 lbs CO<sub>2</sub>/MWh performance standard or the “alternative compliance option.” The EPA seeks to justify this *de facto* prohibition by asserting that coal-fired units will not be constructed for unrelated economic reasons. *See generally* RIA at ES-3.<sup>5</sup> While there may be some market forces at play, there is no doubt that the EPA’s proposal would dictate fuel choices by increasing the barriers to entry into the utility market to the point that coal-fired EGUs are not economically viable. Nor can the EPA justify its approach by offering an alternative compliance option for coal-fired EGUs because this option is no more feasible than the standard itself.

When enacting the Clean Air Act, Congress did not intend to delegate to the EPA the authority to dictate fuel or design choice. Instead, Section 111 was intended to provide a flexible standard that considers costs, non-air impacts, and “energy requirements.” In fact, a regulation that effectively bans the use of coal would be contrary to Congress’ intent when it “designed this section and the entire bill, to encourage and facilitate the increased use of coal . . .” *See, e.g.*, H. Rep. No. 95-294 at 192. Policy considerations, such as the President’s “Blueprint for a Secure Energy Future” (March 30, 2011), *see* RIA at ES-2, do not authorize the EPA to ignore the text and legislative history of Section 111 and do not provide a lawful basis for its actions. Only Congress should determine whether, as a matter of energy, economic security, or environmental policy, one type of fuel should essentially be banned. The following sections address specific concerns that the Associations have with the proposed NSPS standards.

### **C. The EPA’s New “Mega” Category Is Inconsistent With The Clean Air Act And Is Inconsistent With Years Of NSPS Regulatory History.**

The fundamental flaw with the EPA’s proposed rule is its creation of a “mega” category that includes both natural gas combined cycle (“NGCC”) and other fossil fuel-fired sources. Section 111(b)(2) provides the EPA with discretion to create subcategories when there are legitimate reasons to distinguish among sources in a particular category. *See Sierra Club v. Costle* 657 F.2d 298, 319 (D.C. Cir. 1979); Clean Air Act 1977 Conference Report (authorizing the EPA to “set a range of pollutant reduction that reflects varying fuel characteristics”). Historically, the EPA has used that discretion to treat various fuels, designs, and circumstances differently in fashioning NSPSs. *See, e.g.*, 44 Fed. Reg. 33,580 (July 11, 1979) (distinguishing between solid and gaseous fuels and among specific coal types). Such an approach recognizes that each fuel type provides unique benefits and provides electricity generators with flexibility to choose the fuel that will best meet their needs. Here, in contrast, the EPA has taken the opposite approach and aggregated disparate source categories (Subpart Da and parts of Subpart KKKK) and proposed a standard of performance for the entire source category based on the performance capabilities of a single component, NGCC units. By proposing a 1,000 lbs CO<sub>2</sub>/MWh standard, the EPA would essentially mandate that the design and fuel choice for all new EGUs would be NGCC because it is the only cost-effective and feasible way to meet the standard with existing

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<sup>5</sup> If the EPA were correct, the proposed rule would also be inconsistent with Executive Order 13563, which requires agencies to promote coordination, simplification, and harmonization in order to reduce costs and simply redundant, inconsistent, or overlapping regulation. If the market already ensures that no new coal-fired EGUs will be built, the proposed rule would be unnecessary under the executive order.

BSEER. This mega-categorization is inconsistent with how these same units are categorized for other overlapping Clean Air Act programs.

The EPA offers two primary reasons for the new source category: (1) each source in the new category “perform[s] the same essential function” and (2) new sources “have options in selecting their design” in order to “readily comply with the proposed emission standards by choosing to construct a NGCC unit.” 77 Fed. Reg. at 22,411. These two observations have always been true of coal- and gas-fired EGUs, yet the EPA has provided no legitimate rationale why—for the first time—the sources should be combined under a common standard for GHG emissions that only a subcategory can actually meet. *See Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“The agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”). The fact that coal- and gas-fired EGUs both generate base load or intermediate load power does not provide a rational basis for aggregating the sources, because it is unrelated to the manner in which such units are designed, the way they operate, and the types of BSEER that could be applied to them. Instead, it appears to be an arbitrary hook allowing the EPA to hold all EGUs, including coal and other non-natural gas-fired units, to a performance standard that only gas-fired units can meet.<sup>6</sup> If this common attribute were relevant to the purpose and requirements of Section 111, the EPA would have combined the sources long ago. The EPA also listed a “third factor” that “lends additional support” for its decision: the assumption that industry will predominantly build gas-fired EGUs due to cost concerns. However, the EPA’s reliance on *Portland Cement Ass’n* is misplaced because in that case “the EPA demonstrated how all regulated kilns could meet NSPS standards.” 665 F.3d 177, 190 (D.C. Cir. 2011). In contrast here, coal-fired EGUs cannot meet the gas-based standard that the EPA has proposed.<sup>7</sup>

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<sup>6</sup> The proposed definition of “electric utility generating unit” is extremely broad and includes “any steam electric generating unit or stationary combustion turbine that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW net-electrical output to any utility power distribution system for sale.” 77 Fed. Reg. at 22,439. Indeed, this definition would appear to apply to any multi-fuel EGU such as a biomass and coal or biomass and gas boiler (to the extent fossil fuels accounts for over 250 mmBtu of the heat input). In future regulations the same problem will arise for other non-EGU sectors using these various fuel types.

In addition, EPA appears to regulate combined heat and power (“CHP”) facilities in this proposed Subpart TTTT as a result of the applicability provisions and Subpart TTTT-specific definitions for “gross output” and “combined heat and power” but provides no exemption. Though EPA gives a potential break to CHP facilities where all the thermal energy is used first for electrical power generation, many CHP configurations in industry utilize portions of the steam from the combustion unit boiler into headers where some—but not all—of the steam is used to generate electrical power and then reused as useful thermal energy, and other portions of steam from the same combustion unit is used for thermal energy uses only. This proposed rule does not address the feasibility of the limit for those CHP sources.

<sup>7</sup> The EPA is in essence requiring redefinition of the source as well as fuel switching, neither of which is permissible. *Cf. In re Pennsauken, N.J. Res. Recovery Facility*, 2 E.A.D. 667, 673 (EAB

When an agency breaks with past practice as the EPA admits it has done here, it must “supply a reasoned analysis” for the switch, *Airmark v. FAA*, 758 F.2d 685, 691-692 (D.C. Cir. 1985) (citation omitted), and show “that the prior standards are being deliberately changed, not casually ignored.” *Id.* at 692 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)). The EPA attempts to justify that deviation on two grounds: (1) emissions benefits; and (2) lower natural gas prices. 77 Fed. Reg. at 22,418. Neither justification is reasonable in the circumstances. While the reference to emissions benefits is not explained, it appears to be an “ends-based” argument that the mandated switch from coal-fired EGUs to NGCC will reduce emissions. If such a justification were permitted, the EPA could always subject diverse sources to a single standard in order to regulate certain designs or fuel types out of existence, even when there may be perfectly valid commercial or other reasons for each design and fuel type. The fact that coal- and gas-fired EGUs have different emission profiles is not a basis for holding them to the same standard; to the contrary, it is a basis for treating them differently. Nor do lower gas prices justify the EPA’s decision, as the EPA has no authority to legislate fuel choices. The market, not the EPA, should govern fuel choice.

#### **D. The Standard Of Performance Does Not Reflect BSER.**

Even if the EPA could properly aggregate coal- and gas-fired units into a single source category for a GHG NSPS, the EPA’s proposal does not appropriately reflect BSER. In justifying the standard of performance, the EPA relies on three incorrect assumptions.

First, the EPA seeks to support the 1,000 lbs CO<sub>2</sub>/MWh performance standard in the proposal by asserting that it “is based on the demonstrated performance of [NGCC] units.” 77 Fed. Reg. at 22,398. But the EPA does not provide any evidence of an analysis establishing this standard as BSER, *id.* at 22,394. Instead, it simply says that 1,000 lbs CO<sub>2</sub>/MWh is BSER because it can be achieved by gas-fired units. *Id.* The arbitrariness of the EPA’s conclusions is illustrated by its assertion that coal-fired EGUs with much *higher* average CO<sub>2</sub> emission rates than NGCC units can achieve a substantially *lower* emissions limit—600 lbs CO<sub>2</sub>/MWh—than NGCCs. *See* proposed § 60.5520(b).<sup>8</sup> The Associations do not seek a more stringent standard for NGCCs; they are merely pointing out that the EPA lacks a rational basis for the standards it has proposed.

Second, a more fundamental problem is that the proposed rule unlawfully treats NGCC as BSER for coal-fired EGUs. *See, e.g., id.* at 22,398 (“NGCC qualifies as the [BSER]...”). The EPA does not identify any support for the proposition that NGCC itself can be BSER for coal-

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1988); *see also In re: Prairie State Generating Co.*, 13 E.A.D. \_\_\_, slip. op. at 28, *aff’d, sub nom, Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007); *In re Three Mountain Power, L.L.C.*, 10 E.A.D. 39, 47 (EAB 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. at 128-29; *In re CertainTeed Corp.*, 1 E.A.D. at 747.

