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Submitted via Regulations.gov, Email (a-and-r-docket@epa.gov), and U.S. Mail

Attn: EPA-HQ-OAR-2017-0355

Re: Joint Comments of Health, Environmental, and Conservation Groups on EPA's Proposed Rule: Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017)

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Appalachian Mountain Club; Center for Biological Diversity; Clean Air Council; Clean Air Task Force; Clean Wisconsin; Coalition to Protect America's Parks; Conservation Law Foundation; Earthjustice; Environmental Defense Fund; Environmental Law and Policy Center; Minnesota Center for Environmental Advocacy; National Parks Conservation Association; Natural Resources Defense Council; Sierra Club, and the Union of Concerned Scientists ("Organizations") hereby submit these joint comments in opposition to the Administrator's proposal to repeal EPA's Clean Power Plan. See 82 Fed. Reg. 48,035 (Oct. 16, 2017) ("Repeal Proposal" or "Proposal"). These comments discuss certain of the Organizations' overarching objections to the Proposal. Some of the Organizations are also filing separate comment letters to provide more detail and to address additional issues. A list of those comments is set forth in the Addendum.

INTRODUCTION

To repeal the Clean Power Plan ("CPP")[1] as the Administrator has proposed would represent a stark abdication of EPA's duty under the Clean Air Act to protect the public health and welfare. The Proposal rests upon a crabbed effort to import limitations into section 111 of the Clean Air Act that Congress did not put there. It ignores the compelling facts concerning the imminent dangers that climate change poses to the United States, as well as the unique characteristics of carbon dioxide pollution and the electric power sector that make the CPP a lawful and reasonable approach to protect against that threat.[2] The Administrator likewise

[1] *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

[2] *See, e.g.*, *PDK Laboratories v. US DEA*, 362 F.3d 786, 796, 797-98 (D.C. Cir. 2004) (statutory interpretation "is not just about logic;" instead, "the problem Congress sought to solve should be taken into account;" when choosing among competing interpretations, "it is incumbent upon the agency not to rest simply on its parsing of the statutory language. It must bring its experience and expertise to bear in light of competing interests at stake") (footnote and citations omitted).

wholly disregards the massive factual record supporting the Clean Power Plan. If finalized, the proposed repeal would be unlawful.

Climate change presents a grave and urgent threat to public health and human civilization. It is principally caused by the combustion of fossil fuels. Fossil electric generating units ("EGUs") are the nation's largest stationary-source contributors to the greenhouse gas ("GHG") pollution that causes climate change. As EPA has repeatedly recognized, meaningfully addressing climate change necessarily requires expeditious, deep reductions in EGUs' carbon dioxide ("CO_2") emissions. Furthermore, the ability of other major sectors, including transportation and manufacturing, to reduce their emissions depends in large part upon their ability to access large quantities of low- or zero-carbon electricity. Deep emissions reductions from EGUs are urgently needed to protect the public health and welfare.

Such reductions are also readily attainable. The CPP provides a cost-effective, sensible framework for achieving such reductions based on tested means of reducing EGUs' CO_2 emissions. Adopted after years of public outreach, including scores of public meetings and millions of comments from stakeholders and the public, and based upon a massive factual record and exhaustive agency analysis, the CPP represents one of the country's most important steps to address climate change.

Experience since the CPP's promulgation in 2015 has proven its emissions targets to be even more readily attainable than originally expected. As EPA has observed, the power sector's reorientation toward cleaner generation is "now significantly more pronounced than EPA initially projected at the time it finalized the CPP."[3] Well in advance of the 2022 initial compliance date (and despite a Supreme Court stay of the CPP), power sector emissions have declined at a rate far more rapid than required for compliance with the CPP.[4] Experience since the CPP's promulgation has disproven claims that meeting the CPP's targets would impose serious strains on the electric power system or otherwise be unreasonably ambitious. The CPP is essential to ensure that regardless of changes in market dynamics, the sector's emissions trajectory continues to decline and emissions reductions are achieved throughout the country. It provides the regulatory architecture that will allow EPA to strengthen the CPP to achieve further reductions that will be necessary to mitigate grave climate risks.

If any change were warranted on the basis of these facts, it would be to strengthen the CPP, not to repeal it. Nevertheless, despite the urgency of the hazards, the CPP's achievability, and the massive record supporting it, Administrator Scott Pruitt has proposed an outright repeal of the rule. The Proposal states that the new rulemaking is "based on the outcome of" an agency review under Executive Order 13,783, entitled "Promoting Energy Independence and Economic

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[3] EPA, *Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units*, *App. 2: Power Sector Trends*, at 8 (Jan. 11, 2017) [hereinafter "*Power Sector Trends*"] (Attachment F5 to Joint Appendix of Environmental and Public Health Organizations, and States Regarding the Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Submitted to this docket in hard copy on Apr. 20, 2018) [Hereinafter "Joint Appendix"].