<sup>8</sup> Even one of the most recent proposed permits for a NGCC facility (by the EPA Region 8) does not meet the EPA’s proposed standard. Region 8 proposed a standard 10 percent higher. *See* <http://www.epa.gov/region8/air/permitting/pubcomment.html>. The Associations are *not* suggesting the proposed limit should be 10 percent higher; rather, the Region 8 permit underscores the EPA’s complete lack of analysis and the arbitrariness of its proposed limit.

fired EGUs. NGCC is a completely different form of EGU, not an emission control system. Again, the EPA offers no rational basis for subjecting coal-fired EGUs to a performance standard of 1,000 lbs CO<sub>2</sub>/MWh.

Third, the proposed “alternative compliance option” is simply an attempt to regulate coal-fired EGUs using an unreachable performance standard. The EPA did not identify any legal authority to promulgate “compliance options” under NSPS, and the Associations are not aware of any such authority. Section 111(a)(1) defines a “standard of performance,” in part, as a “standard for emissions of air pollutants.” This also describes the proposed “alternative compliance option.” Under the proposed rule, a newly constructed coal-fired EGU would meet the “alternative compliance option” by first emitting no more than 1,800 lbs CO<sub>2</sub>/ MWh for 10 years and then emitting no more than 600 lbs CO<sub>2</sub>/ MWh for at least 20 years by installing CCS. *See* proposed § 60.5520(b); 77 Fed. Reg. at 22,399. Because a failure to satisfy the CCS “alternative compliance option” could lead to an enforcement action, there is no practical difference between the “alternative compliance option” and a “standard of performance.” There is, however, an important legal difference because the EPA claims that the “alternative compliance option” need not qualify as BSER. Under Section 111(a)(1), the EPA is required to base the emission standard on the best system of emission reduction, accounting for costs, energy requirements and environmental impacts, that has been adequately demonstrated. The EPA cannot ignore this requirement by renaming a standard of performance as an “alternative compliance option.”

#### **E. The EPA Cannot Mandate Specific Control Equipment.**

Under Section 111(b)(5) the EPA may not mandate the use of a specific type of pollution control equipment: “nothing in this section shall be construed to ... authorize the Administrator to require any new or modified source to install and operate any particular system of continuous emission reduction to comply with any new source standard of performance.” 42 U.S.C. § 7411(b)(5).<sup>9</sup> While the EPA is permitted to require a specific control technology under Section 111(f), it can only do so after making a finding that “it is not feasible to prescribe or enforce a standard of performance.” *Id.* § 7411(h). The proposed rule violates this requirement by mandating, under Section 111(b)(5), that coal-fired EGUs be equipped with CCS or NGCC. By mandating that, under the “alternative compliance option,” coal-fired power plants “will need to implement CCS,” 77 Fed. Reg. at 22,399, the EPA would require a specific type of equipment under the guise of a performance standard. The EPA cannot avoid this conclusion by speculating that “there may also be other potential compliance options available” in the future. 77 Fed. Reg. at 22,399. Regardless of what the future may hold, the EPA’s own analysis establishes that, at this time, there are no other conceivable compliance options for new coal-fired EGUs.

In addition, despite Section 111(b)(5)’s prohibition against mandating a “particular technological system of continuous emission reduction,” the EPA has effectively required all EGUs to construct NGCC rather than coal-fired units. Here, the EPA mandated the use of NGCC because “[n]atural gas combustion inherently emits less CO<sub>2</sub> than coal combustion....” 77 Fed. Reg. at 22,396. Thus, the EPA has effectively mandated an equipment standard under Section 111(h) without making the requisite finding that it is “‘not feasible’ to allow sources of pollution

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<sup>9</sup> Deviation from the standard is limited to the Administrator’s issuance of a design, equipment, work practice, or operational standard under § 111(h), none of which have occurred here.

to choose the control technology they will employ to meet emissions standards.” *Sierra Club v. Costle*, 657 F.2d 298, 316 n. 38 (D.C. Cir. 1981). Even if the proposed rule were not directly subject to the limitation in Section 111(b)(5), the EPA should not circumvent Congressional intent by requiring NGCC or CCS, either of which is functionally an equipment standard.

**F. The Performance Standard As Applied To Coal-Fired EGUs Is Inconsistent With Recent BACT Decisions.**

In the last 18 months, state agencies have permitted four coal-fired EGUs after completing a BACT analysis that, by law, must be no less stringent than the new source performance standards for that source. 42 U.S.C. § 7479(3). Those permits do not impose a 1,000 lbs CO<sub>2</sub>/MWh emissions limit or require the applicant to switch fuels from coal to natural gas. The CO<sub>2</sub> emission limits imposed by the respective permitting authorities are:

1. MidAmerican George Neal South – 2,599 lbs CO<sub>2</sub>/MWh;
2. MidAmerican George Neal North – 2,437 lbs CO<sub>2</sub>/MWh;
3. Wolverine Sumpter – 2,100 lbs CO<sub>2</sub>/MWh; and
4. Interstate Power & Light (“IPL”) Ottumwa Generating Station – 2,927.1 lbs CO<sub>2</sub>/MWh

Nor did the EPA’s comments suggest such standards. *See* Letter from Mark A. Smith, the EPA Region VII to David Phelps, Iowa DNR (May 6, 2011) (George Neal South); Letter from Genevieve Damico, the EPA Region V to Mary Ann Dolehanty, MDEQ (Nov. 10, 2011) (Wolverine Sumpter); Letter from Mark A Smith, the EPA Region VII to Dave Phelps, Iowa DNR (Dec. 19, 2011) (IPL Ottumwa). The EPA must explain why these BACT analyses, which the EPA endorsed in recent months, are no longer applicable and why it now believes that *all* new coal-fired EGUs can meet the 1,000 lbs CO<sub>2</sub>/MWh performance standard or “alternative compliance option.”

**G. CCS Is Not Adequately Demonstrated.**

The EPA should not apply CCS as a new source performance standard (even if labeled as an “alternative compliance option”) for a number of reasons. First, the EPA has not made a finding that CCS qualifies as BSER under Section 111. Second, despite asserting that CCS *could* qualify as BSER, the EPA did not address the criteria listed in Section 111 that the Administrator must consider when making that determination: cost; non-air quality, health, and environmental impacts; and energy requirements. Third, the suggestion that CCS has been adequately demonstrated is contradicted by applicable case law, recent evaluations by Clean Air Act permitting agencies, and the EPA’s own prior descriptions of CCS.

Despite its suggestions to the contrary, the EPA is essentially setting a new source performance standard for coal-fired EGUs based on CCS. Yet the agency has implicitly acknowledged that it cannot satisfy Section 111 because it has not determined that CCS qualifies as BSER:

It should be noted that we are not required to justify the 30-year averaging compliance option on the grounds that it qualifies as the “best system of emission reduction” adequately demonstrated, and we are not stating in this action whether that compliance alternative does or does not qualify as such. Thus, it is not necessary to determine that our expectation that costs will go down meets the standards for determining that CCS is “adequately demonstrated.”

77 Fed. Reg. 22,399; *see also id.* (“a new coal-fired power plant *may* be able to meet the 1,000 lb CO<sub>2</sub>/MWh standard by installing CCS at the time of construction.”) (emphasis added).<sup>10</sup> Further, the EPA suggests that a future study can make up for its decision not to conduct a BSER analysis now. 77 Fed. Reg. at 22,398, 22,407.<sup>11</sup> Because the EPA’s CCS “alternative compliance option” does not comply with the requirements of Section 111, the EPA should not finalize that aspect of the proposed rulemaking.

Despite failing to undertake a BSER analysis for CCS, the EPA proposes to find that “CCS is technically feasible and sufficiently available” as a control technology. 77 Fed. Reg. at 22,414. Even if true, a “technically feasible and sufficiently available” control technology does not comply with Section 111, which requires “the application of the best system of emission reduction” that “has been adequately demonstrated.” 42 U.S.C. §7411(a)(1). An emission control technology is “adequately demonstrated” when it is proved reliable, efficient, and warranted under a cost-benefit analysis. *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973). NSPS may not be based on “purely theoretical or experimental” emission control technologies. *Id.* at 434; *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

The *Sierra Club v. Costle* decision is instructive. There, the D.C. Circuit found that dry scrubbing, an “emerging technology” at the time, had not been adequately demonstrated under Section 111. The court recognized an “inherent tension” between “emerging technology” and “adequately demonstrated technology,” 657 F.2d 298, 341 n. 157, concluding that for dry scrubbers, there was no record evidence for the EPA to make a BSER determination. *Id.* The court relied on (1) the absence of commercial-scale use of dry scrubbers (as opposed to prototype or pilot scale units); (2) the Administrator’s failure to explain the predictive value of pilot scale

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<sup>10</sup> Instead of complying with Section 111, the EPA suggests that it can justify imposition of the CCS “alternative compliance option” based on “the policy goals of promoting energy diversity, as well as other policy objectives.” 77 Fed. Reg. at 22,399. Section 111 does not permit the EPA to establish NSPS based on “policy goals.”

<sup>11</sup> However, the proposed rule does not address CCS’s non-air quality, health, and environmental impacts, as required by Section 111, or include a plan to do so in the future.



testing for full scale plant implementation, and (3) the absence of test data for different types of coals. *Id.* In summary, unless the EPA produced data showing that dry scrubbing would actually allow coal-fired EGUs to achieve the NSPS, it could not consider dry scrubbing to be adequately demonstrated.

Further, in that case, dry scrubbing was far ahead of CCS technology today, as commercial-scale dry scrubbers were already under contract and being installed. *Id.* at 325 n. 74. Here, in contrast, no full scale CCS unit is under contract or being installed for commercial use at a coal-fired power plant. In fact, CCS is unproven at the scale contemplated by EPA in the proposed rule. According to MIT's Carbon Capture and Sequestration Technologies Program, which tracks CCS projects around the world, there are no commercial-scale CCS projects for coal-fired EGUs in existence.<sup>12</sup> Further, the largest CCS test plant, Test Centre Mongstad in Norway, opened in May 2012 *after* the EPA had issued the proposed rule.<sup>13</sup> In any event, this test plan will only capture a small fraction of CO<sub>2</sub> emissions at a cost of \$1 billion and will not store the CO<sub>2</sub> for any period of time.<sup>14</sup> The EPA's reference to other pilot studies, 77 Fed. Reg. at 22,416-17, are equally unavailing because they, too, will capture only a fraction of the plants' CO<sub>2</sub> emissions. *See* Report of the Interagency Task Force on Carbon Capture and Storage (Aug. 2010) at 31 ("Task Force Report") (pilot projects will only capture between 66,000 and 270,000 tons of CO<sub>2</sub> per year). The EPA does not explain why it believes these projects can be scaled up to utility-scale power plants or address the Task Force Report's contrary conclusion that "'scaling up' these existing processes and integrating them with coal-based power generation poses technical, economic, and regulatory challenges." Task Force Report at 9. The EPA also cites to various planned demonstration projects to show that CCS is "technically feasible and sufficiently available." 77 Fed. Reg. at 22,416-17. However, these projects are far from certain and, given a string of prior demonstration project failures, the EPA's claim that 5 to 10 demonstration projects will be online by 2016 seems doubtful. 77 Fed. Reg. at 22,414. The EPA's reliance on small scale and as-yet undeveloped pilot projects is insufficient to meet the Clean Air Act's standard to show that a specific technology is demonstrated as achievable under the Clean Air Act. *Sierra Club*, 657 F.2d at 363 (D.C. Cir. 1981).

The EPA's claim that CCS is "technically feasible and sufficiently available" is also contradicted by assessments from other permitting agencies, the Interagency Task Force on Carbon Capture and Storage, and the EPA itself. The Agency's GHG BACT Guidance, published in March 2011, cautioned that CCS should not be designated as BACT under many

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<sup>12</sup> *See* MIT, Power Plant Carbon Dioxide Capture and Storage Projects, *available at* [http://sequestration.mit.edu/tools/projects/index\\_capture.html](http://sequestration.mit.edu/tools/projects/index_capture.html) (last visited May 24, 2012).

<sup>13</sup> MIT, Statoil Mongstad Fact: Carbon Dioxide Capture and Storage Project, *available at* [http://sequestration.mit.edu/tools/projects/statoil\\_mongstad.html](http://sequestration.mit.edu/tools/projects/statoil_mongstad.html) (last visited May 24, 2012).

<sup>14</sup> Nerijus Adomaitis, Norway opens major facility to test carbon capture, Reuters U.K., May 7, 2012, *available at*, <http://uk.reuters.com/article/2012/05/07/norway-carboncapture-idUKL5E8G7DVY20120507> (last visited June 7, 2010).

circumstances.<sup>15</sup> Instead, it described CCS as “a promising technology” that might be “more widely applicable in the future, GHG BACT Guidance at 35, and identified several “logistical hurdles” that could render CCS technically infeasible in specific applications. *Id.* at 36. The GHG BACT Guidance also concluded that CCS is expensive and its “costs will generally make the price of electricity from power plants with CCS uncompetitive compared to electricity from plants with other GHG controls.” *Id.* at 42. Because CCS is not cost effective, the EPA projected that it would typically be eliminated in Step 4 of the BACT analysis, even if it were technically feasible. *Id.*

State permitting agencies, assessing BACT for greenhouse gases, have agreed with the EPA’s assessment in the GHG BACT Guidance and have ultimately rejected CCS. For example, finding CCS to be “technically feasible for the sake of discussion,” the South Dakota Department of Environment and Natural Resources (“DENR”) performed an extensive cost analysis for the Hyperion Energy Center, which found that capital costs for the CCS unit, the associated pipeline,<sup>16</sup> and additional power requirements would cost \$1 billion or more.<sup>17</sup> In addition to cost concerns, DENR noted problems with the parasitic load associated with CCS, as well as problems gaining access to pipelines and infrastructure for the captured carbon. Likewise, the Michigan Department of Environmental Quality (“MDEQ”) rejected CCS as BACT for a 600 MW power plant. Relying upon the EPA’s GHG BACT Guidance, MDEQ determined CCS was technically infeasible and not cost effective, due in part to its parasitic load.<sup>18</sup> Other agencies have come to similar conclusions.<sup>19</sup> As noted above, the EPA’s comments on these state permit failed to contradict the states’ conclusions that CCS is not technically feasible.

Under the Clean Air Act, NSPS serves as a floor for BACT analysis, 42 U.S.C. § 7479(3), meaning that “BACT should usually be more stringent than the NSPS.” *See, e.g.*, Letter from Gary McCutchen, the EPA OAQPS to Richard Grusnick, Alabama Dep’t of Env’tl Mgmt. (July

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<sup>15</sup> The EPA Office of Air and Radiation, PSD and Title V Permitting Guidance for Greenhouse Gases (Nov. 2010) (“GHG BACT Guidance”), *available at*, <http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf> (last visited June 25, 2012).

<sup>16</sup> The capital costs associated with pipeline construction also make enhanced oil recovery (“EOR”) technically infeasible for most EGUs due to the distances between EGU facilities and EOR operations. For example, DENR determined that it would cost between \$280 and \$420 million to construct a 205 mile pipeline from the Hyperion Energy Center to the nearest EOR operation in Canada. South Dakota DENR, Statement of Basis Construction Deadline Extension Request for the Prevention of Significant Deterioration Permit # 28.0701-PSD 39 (“Hyperion RTC”). Thus, extremely limited CO<sub>2</sub> pipeline infrastructure renders EOR infeasible.

<sup>17</sup> *Id.* at 37-40. The EPA did not object to this analysis in its comments or urge DENR to require CCS as BACT. Letter from Deborah Aal, the EPA Region 8 to Brian Gustafson, South Dakota DENR (Apr. 1, 2011).

<sup>18</sup> MDEQ, Wolverine Power Supply Cooperative, Inc., Response to Comments Document (June 2011) (“Wolverine RTC”) at 102-03, 113-14.

<sup>19</sup> Illinois EPA, Responsiveness Summary for Public Questions and Comments on the Construction Permit Application from Christian County Generation for the Taylorville Energy Center in Taylorville, Illinois (April 2012).

28, 1987) at 1. This is in large part because BACT involves a case-by-case, individualized review of each source, while NSPS must be applied broadly to an entire category of regulated sources. Yet at least four state permitting authorities have determined that CCS is inappropriate under a BACT analysis. Likewise, the EPA's own BACT guidance all but rules out CCS in most cases, based on its understanding of when a control technology is available. *See, e.g.*, NSR Manual at B.18 (technology not beyond experimental stages not "available"); *In re Cardinal FG Co.*, 12 EAD 153, 166 (EAB 2005) (control techniques are not "available" until they have "reached the licensing and commercial sales stage of development"); *Newmont Nev. Energy Investment, LLC* at 441 (BACT control technologies "must be solidly grounded on what is presently known about the selected technology's effectiveness"). In light of the contrary evidence, the EPA has a duty to adequately explain its conclusions regarding CCS.

Outside of the BACT context, the Interagency Task Force on Carbon Capture and Storage generally agrees that CCS is, in many cases, technically and cost infeasible. *See* Task Force Report at 8. The Task Force concluded that "CO<sub>2</sub> removal technologies are not ready for widespread implementation on coal-based power plants, primarily because they have not been demonstrated at the scale necessary to establish confidence for power plant application." *Id.* at 34. The Task Force also noted that CCS is hindered by several legal uncertainties, including ownership of underground pore space, short- and long-term liability for CO<sub>2</sub> underground storage, the lack of clear authority to permit sequestration on federal land, and if it is allowed, whether the federal government would charge companies rent for storage. *See generally* Task Force Report at 66-76. The proposed rule does not address these issues of state law and federal land use which are outside of the EPA's purview.