[4] By 2017, power sector emissions had decreased by approximately 27 percent since 2005 (a commonly used benchmark year, see 80 Fed. Reg. 64,665), meaning current emissions levels are already most of the way toward the 32 percent reduction the CPP is projected to provide in 2030 relative to 2005 emissions. CO_2 emissions from the power sector declined from 2,416 million metric tons (mmt) in 2005 to 1,753 mmt in 2017, a decline of 27 percent. *See* Energy Information Administration, *Monthly Energy Review*, at 187, tbl. 12.6 "Carbon Dioxide Emissions from Energy Consumption: Electric Power Sector" (March 2018), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf.

Growth," signed by President Donald Trump on March 28, 2017. Yet, the Proposal provides no explanation for how EPA interpreted or applied that Executive Order and supplies no documents concerning the review that ostensibly prompted this entire proceeding. 82 Fed. Reg. at 48,036.

Administrator Pruitt proposes to determine that the CPP is "not within the bounds of [EPA's] statutory authority,"[5] and, in particular, that the interpretation of the term "best system of emission reduction" adopted in the Clean Power Plan "exceeds the EPA's statutory authority."[6] The Proposal embraces what it vaguely calls a "source-oriented" interpretation that the Administrator claims renders the CPP unlawful,[7] yet offers no consistent or coherent account of that interpretation or why it condemns the CPP. The Administrator has not proposed an alternative emission guideline, but has issued an Advance Notice of Proposed Rulemaking ("ANPR") addressing a possible replacement rule focused on efficiency upgrades.[8] The Advance Notice suggests that, if anything, the Administrator is considering only a highly constrained "heat-rate improvements" replacement that would achieve only a small fraction of the emission reductions expected from the CPP.

Without a simultaneous replacement that meets the requirements of the Clean Air Act, a repeal would place EPA in defiance of its mandatory duty under the Act to control emissions of dangerous pollutants from existing power plants – a duty that the Supreme Court relied on in determining that the Clean Air Act authorizes EPA to limit CO_2 emissions from power plants, displacing federal common law. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). The Administrator's effort now to disclaim "authority" to adopt the CPP fails badly. Contrary to his strained theories, the statutory text does not call into doubt EPA's authority to adopt the CPP, and the Administrator makes no attempt to measure his proposed interpretation against the explicit statutory factors on which the CPP was carefully grounded.

The Proposal positively mocks the reasoned decision-making requirements for a major policy reversal of this kind. It wholly disregards the massive administrative record that supported the CPP, and fails to identify alternatives to repeal, let alone compare them in a way that would allow for reasoned evaluation of their relative merits. It is almost completely silent about the grave public health and environmental hazards from carbon pollution, and ignores the health and environmental consequences of repealing the agency's central stationary-source GHG control. It completely disregards the distinctive realities of the power sector reflected in the CPP record, which underlie the CPP's design. The Proposal utterly fails to explain why and on what basis the Administrator proposes to reject EPA's prior factual determinations and legal and policy judgments.

The Repeal Proposal is heedless even of the industry it purports to benefit. The CPP gave an industry with a decades-long planning horizon a clear regulatory path through 2030. Its repeal would leave the industry in pervasive uncertainty concerning the regulatory regime for CO_2,[9] and would throw out the CPP's flexible, cost-effective framework that was developed with extensive

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[5] 82 Fed. Reg. at 48,038; *see also id.* ("[I]t is not appropriate for a rule that exceeds statutory authority … to remain in existence pending a potential, successive rulemaking process.").
[6] 82 Fed. Reg. at 48,036-38, 48,048.
[7] 82 Fed. Reg. at 48,039-40.
[8] 82 Fed. Reg. 61,507.
[9] *See* Gavin Bade, *SEU 2018 Survey: utilities shaken, not moved, by Trump policies*, UTILITY DIVE (Feb. 27, 2018), *available at*: https://www.utilitydive.com/news/seu-2018-survey-utilities-shaken-not-moved-by-trump-policies/517953/.

input from the industry and states. Far from providing regulatory certainty or clarity, the Administrator's proposal only complicates the task of making infrastructure investment decisions for a trillion-dollar industry.

To throw out the CPP's reasonable, carefully-constructed first steps toward addressing the dangers of climate change would be a profound betrayal of EPA's core duties to the public. EPA should withdraw this hopelessly flawed proposal and get back to its basic duties as the nation's leading *environmental protection* agency by implementing and strengthening the CPP.