Even regulatory uncertainty within the EPA's control is crippling CCS development. An example is illustrated by Hydrogen Energy California's proposed \$4 billion hydrogen power plant that would derive hydrogen from coal and petcoke, capturing 90 percent of its CO<sub>2</sub> emissions for use in a nearby EOR operation. But, despite a \$400 million grant from the U.S. Department of Energy, its PSD permit application has been stalled for three years due to indecision by the EPA regional office. Meanwhile, local opposition groups complain that EOR may not permanently sequester CO<sub>2</sub> and demand additional studies that will further delay the project. Thus, for technological, cost, and regulatory reasons, CCS is not "technically feasible and sufficiently available."

While the Clean Air Act does not prohibit the Administrator from predicting the availability of future control technologies, such predictions must be based on reasonable methodology and data. *Portland Cement Ass'n*, 486 F.2d at 392; *see also Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 642. The proposed rule provides no empirical basis for concluding that CCS will be adequately demonstrated in the future. Instead, the EPA's only justification that CCS will become technically feasible is a mere prediction that CCS will mature and become less expensive through wider application. 77 Fed. Reg. 22,399. This prediction lacks support and is in fact contrary to the Agency's own projections for coal-fired energy usage.

More specifically, the EPA predicts that "the costs of CCS will decline in the future as CCS matures and is utilized more widely," *id.*, while simultaneously asserting that virtually no coal-fired EGUs will be constructed over the next few decades. *See id.* at 22,413; RIA at 5-4 to 5-14; *see also id.* at 5-16, Figure 5-4. The EPA's projections regarding coal-fired EGUs are at

odds with the Task Force’s conclusion that “[w]ithout a carbon price and appropriate financial incentives for new technologies, there is no stable framework for investment in low-carbon technologies such as CCS.” Task Force Report at 10. It is simply inconsistent for the EPA to assert that future experience with CCS will resolve technical and logistical difficulties, when there will be no demand for the coal-fired plants it will serve. Again, a comparison to the dry scrubbers in *Costle* is informative. In *Costle*, dry scrubbers cost less than traditional wet scrubbers, meaning that utilities had a great incentive to invest in improving the technology. Here, by contrast, CCS will make coal-fired EGUs more expensive and less efficient. Thus, as a practical matter, utilities will avoid the costs, inefficiencies, and legal uncertainty surrounding CCS and will instead install NGCC units that can comply with NSPS without additional controls. Indeed, by raising the price of coal-fired energy, the proposed rule would halt research on CCS for coal-fired EGUs altogether.

Nor can the EPA rely on the CCS experiences of the five remaining transition sources because they may not be constructed and, if they are, may not utilize CCS. Further the EPA’s assertions that other federal agencies will fund more CCS experiments are filled with speculation regarding the likelihood that such facilities will be built and, if so, what the EPA can learn from them for purposes of establishing BSER. Thus, these demonstration and pilot projects cannot establish that CCS is adequately demonstrated.

Finally, the EPA cannot rely on politically-determined federal and state subsidies to offset CCS’s prohibitive cost. 77 Fed. Reg. at 22,399, 22,414. These political assumptions have no place in the engineering and technological analysis required under Section 111. The proposed rule never provides a reasonable methodology or any data explaining how CCS *technology* will improve over time (*e.g.*, improvements in materials or catalysts). Instead, the EPA merely *assumes* that whatever federal and state subsidies that exist today will exist 10 or more years from now. The EPA cannot provide any credible assurances to that effect because the Agency does not control state or federal budgets. Industry cannot make long-term investment decisions based on subsidies that may be eliminated at any time due to shifting federal or state budgetary priorities. In the end, the EPA’s belief that in 10 years CCS will be adequately demonstrated as the best system of emission reduction, taking into account costs and energy requirements, is exactly the type of “crystal ball” prophecy that is prohibited under the Clean Air Act.

#### **H. The EPA Cannot Bridge The Technological Gap With A 30-Year Averaging Period.**

The proposed rule does not include a reasoned justification for including a 30-year averaging period for CO<sub>2</sub> emissions from coal-fired EGUs. Averaging periods are often established to match regulatory requirements, such as ton-per-year limitations, or to account for daily or long-term variability. *See, e.g.*, 71 Fed. Reg. 9,866, 9,870-71 (Feb. 27, 2006) (establishing 30-day average for sulfur dioxide emissions due to “variability that occurs from non-ideal operating conditions”). While averaging periods may occasionally be set to match the averaging period of a NAAQS, the EPA has not established a NAAQS for GHG emissions. Further, the EPA can and should adopt averaging periods sufficient to address the variability in operations within any given sector.

Here, the EPA is not seeking to moderate a cyclical operation, but rather to bridge a technology gap to a still-infeasible technology: CCS. Under the EPA's proposed rule any new coal-fired EGU would have to meet the 600 lbs/MWh standard within 10 years, based on a yet-unproven technology. This exposes the dilemma of the EPA's proposed rule. If the future of CCS is uncertain, it should not form the basis of the EPA's long-term regulatory goals. By contrast, if CCS is a viable option now, no bridging is necessary and the 600 lbs/MWh standard could be applied for all new facilities. Furthermore, the EPA cannot provide a reasoned basis for using a 10-year horizon for switching to the more stringent 600 lbs/MWh standard. Given the lack of empirical data regarding operational CCS facilities, there is no technical or scientific basis for this time line. Instead, it is part of a back-calculation regarding how long a facility can operate without CCS and still meet the 1,000 lbs CO<sub>2</sub>/MWh average over 30 years.

Additionally, the EPA lacks a reasoned basis for selecting a 600 lbs CO<sub>2</sub>/MWh CCS-controlled standard. Nothing in the proposed rule explains how the EPA arrived at this number. Nor could it, as there are no operational CCS facilities that the EPA could use to verify whether such emissions limits are achievable. Indeed, the only available data are for small pilot plants and other CCS experiments that cannot easily be applied to large-scale CCS for coal-fired EGUs. Therefore, no data exist to support the EPA's assumption that, within 10 years' time, coal-fired power plants could achieve a 600 lbs CO<sub>2</sub>/MWh standard. Thus, the EPA did not, and could not, cite any data from these projects demonstrating that CCS could achieve what is effectively a 70 percent control efficiency for a utility-scale power plant within 10 years.

#### **I. The EPA's Treatment Of Transitional, Modified, And Reconstructed Sources Is Problematic.**

Both the EPA's treatment of "transitional sources" and its failure to address modifications to and reconstruction of existing sources are problematic and lead to substantial uncertainty. Even as it seeks to aid the regulated community, the EPA must take legal positions that are consistent with the language of the Clean Air Act. Adopting legally suspect regulations subjects the Agency's regulatory approaches and policies to legal challenges, creating both uncertainty and vulnerability. The result of legally suspect provisions is uncertainty, as potentially regulated entities must wait to determine the rules that they must consider. Further, such rules create vulnerability as the provision, and even the program as a whole, could be subject to vacatur depending on the seriousness of any errors that were made. Instead, the Agency should not pursue the proposed rule until it can proceed on sound legal footing.

First, despite the EPA's attempt to add flexibility to the sometimes onerous requirements of NSPS, the EPA's proposal to establish a class of "transitional sources" appears to be inconsistent with the plain language of the Clean Air Act and other the EPA regulations. For NSPS, a "new source" is any stationary source that commences construction "after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section..." Section 111(a)(2). Thus, by statute, a final GHG NSPS rule would apply to every source within the source category that did not commence construction before the date of the proposed rule. *See, e.g., United States v. City of Painesville*, 644 F.2d 1186, 1189 (6th Cir. 1981). While the Associations welcome the EPA's attempt to ease the burden on these "transitional sources," the proposal may well violate Step One of *Chevron*. Under Step One, a court must give meaning to the plain language of Section 111(a)(2), obligating a court

(and the EPA) to make NSPS applicable after the publication of proposed regulations. *See Chevron USA Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). But even if the statute were ambiguous, the EPA fails to fully justify this provision as “a permissible construction of the statute.” *Id.* at 843.

Further, the EPA’s definition of “transitional sources” may itself be arbitrary and capricious because the proposal fails to account for similarly situated sources that have already incurred significant costs to comply with PSD permitting programs. The EPA proposes to limit the definition to those sources that obtained a “complete” PSD permit before the rule was proposed and would commence construction within twelve months of the proposal. The former is troublesome because, if exempting “transitional sources” is lawful, it should apply equally to all sources that have already begun the PSD permitting process. Given the complexity of the PSD program, the EPA should not arbitrarily exclude those sources that, often through no fault of their own, have only made it part-way through the PSD permitting process. The latter is also problematic because the EPA has a history of taking longer than 12 months to finalize NSPS rules, meaning that a 12-month exclusion might not be sufficient.

Second, the EPA’s proposal to exempt modified and reconstructed EGUs from the GHG NSPS rule is also troublesome. The EPA proposes to exempt these sources because the Agency lacks sufficient knowledge to identify and regulate them. 77 Fed. Reg. at 22,401. This approach appears to be at odds with the Clean Air Act and the EPA’s NSPS regulations, which define a “new source” to include modified and reconstructed sources. *See also* 40 C.F.R. §§ 60.1(a), (b) (NSPS applicable to modified sources); 60.15(a) (NSPS applicable to reconstructed sources). The proposed rule offers no reason why it should not apply to modified and reconstructed sources.

Furthermore, regardless of the EPA’s authority, it is not clear that the regulations achieve their goal of exempting (or deferring) modified or reconstructed sources. Proposed sections 60.2, 60.5509, and 60.5510 are all silent as to the treatment of modified and reconstructed sources. Thus, a judicial determination could find that none of these provisions actually exclude modified and reconstructed sources under GHG NSPS. At a minimum, if the EPA moves forward with a final rule, it should make clear through a modification to Section 60.5509 or 60.5510 that modified and reconstructed sources are excluded.

In addition, the EPA’s claim that it lacks GHG control technology information about modified and reconstructed sources does not appear credible. The EPA issued a white paper designed to “provide basic information on GHG control technologies and reduction measures” for modified coal-fired EGUs to assist permit writers with BACT determinations for GHG emissions. *See* EPA, Available and Emerging Technologies for Reducing Greenhouse Gas Emissions From Coal-Fired Electric Generating Units 5 (Oct. 2010). The white paper included an extensive discussion of efficiency improvement opportunities, as well as a description of CCS, as potential GHG controls for coal-fired EGUs. *Id.* at 25-28. A chart in the white paper summarizes various EGU efficiency improvement techniques based on “actual efficiency improvement projects.” *Id.* at 28, Exh. 3-1.<sup>20</sup> These efficiency improvement techniques can

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<sup>20</sup> These efficiency improvement techniques are based on extensive research by, among others, the National Energy Technology Laboratory, the U.S. Department of Energy, boiler

surely serve as a starting point for permit writers seeking to develop standards for modified and reconstructed sources, given that the white paper's purpose was to advise permit writers dealing with proposed EGU modifications under the PSD program.

While the Associations oppose the GHG NSPS in general as well as any regulations for "transitional," modified, and reconstructed sources, petitions for review on this matter are certain, and any potentially-reversible provision will add overall regulatory uncertainty. But the EPA cannot simply reverse course between the proposal and a final rule, if any, because the latter would not be a "logical outgrowth" of the former. To provide fair warning to the owners and operators of EGUs that would become subject to the NSPS, the EPA should instead withdraw the existing proposal and proceed, if at all, via an ANPR.

**J. The EPA Failed To Engage In An Appropriate Cost Benefit Or Economic Impact Analysis And Used Flawed Assumptions In Its Modeling.**

Relying on its Integrated Planning Model ("IPM") and other assumptions, the EPA incorrectly concludes that the price differential between natural gas and coal will drive all future construction of EGUs toward natural gas units. The EPA then uses the conclusion that no new coal-fired EGUs will be built to avoid performing full cost-benefit and economic impact analyses. The data do not support the EPA's conclusions.

For example, the Las Brisas Energy Center, a proposed petcoke facility in Corpus Christi, Texas, would be subject to the GHG NSPS and has gone so far as to petition for review the *proposed rule* in the D.C. Circuit Court of Appeals on the grounds that the proposal is applicable to and harming it.<sup>21</sup> In any event, even the EPA's calculations show *some* new coal facilities are likely. RIA at 5-14. Further, a national analysis of energy prices may well mask regional differences and obscure areas where coal-fired EGUs are viable.

The EPA's analysis also bypasses the Agency's requirement to conduct an "Economic Impact Analysis" under Section 317 of the Clean Air Act, a provision that is not even cited in the proposed rule. Section 317 requires the EPA to prepare an economic assessment that takes into account (1) the cost of compliance with the new standard, (2) the potential inflationary or recessionary effects of the standard, (3) the effects of the standard on competition with respect to small businesses, (4) the effect of the standard on consumer costs, and (5) the effect of the standard on energy use. *Id.* The EPA's superficial treatment of a few of these topics in the proposed rule and RIA is insufficient, because it fails to account for the long- and short-term impact of the "de facto" ban on coal. In addition, some facilities have informed the EPA that they will have to abandon their projects in response to the proposed rule, directly rebutting the EPA's "zero cost" conclusion. Thus, the EPA must withdraw the rule and conduct a complete economic analysis.

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manufacturers, and professionals publishing in trade and environmental journals. *See id.* at 42-46 (listing the extensive references upon which the white paper relies).

<sup>21</sup> *See White Stallion Energy Center LLC v. EPA*, No. 12-1251 (D.C. Cir.); *Sunflower Electric Power Corp. v. EPA*, No. 12-1253 (D.C. Cir.); *Las Brisas Energy Center LLC v. EPA*, No. 12-1248 (D.C. Cir.)

Additionally, the EPA used flawed assumptions in its IPM. Costs and performance characteristics of new generating technologies—along with price expectations—drive construction decisions for coal-fired EGUs. Among the most significant variables, particularly for coal-fired EGUs, is overnight capital costs. Thus, the EPA’s assumptions about this variable are critical to its results. However the data suggest that the EPA’s “Base Case” NSPS run (IPM v4.10) significantly overestimates overnight capital costs for coal, creating a bias against coal-fired EGUs in its modeling. The EPA’s estimates of \$2,981-3,008 (2007\$/kW)<sup>22</sup> are 7-11% higher than the data from EIA’s Annual Energy Outlook<sup>23</sup> and 44% higher than the Department of Energy’s National Energy Technology Laboratory’s findings.<sup>24</sup> Given the importance of overnight capital costs in investment decisions in the energy sector, correcting this error can make a significant difference in the cost-competitiveness of coal.

The EPA’s assumption about the overnight capital costs for wind capacity may also impact estimates of the amount of new coal generating capacity coming online. For example, the EPA’s assumption of \$2,809 to \$3,708 (2007\$/kW) for Vintage #3 is 52% to 37% lower, respectively, than the EIA’s 2011 reference case assumptions. Although wind cannot substitute directly for coal generating capacity because wind is intermittent, such a large difference in overnight capital costs would likely alter the mix of new generating capacity brought online under the EPA’s models by the IPM model. The EPA does not explain the sources of its assumptions, which differ so widely from other, more credible government assessments.

For natural gas generation, current prices and expectations of future prices play a central role in siting decisions. A comparison of the EPA’s base and sensitivity case runs suggests that new coal generating capacity is very sensitive to changing assumptions for natural gas. The EPA ran three different models for natural gas demand: a High Electric Demand case, a Base Case, and a Low Shale Recovery case. The results show that on a national basis, altering expectations can produce a 7 GW difference in demand for biomass. Overall, the EPA’s data collection and modeling are highly influential in creating expectations for growth for coal and other fuel sources.

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<sup>22</sup> The overnight capital cost assumptions were taken from Chapter 4, Generating Resources, Tables 4-13 and 4-16, of the IPM documentation, *available at*, <http://www.epa.gov/airmarkets/progsregs/epa-ipm/BaseCasev410.html#documentation>. Tables 4-13 and 4-16 (last visited June 7, 2012).

<sup>23</sup> From Table 8-2, Cost and Performance Characteristics of New Central Station Generating Technologies, of the Electricity Market Module, Assumptions of AEO 2011, Table 8-2, *available at*, <http://www.eia.gov/forecasts/aeo/assumptions/> (last visited June 7, 2012).

<sup>24</sup> DOE/NETL Cost and Performance Baseline for Fossil Energy Power Plants Volume 1 - Bituminous Coal and Natural Gas to Electricity (Nov 2010). Exhibit ES-2. The difference in the overnight capital costs of natural gas combined cycle capacity between the NETL study and the EIA is smaller than the difference in the overnight capital costs of pulverized coal capacity between NETL and EIA, which suggests that the difference in the coal capacity costs is the more important factor.



Contrary to the EPA's assertions, these models suggest that coal will have a role to play in meeting increased energy demand going forward. Rather than simply adopting its prior conclusions that demand for coal would cease, the EPA should consider all of its models in order to provide a more accurate picture of coal demand.

#### **K. The EPA Failed To Comply With Executive Order 13211.**

Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," requires the EPA to prepare a "Statement of Energy Effects" for any rule that is a significant regulatory action under Executive Order 12866 *and* that "is likely to have a significant adverse effect on the supply, distribution, or use of energy." §§ 2, 4(b). Here, the EPA has designed the proposed rule as a significant regulatory action. 77 Fed. Reg. at 22,432. Despite the profound impact the proposed rule would have on the future use of coal as a fuel in this country, the EPA blithely states that the proposal "is not likely to have a significant adverse effect on the supply, distribution, or use of energy," without any supporting rationale. *Id.* at 22,435. The EPA should acknowledge the potential impacts of its proposal and prepare the required statement pursuant to Executive Order 13211.

### **III. THE EPA SHOULD NOT EXPAND THE PROPOSED NSPS RULE TO ENCOMPASS EXISTING SOURCES.**

The EPA properly excluded existing sources from the proposed NSPS GHG rule, and the Associations urge the EPA to maintain this approach. The EPA should not propose to regulate GHG emissions from existing sources now or in the future because it lacks both the legal authority to regulate GHG emissions from existing sources that are already subject to a Clean Air Act Section 112 National Emissions Standard for Hazardous Air Pollutants ("NESHAP") and the policy justification to expand the reach of energy and fuel regulation to existing sources.