I. THE PROPOSAL IGNORES THE GRAVE HAZARDS POSED BY CLIMATE CHANGE AND ARBITRARILY FAILS TO CONSIDER THE IMPLICATIONS OF THE PROPOSAL FOR PUBLIC HEALTH AND WELFARE

Climate change, and the power sector pollution that contributes to it, poses an imminent and dire threat to society and the environment. In 2009, EPA issued an extensive, science-based determination that heat-trapping GHG emissions endanger the public health and welfare of both current and future generations[10] – a determination that was upheld by the United States Court of Appeals for the District of Columbia Circuit, and that the Supreme Court declined to review.[11] In the more than eight years since it issued this Endangerment Finding, EPA has repeatedly reaffirmed and bolstered that determination in subsequent rulemakings – consistent with recent scientific literature that has only added to the vast body of evidence underlying the Endangerment Finding.[12] According to the most recent scientific assessment by the U.S. Global Change Research Program ("USGCRP") – published in November 2017 and cleared by EPA among other agencies – "there is no convincing alternative explanation" other than human activities for the observed climate warming over the last century.[13]

Existing power plants are the largest stationary sources of CO_2 pollution, responsible for approximately 30 percent of the nation's total GHG emissions (a total of over 1.8 billion metric tons in 2015), making them among the largest contributors (and by far the largest stationary-source contributors) of this harmful pollution.[14] Any serious effort to reduce U.S. carbon pollution must include large reductions in emissions from these sources.[15]

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[10] 74 Fed. Reg. at 66,496.

[11] *See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

[12] *See* 80 Fed. Reg. at 64,675, 64677, 64,684, 64,686; *id.* at 64,776; *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources*, 81 Fed. Reg. 35,824, 35,834 (June 3, 2016); *Finding that Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated to Endanger Public Health and Welfare*, 81 Fed. Reg. 54,422 (Aug. 15, 2016).

[13] U.S. Global Change Research Program, *Climate Change Special Report*, Vol. 1 at 12 (2017) ("USGCRP") (Joint Appendix, Attachment B69).

[14] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2016*, Table ES-2 at p. ES-6 (2018) (reporting that electric power generation was the single largest source of greenhouse gas emissions in 2016, slightly ahead of the transportation sector), available at https://www.epa.gov/sites/production/files/2018 01/documents/ 2018_ complete_report.pdf.

[15] *See, e.g.,* The White House, *United States Mid-Century Strategy for Deep Decarbonization* 33-34 (Nov. 2016) (describing electricity "produced almost entirely from clean generation sources by 2050" and "broad utilization of clean electricity and low-carbon fuels" as central elements of a strategy to reduce net greenhouse gas emissions to 80 percent below 2005 levels by 2050), https://unfccc.int/files/focus/long-term_strategies/application/pdf/us_mid_century_strategy.pdf (submitted as Attachment E to Comments of Environmental Defense Fund on EPA's Proposed Rule: Repeal of Carbon Pollution Emission Guidelines for

The mounting hazards of climate change make reducing those emissions a matter of real urgency. Indeed, since the CPP was finalized in 2015, the dangers posed and damage done by GHG emissions have become still clearer.[16] The years 2015-2017 were the three hottest years on record, and 17 of the 18 hottest years on record have occurred since 2000.[17] Over the next few decades, the U.S. is expected to warm an additional 2.5°F on average.[18] And as temperatures continue to increase, there is a greater risk that non-linear climate thresholds, or "tipping points" will occur.[19] Climate change contributes to, and exacerbates, many of the severe disasters that have afflicted the United States in recent years – including intense tropical storms, devastating wildfires, and droughts.[20] Climate change is altering the United States' iconic wild places, including its National Parks. Soon we will have a Glacier National Park with no glaciers, and other National Parks are at risk of losing the natural features that give these places their essential character.[21]

In the CPP rulemaking, EPA explained that climate change "has become the nation's most important environmental problem" and that mitigation has become an urgent necessity.[22] As the preamble to the final rule explained, "[w]e are now at a critical juncture to take meaningful action to curb the growth in CO_2 emissions and forestall the impending consequences of prior inaction. CO_2 emissions from existing fossil fuel-fired power plants are by far the largest source of stationary source emissions."[23] The agency also emphasized that the Clean Air Act's purposes "include protecting public health and welfare by comprehensively addressing air pollution, and, particularly, protecting against urgent and severe threats."[24] Notably, the Act expressly includes effects on "climate" among those EPA must guard against. 42 U.S.C. § 7602(h). EPA designed the CPP, including its implementation schedule, in light of

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Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017) (filed in this CPP Repeal docket on April 26, 2018) (hereinafter "EDF Comments").

[16] The agency itself acknowledged this in an appendix to its January 2017 denial of reconsideration petitions. *See*, EPA, *Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units, Appendix 4 — Climate Science Updat*e, 3 (Jan. 2017) ("The science regarding the impacts of climate change has also continued to advance since publication of the CPP. Major assessments have been released by the USGCRP and the National Academy of Sciences, as well as the annual State of the Climate report from NOAA. The major assessments demonstrate the continued and, for certain outcomes, increased certainty and likelihood that GHGs impact health and welfare now and in the future.") (Joint Appendix, Attachment F7).

[17] *See NOAA, NASA Scientists Confirm Earth's Long-term Warming Trend Continues* (Jan. 18, 2018), *available at*http://www.noaa.gov/news/noaa-2017-was-3rd-warmest-year-on -record-for-globe; *see also* Jugal K. Patel, *How 2016 Became the Earth's Hottest Year on Record*, N.Y. TIMES (Jan. 17, 2017) *available at* https://www.nytimes.com/interactive/2017/01/18/science/earth/ 2016-hottest-year-on-record.html.

[18] USGCRP at 17.

[19] USGCRP at 411.

[20] *See* Joint Comments of Environmental and Public Health Organizations Regarding the Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Comments Specific to Climate Change (submitted in this docket on April 26, 2018) ("Joint Climate Change Comments").

[21] *See* Comments of National Parks Conservation Association (NPCA), the Appalachian Mountain Club (AMC) and the Coalition to Protect America's National Parks (CPANP) (submitted in this docket April 26, 2018).

[22] 80 Fed. Reg. at 64,774; *see also* Basis for Denial of Recon., at 1 (noting that climate change is the nation's "most urgent and important environmental challenge").

[23] 80 Fed. Reg. at 64,774.

[24] 80 Fed. Reg at 64,773. As EPA noted: "At its core, Congress designed the CAA to address urgent and severe threats to public health and welfare." *Id*. at 64,774.

what it found to be an "urgent need for actions to reduce GHG emissions."[25] Similarly, EPA described the climate change danger that prompts the CPP as a "monumental threat to Americans' health and welfare."[26]

The Repeal Proposal does not (and given the overwhelming scientific evidence, reasonably could not) question EPA's own prior findings that climate change endangers public health and welfare and is an urgent and growing threat. Indeed, the Proposal specifically notes that "[t]he substance of the 2009 Endangerment Finding is not at issue in this proposed rulemaking, and we are not soliciting comment on the EPA's assessment of the impacts of GHGs with this proposal."[27]

Yet the Repeal Proposal is completely silent about the urgent health and environmental threat the Clean Power Plan is designed to address. By giving no weight to the health and environmental implications of repealing the CPP with no valid replacement in place, the Repeal Proposal does not acknowledge that under the Clean Air Act, and under section 111 in particular, the agency has an obligation to reduce health and environmental dangers and to consider the benefits of regulation in addition to taking into account the costs.[28] Nor does the Proposal give any consideration to how the agency's proposed interpretation of section 111(a)(1) would affect the agency's ability to implement the statute's core purpose to protect the public from air pollution's grave threats. Failing to explore the health and environmental consequences of a proposed new interpretation of a provision designed to protect health and the environment, and to weigh those consequences against the costs of regulation, is illegal and irrational.

The Administrator must explain how his proposal to repeal the CPP and replace it with nothing can be reconciled with the agency's unchallenged recognition that climate change is an "urgent and severe" threat. Moreover, EPA must provide sound reasons for its proposed interpretation of section 111(a)(1) that account for the potential impacts of that interpretation on its ability to protect the public health and welfare and fulfil the statutory purpose of securing maximum feasible emissions reductions. The Administrator's failure to engage with EPA's own record while he proposes action that will *increase* this well-understood, serious danger is unlawful, arbitrary and capricious.

II. A REPEAL OF THE CPP WITHOUT A VALID REPLACEMENT RULE VIOLATES EPA'S STATUTORY OBLIGATION TO CONTROL DANGEROUS CARBON DIOXIDE POLLUTION EMITTED BY POWER PLANTS AND IS ARBITRARY AND CAPRICIOUS

Administrator Pruitt has proposed to repeal the CPP without issuing a replacement regulation that would limit dangerous CO_2 emission from existing fossil fuel-fired power plants. This alone would be unlawful. Repealing the CPP without simultaneously issuing a replacement

[25] 82 Fed. Reg. at 64,937.