#### **A. The Literal Interpretation Of Section 111(d) Prohibits The EPA From Establishing NSPS For Source Categories Regulated Under Section 112.**

First, as a legal matter, the literal interpretation of the Clean Air Act prohibits the EPA from regulating emissions from a source category under Section 111(d) if that source category is already regulated under Section 112. Section 111(d) provides:

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by Section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance *for any existing source for any air pollutant* (i) for which air quality criteria have not been issued or *which is not* included on a list published under section 7408(a) or *emitted from a source category which is regulated under 7412* but (ii) to which a standard of performance would apply ....

Section 111(d) (emphasis added). The plain, literal interpretation of Section 111(d) prohibits NSPS for existing sources for any air pollutant emitted from any source category that is regulated under Section 112. In *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527

(2011), the Supreme Court reinforced a literal interpretation of Section 111(d) that focuses on whether a source category is regulated under Section 112. The Court noted an exception to the EPA's authority to regulate existing sources under Section 111: "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408-7410, or the hazardous air pollutants' program, § 7412. See § 7411(d)(1)." *Id.* at 2537 & n.7. Thus, the EPA cannot regulate any pollutant under Section 111(d)—whether a HAP or non-HAP pollutant—if the source category is regulated under Section 112.

Likewise, the EPA recognized, in the preamble to the proposed Clean Air Mercury Rule, that a literal interpretation of Section 111(d) would prevent the EPA from regulating pollutants from sources regulated under Section 112. In the preamble, the EPA addressed two provisions of the 1990 Clean Air Act Amendments that it alleged were in conflict:

A literal reading of the House amendment, as contained in the Statutes at Large, is that a standard of performance under CAA cannot be established for any air pollutant that is emitted from a source category regulated under section 112. Under this reading, the EPA could not regulate, under CAA section 111(d), HAP and non-HAP emissions that are emitted from a source category regulated under section 112. A literal reading of the Senate amendment is that a standard of performance under section 111(d) cannot be established for any HAP that is listed in section 112(b)(1), regardless of what categories of sources of that pollutant are regulated under section 112. The House and Senate amendments conflict in that they provide different standards as to the scope of the EPA's authority to regulate under section 111(d).

69 Fed. Reg. 4651, 4685 (Jan. 30, 2004).<sup>25</sup> But, the EPA is entirely incorrect because these two provisions can read consistently with each other if the EPA excludes from Section 111(d) *both* source categories covered by a NESHAP *and* hazardous air pollutants listed in Section 112(d). In contrast, the EPA's proposed interpretation was an attempted compromise that "does not give full effect to the House's language." *Id.* But the EPA cannot simply dismiss the plain language of Section 111(d).

A core principle of statutory construction is that an agency must adopt a statute's literal, plain meaning.<sup>26</sup> Indeed, this forms the basis of Step One of *Chevron*. *Chevron*, 467 U.S. at 842-43. Here, because Congress' intent is clear and prohibits the EPA from regulating under Section

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<sup>25</sup> By way of further background, the EPA also described the unusual history of Section 111(d) in that Federal Register notice. In short, Congress apparently enacted two different amendments to Section 111(d), House and Senate versions, in 1990. The Statutes at Large contain a hybrid section that includes the text of both in alternative parenthetical clauses, but the U.S. Code version only contains the House amendment.

<sup>26</sup> See, e.g., Yule Kim, Congressional Research Service, CRS Report for Congress: Statutory Interpretation: General Principles and Recent Trends 39 (updated Aug. 31, 2008).

111(d) any existing source that is also subject to regulation under Section 112, the Clean Air Act amendments do not provide the EPA with discretion to ignore the statutory text and adopt any interpretation it sees fit. When, as here, two amendments include different language, they must be harmonized in a manner that gives full effect to both. *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Read literally, the House and Senate amendments are complimentary, restricting the EPA's authority under Section 111(d) in different ways. The House amendment would prohibit the EPA from regulating any pollutant—whether HAP or non-HAP—from a source regulated under Section 112, while the Senate amendment would prohibit the EPA from regulating any HAP listed in Section 112. Each can be given full effect without harm to the other.

Finally, even if Section 111(d) were considered ambiguous, the EPA's interpretation expressed in the Clean Air Mercury Rule should not be given any weight. First, this outcome is not controlling here because the Clean Air Mercury Rule was vacated in *State of New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Thus, the EPA's approach in the Clean Air Mercury Rule proposal is void *ab initio*. See *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795 (D.C. Cir. 1983).

Second, the EPA's adoption of the interpretation included in the Clean Air Mercury Rule would constitute a reversal of the EPA's past practice under Section 111(d), and the EPA has not provided a "legitimate reason" for doing so. See *Independent Petroleum Association of America v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). With two exceptions, no Section 112 source categories are subject to regulation under Section 111(d).<sup>27</sup> Given the clear and straightforward meaning of the statute, there is simply no reason for the EPA to change course and regulate these source categories under Section 111(d).

Third, an interpretation that prohibits the EPA from regulating under Section 111(d) existing sources that are also subject to Section 112 NESHAPs is the only "permissible construction of the statute" under Step Two of *Chevron*. *Chevron*, 467 U.S. at 837. As noted above, the House and Senate amendments to Section 111(d) can be fully reconciled by prohibiting the EPA from regulating any emissions from a source category regulated under Section 112 and any HAP emitted from any source. This construction gives full meaning to the House amendment. As a result, any other interpretation that fails to give it full meaning cannot be reasonable.

Thus, there is no legal basis for the EPA to avoid the clear, literal language of Section 111(d) which prohibits it from adopting NSPS standards for existing source categories that are already regulated under Section 112. Because the EPA has already regulated the proposed source

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<sup>27</sup> For the two exceptions—pulp manufacturing facilities and municipal solid waste landfills—the 111(d) NSPS preceded the Section 112 MACT for that source category. The EPA published Section 111(d) guidelines in March 1979 after it established NSPS for new Kraft Paper Mills. See 40 C.F.R. § 60, Subpart BB; the EPA, Kraft Pulping: Control of TRS Emissions from Existing Mills (Mar. 1979). The EPA did not establish Section 112 NESHAP for this category until 1998. 63 Fed. Reg. 18503 (Apr. 15, 1998). Likewise, the EPA issued the 111(d) NSPS for municipal solid waste landfills in 1999, 64 Fed. Reg. 60,689 (Nov. 8, 1999), more than three years before it established a Section 112 NESHAP for the source category, 66 Fed. Reg. 2,227 (Jan. 16, 2003).

category, 77 Fed. Reg. at 9,304, it is prohibited from regulating existing EGU sources under Section 111(d).

**B. Policy Considerations Also Require Adoption Of The Literal Interpretation Of Section 111(d).**

Even if the EPA retains some discretion with respect to interpreting Section 111(d), the Agency is also compelled to avoid regulation of GHG emissions from existing sources for policy reasons. Regulating GHGs from existing sources is fundamentally different than the regulation of GHGs from new sources, as well as from other pollutants from existing sources. The EPA must avoid adding regulatory burdens before it considers the full costs of the regulations as well as the benefits that might accrue.

First, regulation of existing sources already subject to Section 112 would add an additional layer of regulatory complexity to industries that can ill afford it. The NSPS program was not intended to provide the EPA with authority over the fuel mix and energy efficiency of existing sources, yet this is likely the only means by which emissions reductions can be realized at existing sources. Further, retrofitting technologies will likely be much more costly than technologies for new sources because initial construction decisions were made without anticipating that the EPA might subsequently regulate them. For example, an existing coal-fired EGU may lack access to natural gas alternatives due to geographical constraints. As a result, Section 111(d) would not provide a cost-effective or efficient means of reducing GHG emissions.

Second, Section 111(d) is a state-driven program, which will create a patchwork of independent and potentially inconsistent rules for existing sources. This system will have significant economic impacts, as energy is a fungible commodity that can be marketed across state lines. While new sources may be able to prepare for specific state requirements before they come online, existing sources would be unable to do so, potentially threatening their economic viability and potentially disrupting energy infrastructure, transmission, and reliability. In addition, inconsistent regulatory approaches will create competitive advantages and disadvantages for existing sources, depending on how states choose to implement the NSPS.

Third, by regulating existing fossil fuel EGUs under Section 111(d), the EPA creates a risk of particularly adverse impacts for other trade exposed sectors. Most of the manufacturing sectors subject to Section 112—including those of the Associations' members—are trade exposed. These facilities operate with very small margins and face stiff competition from nations where there are often no GHG controls. Imposing NSPS GHG regulations for these sources could create perverse effects by encouraging overseas leakage of emissions. Barring NSPS for existing sources will help alleviate some of the burdens of the U.S. regulatory system on trade exposed industries, reduce the risk of overseas emissions leakage, and help ensure that these sources remain competitive in the global marketplace. In contrast, even the threat of potential future regulation of existing sources will create significant uncertainty. The EPA should clarify now that existing sources subject to Section 112 will not be regulated under Section 111(d).