[26] *See* Respondent EPA's Final Brief, *West Virginia v. EPA*, D.C. Cir. No. 15-1363 at 1 (Doc. 1609995) (April 22, 2016) (hereinafter "EPA CPP Br.") (Joint Appendix, Attachment A7).

[27] 82 Fed. Reg. at 48,037 n.3.

[28] Indeed, the Administrator's proposed interpretation appears to be frankly designed to try to *minimize* the pollution reductions available under section 111. *See* 82 Fed. Reg. at 48,042 (asserting that proposed interpretation will have benefit of "substantially diminishing the potential economic and political consequences of any future regulation of CO_2 emissions from existing fossil fuel-fired EGUs").

that makes equal or greater reductions in power plant CO_2 emissions would put EPA in default of its affirmative obligation to protect the public from this dangerous pollution.

The Clean Air Act requires EPA to regulate air pollutants emitted from major stationary sources.Section 111(b) of the Act directs EPA to identify categories of stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[29] Power plants have been listed under this provision since 1971 as a source category that contributes significantly to dangerous air pollution.[30] After listing a source category, EPA must set standards of performance (also known as New Source Performance Standards) covering new and modified sources under section 111(b). EPA has issued such a regulation for power plant carbon dioxide, in which the agency determined that power plants' CO_2 emissions significantly contribute to dangerous atmospheric concentrations of that pollutant.[31]

Section 111(d) directs EPA to issue regulations that establish a state implementation process similar to the one applicable to the adoption of state implementation plans for criteria air pollutants under section 110 of the Act.[32] Under section 111(d) states must submit for EPA's approval plans containing "standards of performance" – a term defined in Section 111(a)(1) to be based upon EPA's determination of the "best system of emission reduction" – and in the event a state fails to submit an adequate plan, EPA must issue its own plan.[33]

EPA issued its section 111(d) framework regulations (40 C.F.R. Subpart B) in 1975.[34] These regulations provide that, after promulgation of a New Source Performance Standard for new sources in a listed category, EPA must issue an "emission guideline" that reflects the BSER for existing sources. States then submit to EPA for approval their plans establishing standards of performance (called "emission standards" in the regulations) that incorporate or that set more stringent standards than EPA's emission guideline; for any state that fails to submit a satisfactory state plan, EPA must issue a federal plan.[35]

In *Massachusetts v. EPA*, the Supreme Court held that "EPA has the statutory authority to regulate the emission of [greenhouse] gases," because they "fit well within the Clean Air Act's capacious definition of an 'air pollutant.'"[36] The Court ordered EPA to make a science-based determination as to whether those pollutants endanger public health and welfare, ruling that "the Clean Air Act requires the Agency to regulate emissions" of gases contributing to climate change if there is an endangerment finding.[37]

Following an extensive notice-and-comment proceeding and based on a voluminous scientific record, EPA concluded in 2009 that GHGs "endanger human health and welfare."[38] On

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[29] 42 U.S.C. § 7411(b)(1)(A).
[30] *See* Air Pollution Prevention and Control: List of Categories of Stationary Sources, 36 Fed. Reg. 5,931 (Mar. 31, 1971).
[31] *Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,510, 64,517-24, 64,529-31 (Oct. 23, 2015).
[32] 42 U.S.C. § 7411(d)(1).
[33] 42 U.S.C. § 7411(d)(1), (2).
[34] 40 Fed. Reg. 53,340 (Nov. 17, 1975).
[35] 42 U.S.C. § 7411(d)(2); 40 C.F.R. §§ 60.22-60.24.
[36] 549 U.S. 497, 532 (2007).
[37] 549 U.S. at 533.
[38] 74 Fed. Reg. 66,496 (Dec. 15, 2009).

review, the U.S. Court of Appeals for the D.C. Circuit firmly rejected all challenges to EPA's endangerment finding, concluding that EPA's body of evidence in support of its finding was "substantial"–indeed, an "ocean of evidence."[39] As demonstrated in our separate comments on climate science, since 2009 the literature on climate change and evidence of *current* climate impacts has only continued to develop and increase, and EPA has issued a series of subsequent findings determining that the science has become even more expansive and compelling.[40] This body of research continues to underscore the urgency of mitigating greenhouse gas pollution and the severity of the impacts that are happening now and will continue to intensify if we fail to act.