Fourth, for sources already regulated under Section 112, compliance with NESHAP standards is already onerous and costly, and Congress did not intend that existing sources should be subject to additional regulatory burdens beyond those applied by MACT controls. Subjecting

the same source to regulation under both Sections 111(d) and 112 would result in duplicative and burdensome regulations and would be contrary to Congress' intent to regulate existing sources primarily under Sections 108 and 112.

Finally, applying Section 111(d) to the new source category will unreasonably burden state permitting agencies, given the large number of existing sources. Because Section 111(d) is implemented primarily by the states, those agencies would have to address all covered sources within their jurisdiction. But state permitting agencies are already struggling under the administrative burdens of existing federal GHG permitting programs and lack the capacity to implement additional complex permitting programs such as a Section 111(d) NSPS. *See* 77 Fed. Reg. 14,226, 14,237 (Mar. 8, 2012). As the EPA recognized in the proposed GHG Tailoring Rule Step 3, the Agency should avoid adding to the burdens on state permitting agencies until they develop the capacity to address the existing permitting requirements imposed by federal law.

#### **IV. THE EPA SHOULD NOT EXPAND GHG NSPS TO OTHER SOURCE CATEGORIES.**

The EPA has indicated that it is considering GHG new source performance standards for other source categories. For a number of reasons, the Associations believe that even if the EPA were to finalize NSPS for EGUs, it should not proceed with additional GHG standards of performance for other source categories. As an initial matter, there is no legal obligation to do so. The refinery settlement agreement, for example, is crystal clear. It does not impose any legal requirements to impose a GHG NSPS for petroleum refineries, Refinery Settlement Agreement at ¶ 9, nor does it “limit or modify the discretion accorded the EPA.” *Id.* at ¶ 11. Beyond the lack of legal obligation, the EPA should exercise that discretion to not propose GHG standards of performance for other source categories for all of the reasons set forth below.

There are fundamental and overarching distinctions between EGUs and other source categories in the manufacturing sector that warrant a fundamentally different approach to EGUs and all other sectors. GHG emissions from individual manufacturing source categories are at least an order of magnitude lower than those from EGUs, fundamentally altering the cost-benefit and endangerment equations. If the EPA's rudimentary cost-benefit analysis in this proposal is to be taken at face value, one could conclude that the proposed rule here would have no cost and no benefit. While the Associations disagree with this conclusion, it would clearly not be an appropriate conclusion in other contexts. Other source categories are impacted by a much broader range of factors, such as industry economics, geography, federal and state incentives, transportation networks, ownership structures, foreign competitors, profit margins, and customer bases. All of these must be considered, necessitating a fundamentally different approach than that for EGUs.

Regulating GHG emissions from the manufacturing sector is neither prudent nor necessary at this time. Many industries have already taken aggressive, voluntary action to reduce GHG emissions through energy efficiency initiatives—the only available option to reduce GHG emissions from most manufacturing source categories. Aside from feedstocks, energy use is the single largest cost to many manufacturing operations. A commitment to identify and implement cost-effective energy efficiency initiatives has been a primary driver of the continued competitiveness of domestic manufacturing. Unlike with EGUs, the domestic manufacturing

sector faces heightened global competitiveness. Thus, manufacturers already understand that reducing expenditures on energy usage in the manufacturing process is of the utmost importance. Given industry's own interest and significant investment in improving energy efficiency, it is unlikely that there are significant cost-effective opportunities that have not already been exploited by manufacturers on a voluntary basis.

New source performance standards are an especially inefficient way to impose GHG emission reductions due to its one-size-fits-all application. Complex manufacturing sectors create products through varied and differing processes. Each source category and, in turn, each facility within a source category, is unique in its design, process, feedstock, and products. In fact, a fundamental justification for the EPA's proposed rule here—to urge the development and deployment of CCS—is even more inappropriate in other contexts than it is for EGUs. Manufacturers have less fuel flexibility in this regard than the power sector. They may not be able to burn certain fuels due to their locations (such as oil-burning island refineries without access to natural gas or with space limitations) or their manufacturing requirements. The application of CCS to any manufacturing facility should be considered on a case-by-case basis, if considered at all.

Foreign competition also complicates the imposition of uniform standards of performance. Many manufacturing sectors, unlike EGUs, are trade exposed and face stiff competition from overseas competitors. New regulations with significant compliance costs that fail to account for trade exposure will simply result in significant and irreversible job losses without reducing global GHG emissions. To the extent that overseas facilities operate in less regulated conditions, global GHG emissions will actually increase. This is why Congressional proposals to regulate GHG emissions have generally provided for protections to domestic industries that are trade exposed. Executive Order 13563 embodies similar principles, requiring regulations to promote economic growth, competitiveness and job creation by achieving regulatory ends through the least burdensome means. 76 Fed. Reg. 3,821. Given existing PSD regulation and the significant potential costs to the manufacturing sector, including reduced international competitiveness, leakage through trade, and job losses, the EPA should not proceed with additional GHG standards of performance.

Should the EPA decide to consider GHG new source performance standards for other sectors—over the strong objections of the Associations—it should first proceed with an ANPR that provides significant lead time for the Agency to solicit views and comments from all impacted stakeholders and make a source-category specific endangerment determination for GHG emissions. This would avoid surprise by triggering regulatory obligations on the industry and allow the EPA enough time to understand the complex and varied energy requirements and manufacturing processes involved for various source categories prior to such rules having an unannounced impact. An ANPR would also obviate the need to create dubious legal fictions, such as the “transitional source” category and claims that modified and reconstructed sources are not “new sources” under Section 111. As discussed above, a “slight of hand” offered to mitigate the costs of a rulemaking only promotes uncertainty, prolongs the regulatory process through litigation, and discourages economic development.

## **V. THE EPA HAS NO CAUSE TO REVISIT THE POLLUTION CONTROL PROJECT EXCLUSION.**

In the proposed rule, the EPA solicits comments on the continuing validity of the exemption for pollution control projects under 40 C.F.R. § 60.14(e)(5) in response to the D.C. Circuit's vacatur of an analogous exemption in the EPA's New Source Review ("NSR") program. *New York v. EPA*, 413 F.3d 3, 40 (D.C. Cir. 2005). While the Associations believe that the EPA should have addressed modifications as discussed above, they *oppose* any change to the exemption for pollution control projects in § 60.14(e)(5).

First, the exemption is still needed and is as sensible as the day it was issued. The EPA estimates that the majority of modifications that would otherwise trigger NSPS for GHGs are pollution control products resulting in small (if any) new CO<sub>2</sub> emissions. 77 Fed. Reg. at 22,421. Recent and impending regulations including the Cross State Air Pollution Rule and the Mercury and Air Toxics Standards will likely require EGUs to complete pollution control projects that trigger the exemption. Yet in proposing those rules, the EPA did not hint at the possibility of changing the NSPS exemption for pollution control projects. Nor is there any reason for the EPA to do so here. Second, the court's ruling in *New York* was narrowly constrained to the NSR pollution control provision and, thus, is not directly applicable here. 413 F.3d at 42-43. Third, and perhaps most importantly, the statutory limit for challenging the NSPS pollution control exemption is long-expired. Challenges to the EPA rulemakings under the Clean Air Act must be brought "within sixty days from the date notice appears in the Federal Register." 42 U.S.C. § 7607(b)(1). The NSPS pollution control project exemption was promulgated more than 60 days ago, in 1975, 40 Fed. Reg. 58,415, 58,420 (Dec. 16, 1975), meaning that the EPA need not consider it further.

Thus, the EPA should not pursue further rulemaking concerning the pollution control project exemption to the NSPS definition of "modifications."

## **VI. THE EPA MUST ADDRESS THE THREAT THAT THE PROPOSED RULE POSES TO THE TAILORING RULE BEFORE PROCEEDING.**

The Associations have challenged the EPA's Tailoring Rule and related interpretations of the PSD provisions of the Clean Air Act in the D.C. Circuit.<sup>28</sup> Yet, should the EPA prevail on

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<sup>28</sup> In presenting comments on this topic, the Associations do not intend to, and do not, waive any arguments made in comments on or in the context of the pending challenges to the Tailoring Rule and the EPA's related historic interpretations. *See, e.g.*, Briefing in *Coalition for Responsible Regulation, Inc. v. EPA*, No. 10-1073 and consolidated cases (D.C. Cir.) and in *American Chem. Council v. EPA*, No. 10-1167 and consolidated cases (D.C. Cir.); National Association of Manufacturers, *et al.*, Petition to Reconsider, Rescind, and/or Revise the EPA's Prevention of Significant Deterioration Regulation (July 6, 2010) ("Petition"); American Chemistry Council, Petition to Reconsider, Rescind, and/or Revise the EPA's Prevention of Significant Deterioration Regulations: 40 C.F.R. Sections 51.166 and 52.21 (July 6, 2010); Comments of Air Permitting Forum, *et al.*, Docket ID No. EPA-HQ-OAR-2009-0517-5181 (Dec. 28, 2009) (Tailoring Rule); Comments of American Chemistry Council, Docket ID No. EPA-HQ-OAR-2009-0517-5181 (Dec. 28, 2009) (Tailoring Rule); *see also* Comments on the EPA's Prevention of Significant

those petitions, the promulgation of GHG NSPS could undermine the EPA's approach under the Tailoring Rule and trigger PSD permitting requirements for GHGs at the *statutory* (rather than Tailoring Rule) thresholds.<sup>29</sup> Likewise, it could trigger Title V permitting requirements for GHGs at the statutory threshold.

The EPA asserts in the proposed rule that it does not intend for its GHG NSPS to trigger PSD (or Title V) at the statutory thresholds. *See, e.g.*, 77 Fed. Reg. 22,428-29. However, the EPA's intentions may not overcome the apparent plain meaning of the EPA's PSD and Title V regulations. To be consistent with the EPA's own regulatory approach, the Agency must ensure the final rule is consistent with the Tailoring Rule and that it does not trigger PSD (or Title V) at the statutory thresholds for GHGs. For this reason alone, the EPA should promptly withdraw the proposed rule.

This problem centers on the EPA's definition of "regulated NSR pollutant" in its PSD regulations, which includes "(ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act." *See, e.g.*, 40 C.F.R. § 51.166(b)(49). A "major stationary source" is defined to include various types of sources that emit, or have the potential to emit, 100 or 250 tons per year of a regulated NSR pollutant (depending on the type of source). *Id.* § 51.166(b)(1)(i). The EPA avoided the statutory thresholds under the Tailoring Rule, specifying the conditions under which GHG emissions were "subject to regulation." *See, e.g., id.* at § 51.166(b)(48). But the definition of "subject to regulation" does not appear to eliminate other triggers, *e.g.*, 40 C.F.R. § 51.166(b)(49)(ii). To further complicate matters, the Tailoring Rule thresholds apply to a suite of chemicals defined as "GHGs," *id.* § 51.166(b)(48)(i), while the proposed GHG NSPS would only regulate CO<sub>2</sub>. *See proposed* 40 C.F.R. § 60.5515.

Further, the effect of the proposed NSPS GHG rule on the Tailoring Rule threshold for Title V permits is unclear. On the one hand, a "major source" for Title V includes a "stationary source," which includes any facility that emits a "regulated air pollutant." *See, e.g.*, 40 C.F.R. § 70.2. A regulated air pollutant, in turn, includes "(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act," *id.*, which would include CO<sub>2</sub> if the proposed NSPS GHG rule were finalized. On the other hand, the thresholds in the definition of "major source" arguably carve out CO<sub>2</sub> emissions by virtue of the fact that the 100 tpy of non-HAP pollutants only applies to "any air pollutant *subject to regulation*." *Id.* (emphasis added). The definition of "subject to regulation" excludes GHGs under the higher, Tailoring Rule thresholds. While the EPA takes the position that the "major source" definition controls, the Clean Air Act is not clear, leaving room for alternative judicial interpretation that could trigger Title V permitting for CO<sub>2</sub> at the statutory threshold.

The EPA's interpretive solution leaves substantial uncertainty. An agency's interpretation of its own regulations is entitled to deference "only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). It may be difficult for the

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Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3, GHG Plantwide Applicability, Limitations and GHG Synthetic Minor Limitations (April 20, 2012).

<sup>29</sup> This phenomenon is referred to herein as the "NSPS trigger issue."



EPA to claim that its regulations are ambiguous as to whether issuance of a NSPS standard for CO<sub>2</sub> would trigger PSD given the definition of “regulated NSR pollutant.”

Further complicating the matter are the many state-run PSD programs with different regulations that may apply different standards and to which the EPA’s interpretation will not apply. These states will also need to take some action to remedy the problem, and the EPA should not finalize the proposed NSPS without addressing this issue. Some states, such as North Dakota and New Mexico adopted or incorporated the EPA’s language from the Tailoring Rule into their own regulations<sup>30</sup> and may be able to remedy this issue by simply adopting the EPA’s interpretive fix. However, many states, such as Colorado, declined to simply adopt the Tailoring Rule and instead completed a notice-and-comment rulemaking process. States like Colorado would likely need to complete another official rulemaking process to incorporate the EPA’s fixes to address the NSPS trigger issue into their state regulations and then submit the revisions to the EPA for approval. While this sometimes lengthy process unfolds, the EPA should be aware that the NSPS trigger issue may continue to apply until permitting agencies have *both* revised their regulations *and* obtained the EPA approval.

The EPA concludes its discussion of the NSPS trigger issue by declaring that it expects to “propose a rule that is comparable to the SIP PSD Narrowing Rule” for any state that informs the EPA that it must revise its SIP. 77 Fed. Reg. at 22,429.<sup>31</sup> Even assuming that some new PSD narrowing rule would be sufficient to ensure that state requirements that apply PSD to GHGs below Tailoring Rule thresholds are not federally-enforceable, it would *not* automatically resolve compliance issues under state law. Even states that are subject to the existing PSD Narrowing Rule can apply their own state law to require GHG permitting for stationary sources at statutory PSD levels.

The EPA states in the proposed rule that it intends to include language in the final rule addressing this issue, but did not include such language in the proposed rule. *See* 77 Fed. Reg. at 22,429. The Associations are entitled to notice and an opportunity to comment on any “fix” to this issue before final regulations are issued.<sup>32</sup> Assuming the Tailoring Rule and related historic

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<sup>30</sup> NDAC 33-15-15; 20.2.74.7 NMAC.

<sup>31</sup>The existing PSD Narrowing Rule, 75 Fed. Reg. 82,536 (Dec. 30, 2010), could potentially be read to resolve NSPS trigger issue under federal law in the states to which it applies, but only by applying an exceedingly broad interpretation to it.

<sup>32</sup> After the proposed rule was published, the EPA added a brief memorandum to the docket claiming that it had “inadvertently” omitted proposed language to resolve the NSPS trigger issue. The Associations do not believe that memorandum is sufficient. First, it does not meet EPA’s obligation to provide the language for public comment, because notice of it was not published. Second, the “fix” is proposed for the wrong location; it should be in the PSD rules themselves, not the NSPS rules. For example, it would be much simpler and clearer to add “other than GHGs” after “any pollutant” in 40 C.F.R. § 52.21(b)(50)(ii) (and to make a similar change to Part 166). Such clear language would eliminate the possibility that the PSD regulations could be construed to PSD permitting wherever GHG emissions exceed the statutory thresholds in Section 169(1) of the Clean Air Act rather than the Tailoring Rule thresholds. Third, the proposed solution is too narrow because it is specific to just this proposal (new EGUs); it should instead be

interpretations survive judicial review, the EPA must carefully resolve the NSPS trigger issue. While the Associations believe the EPA should not proceed with a NSPS GHG rule at all, it should, at a minimum, proceed with an ANPR so that it can take the time to fully study this issue and its implications in each Clean Air Act permitting jurisdiction before subjecting sources to regulation by issuing another proposed rule.

### **CONCLUSION**

The proposed NSPS GHG rule is unlawful for the reasons set forth above. The EPA should immediately withdraw the proposed rule. Should the EPA wish to consider regulating GHGs under the NSPS program, it should first issue an ANPR in order to foster an open, unbiased dialogue with all affected and interested parties, without the threat of imminent applicability of the rule.

The undersigned Associations appreciate the opportunity to comment on this proposal.

**National Association of Manufacturers**

**American Chemistry Council**

**American Forest & Paper Association**

**American Fuel & Petrochemical  
Manufacturers**

**American Iron and Steel Institute**

**American Petroleum Institute**

**American Wood Council**

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broad. Fourth, and perhaps most importantly, it does not remedy the problem in states that have SIP provisions that do not incorporate 51.166(b)(48), nor does it fix state regulations that would trigger PSD on account of an NSPS, as discussed above. States will need time to adjust their own regulations and also, where necessary, obtain SIP approval. The EPA should not rush into a solution that will not be immediately and broadly applicable. Finally, EPA has made no effort in this memorandum to address the potential ambiguity, discussed above, as to whether an NSPS rule for GHGs would trigger Title V permitting at the statutory threshold.

If, notwithstanding the Associations' objections, the EPA were to insist on promulgating language similar to the contents of the memorandum, it should at least clarify and strengthen the language. For example, Section 60.19A(a) could say: "For purposes of 40 CFR 51.166(b)(49)(ii), pollutants that are "subject to the standard promulgated under section 111 of the Act" shall only include pollutants that are otherwise "subject to regulation" under the Act as defined in 40 CFR 51.166(b)(48) and in any State Implementation Plan approved by the EPA that is interpreted to incorporate, or specifically incorporates, 40 CFR 51.166(b)(48)." A similar change would need to be made to Section 60.19A(b).

**Brick Industry Association**

**Corn Refiners Association**

**Council of Industrial Boiler Owners**

**National Oilseed Processors Association**

**Portland Cement Association**

**The Fertilizer Institute**

**The U.S. Chamber of Commerce**