EPA's legal authority and obligation to regulate climate pollution emissions under the Clean Air Act have been affirmed twice more by the Supreme Court. In *American Electric Power v. Connecticut*, the Supreme Court found that section 111 of the Clean Air Act "speaks directly" to the regulation of climate pollution from existing power plants.[41] Even opponents of climate protections conceded that point during oral argument.[42] The Court again recognized EPA's authority and obligation to regulate climate pollution in a third decision, *Utility Air Regulatory Group v. EPA*.[43] More recently, judges on the U.S. Court of Appeals for the D.C. Circuit noted that the 2009 endangerment finding "triggered [EPA's] affirmative statutory obligation to regulate greenhouse gases."[44]

In 2014, EPA proposed to regulate carbon pollution from new, modified, and reconstructed fossil fuel-fired power plants because of the extraordinary contribution that these sources make to dangerous climate-destabilizing pollution.[45] The agency issued final carbon pollution standards for new, modified, and reconstructed power plants in 2015,[46] triggering a binding obligation under section 111(d) to issue emission guidelines for carbon pollution from existing power plants covering "any air pollutant" (with specified exceptions not applicable here) and "any existing source . . .to which a standard of performance under this section would apply if such existing source were a new source." 42 U.S.C. § 7411(d)(1).

Under the Clean Air Act, therefore, EPA *must* limit carbon pollution from existing power plants. Accordingly, with EPA's obligation to regulate power plant CO_2 emissions as an air pollutant firmly established, repealing the CPP without having promulgated a lawful replacement is a violation of the agency's duty under section 111, and is unlawful, arbitrary, and capricious. Even if the agency had a valid evidentiary basis and a sound legal theory to support the merits of its Repeal Proposal – which it emphatically does not – promulgating EPA's proposal would still

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[39] *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 116-25 (D.C. Cir. 2012), *rev'd in part on other grounds sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).
[40] *See generally* Joint Climate Change Comments.
[41] 564 U.S. 410, 424 (2011).
[42] *See Am. Elec. Power v. Connecticut*, No. 10-174, Oral Argument Transcript, 16:23–17:6 (Apr. 19, 2011).
[43] 134 S.Ct. 2427, 2448 (2014) ("*UARG*") (holding that greenhouse gas emissions from sources required to obtain Prevention of Significant Deterioration (PSD) permits are subject to "best available control technology" (BACT) limitations).
[44] Order, *West Virginia v. EPA*, No. 15-1363, Order, ECF No. 1687838, at 2 (Aug. 8, 2017) (Tatel and Millett, JJ., concurring in the order granting further abeyance).
[45] *Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Proposed Rule*, 79 Fed. Reg. 1,430 (Jan. 8, 2014).
[46] *Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule*, 80 Fed. Reg. 64,510 (Oct. 23, 2015).

be unlawful because it would leave its affirmative mandate to limit carbon pollution from existing power plants unfulfilled.

The Administrator's Proposal ignores EPA's "affirmative statutory obligation under section 111 to regulate greenhouse gases" from EGUs.[47] EPA has determined that GHG emissions endanger human health and welfare,[48] triggering a duty to regulate GHGs from power plants. EPA recognizes as much: "CAA section 111(d) *requires* the EPA to promulgate emission guidelines for existing sources that reflect the BSER under certain circumstances."[49]

EPA claims it has inherent authority and authority under section 301 of the CAA for the repeal.[50] But the agency has neither. An agency has no "inherent authority" to repeal its rules, only the authority provided by its enabling acts or the APA. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). Clean Air Act section 301 provides no authority to countermand more specific provisions of the Act, and repeal would leave the affirmative duty created by section 111 entirely unfulfilled.

Consequently, the Repeal Proposal cannot be "*necessary*" to carry out the Administrator's duties under the Clean Air Act, as section 301 requires.[51] To the contrary, by leaving the largest stationary sources of air pollution that pose grave risks to human health and welfare subject to no federal controls, it would run directly contrary to the requirements of section 111.[52]

EPA suggests that such an approach is necessary because "[i]t is not in the interests of the EPA, or in accord with its mission of environmental protection consistent with the rule of law, to expend its resources along the path of implementing a rule, receiving and passing judgment on state plans, or promulgating federal plans in furtherance of a policy that is not within the bounds of [EPA's] statutory authority."[53] This explanation does not withstand scrutiny.

As explained below, and in our respective organizational comments, the CPP *is* within the bounds of EPA's statutory authority. Accordingly, the Administrator's entire explanation for the repeal without a replacement – including the extraordinary claim that consideration of health and environmental consequences is unnecessary – fails. To the contrary, EPA's apparent reliance on section 301 as providing authority to repeal the CPP without finalizing a replacement is inconsistent with the "clear statutory command" in section 111 triggering regulation of existing

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[47] Order, *West Virginia v. EPA*, No. 15-1363, Order, ECF No. 1687838, at 2 (Aug. 8, 2017) (Tatel and Millett, JJ., concurring in the order granting further abeyance) (citing *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), and *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)).

[48] 82 Fed. Reg. at 48,037 & n. 3 (acknowledging the "Agency's assessment 'that [greenhouse gases] endanger public health, now and in the future").

[49] 82 Fed. Reg. at 48,036-037.

[50] 82 Fed. Reg. at 48,039.

[51] Section 301 authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. 7601(a)(1). The Proposed Repeal cites section 301 as a basis of the proposed action but does not otherwise discuss it or explain why EPA believes that the provision supports the proposed action. 82 Fed. Reg. at 48,049. As noted above, it clearly does not.

[52] *See* 82 Fed. Reg. at 48,037 (recognizing that fossil fuel-fired EGUs are "by far the largest emitters of [greenhouse gases] among stationary sources in the U.S.").

[53] 82 Fed. Reg. at 48,038; *see id.* ("[I]t is not appropriate for a rule that exceeds statutory authority … to remain in existence pending a potential, successive rulemaking process"). The credibility of this argument about agency resources is particularly strained given EPA's repeated efforts to dissuade the D.C. Circuit Court of Appeals from issuing a decision on the legality of the Clean Power Plan.

sources upon promulgation of new source regulations, and requiring EPA to regulate sources of air pollution that endangers human health and welfare.[54] Here, there is no "gap" to fill with section 301's "gap-filling" authority – section 111 clearly spells out the agency's affirmative obligations.[55] It is consistent with the specific requirements of section 111 to revise the BSER established in the CPP consistent with the requirements of the CAA, but it is not consistent with those requirements to repeal the CPP without having promulgated a lawful replacement.

Indeed, given the statutory mandate, repealing the CPP with no replacement, paired with an "advance notice" indicating merely that the Administrator will *consider* the possibility of issuing a replacement, is comparable to an indefinite suspension of the rule pending EPA's reconsideration, something the courts have not allowed. The CAA is clear that apart from the possibility of a three-month stay, promulgated regulations shall go into effect (i.e., shall *not* be suspended) even though those regulations might be changed through reconsideration or even vacated upon judicial review. At least three provisions of the statute specifically direct EPA to ensure that promulgated rules go into effect, absent a proper exercise of EPA's limited stay authority under section 307(d)(7)(B). Section 111 provides that "[s]tandards of performance or revisions thereof *shall become effective upon promulgation*." 42 U.S.C. § 7411(b)(1)(B) (emphasis added). Similarly, section 307(b)(1) – the Act's judicial review provision – mandates that "[t]he filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action . . . *and shall not postpone the effectiveness* of such rule or action.[56] Finally, the Act's reconsideration provision directs that "such reconsideration *shall not postpone the effectiveness* of the rule."[57]

EPA's attempt to repeal the CPP without having finalized a lawful replacement is also arbitrary and capricious. Repealing the CPP would be particularly egregious given the long history of EPA shirking its obligation to address this huge source of dangerous pollution. Many of the organizations submitting this comment, along with several states, have long sought to enforce EPA's affirmative duty to set standards for power plant CO_2 emissions under section 111. After a 2002 notice of intent and 2003 lawsuit seeking to force EPA to update the power plant performance standards to include CO_2, EPA issued a final rule, but refused to establish CO_2 standards.[58] That refusal necessitated a second lawsuit, *New York v. EPA*, this time challenging the final rule. Following the Supreme Court's *Massachusetts v. EPA* ruling, the D.C. Circuit granted EPA's request to remand the *New York* case to the agency for "further proceedings in

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[54] *See NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (concluding that EPA could not suspend a regulation while it reconsidered it); *Alabama Power Co. v. Costle*, 636 F.2d 323, 403 (D.C. Cir. 1979) (concluding that section 301 does not empower EPA to extend its authority to review modifications of industrial facilities beyond the limits established by Congress).

[55] *NRDC v. EPA*, 749 F.3d 1055, 1063-64 (D.C. Cir. 2014) ("EPA cannot rely on its gap-filling authority to supplement the Clean Air Act's provisions when Congress has not left the agency a gap to fill."); *see API v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) ("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area.").

[56] 42 U.S.C. § 7607(b)(1) (emphasis added). The D.C. Circuit has specifically addressed whether the Clean Air Act grants EPA authority to stay a promulgated rule beyond the single three-month period described in section 307(d)(7)(B) and determined that the answer is no, even after notice and comment rulemaking. *Reilly*, 976 F.2d at 40-41.

[57] 42 U.S.C.§ 7607(d)(7)(B) (emphasis added); *see also id.* § 7411(e) ("After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.").

[58] 71 Fed. Reg. 9,866 (Feb. 27, 2006).

light of *Massachusetts*." Order, *New York v. EPA*, No. 06-1322, ECF No. 1068502 (D.C. Cir. Sept. 24, 2007). After three more years in which EPA failed to act, state and environmental organizations again demanded that EPA set CO_2 standards, in compliance with the court's remand. The resulting settlement imposed a timetable for EPA to propose regulations and take final action by May 2012[59] – a deadline EPA missed by three years.[60] Meanwhile, the Supreme Court in *AEP* affirmed EPA's authority and responsibility to act on CO_2 emissions from power plants under section 111.

During the agency's delays, CO_2 levels – and concomitant dangers to public health and welfare – have continued to mount. The concentration of CO_2 in the atmosphere was approximately 325 parts per million (ppm) in 1970, when Congress enacted the Clean Air Act authority to address climate change; about 383 ppm in 2007,[61] when the Supreme Court decided *Massachusetts v. EPA*; and well over 400 ppm when Administrator Pruitt proposed to repeal the Clean Power Plan.[62]

In October 2015 – almost fifteen years after the first lawsuit seeking to enforce EPA's statutory duty – EPA finally promulgated the CPP, with an initial compliance period commencing in 2022. EPA now proposes to repeal the CPP with no replacement in sight, thus again flouting the fulfillment of its statutory obligation – already long overdue – for the indefinite future. That unlawfully flouts EPA's obligations under the Act and the agency's own regulations.[63]

Moreover, without showing that the CPP was *impermissible* – a showing EPA has not made and cannot make here – it is arbitrary to repeal the current program, which was the product of years of intensive analysis and public engagement, with only a suggestion that EPA might put a new policy in place in the indefinite future. No court has declared the CPP unlawful. Indeed, EPA has striven mightily to avoid any court reaching the merits of the challenges to the CPP – challenges that raise the very issues concerning the scope of EPA's authority to adopt that rule that EPA raises in the Repeal Proposal.[64] If the Administrator believes the CPP is *unlawful*, then he should have welcomed the court's adjudication of the merits of the CPP – rather than taking every possible step to forestall a court ruling.

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[59] 75 Fed. Reg. 82,392, 82,392 (Dec. 30, 2010).

[60] Complaint, *Save Our Children's Earth Found. & Sierra Club v. EPA,* No. 03-cv-00770-CW, at ¶¶ 4, 32 (N.D. Cal. Feb. 21, 2003), *proposed consent decree published*, 68 Fed. Reg. 65,699 (Nov. 21, 2003), *consent decree approved,* Doc. No. 47 (Feb. 9, 2004). *See In re Murray Energy Corp.*, 788 F.3d 330, 336 (D.C. Cir. 2015).

[61] *See* National Atmospheric and Space Administration, "Global Mean CO_2 Mixing Ratios (ppm) — Observations", https://data.giss.nasa.gov/modelforce/ghgases/Fig1A.ext.txt (last visited Jan. 16, 2018). In the mid-1700s, at the dawn of the industrial revolution, CO_2 concentrations were approximately 280 ppm. *See* Intergovernmental Panel on Climate Change, Climate Change 2014: Synthesis Report 44 (R.K. Pachauri and L.A. Meyer (eds.)), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf.

[62] National Oceanic and Atmospheric Administration, "Recent Global CO^2," https://www.esrl.noaa.gov/gmd/ccgg/trends/global.html (last visited Jan. 16, 2018).

[63] *See Public Citizen v. Steed*, 733 F.2d 93, 97-100 (D.C. Cir. 1984) (holding unlawful agency's indefinite suspension of a rule that fulfilled affirmative statutory duty while it considered new regulations).

[64] *See* EPA Status Report, *West Virginia v. EPA*, No. 15-1363, ECF No. 1698068 (D.C. Cir. Oct. 10, 2017) (asking the Court to hold the case in abeyance until the conclusion of the CPP rulemaking); EPA Status Report, *West Virginia v. EPA*, No. 15-1363, ECF No. 1686504 (D.C. Cir. July 31, 2017); EPA Supp. Br., *West Virginia v. EPA*, No. 15-1363, ECF No. 1675243 (D.C. Cir. May 15, 2017).

By contrast, if EPA merely believes that a different interpretation of the CAA is permissible and *preferable*, it is arbitrary to repeal the CPP, leaving a critical provision of the CAA unheeded, and a huge source of a severely harmful air pollutant without CAA safeguards, while EPA mulls a potential replacement. It bears emphasis that the agency's mere desire to consider a potential different regulation under section 111(d) is *not* a valid basis for repealing the CPP.

III. THE ADMINISTRATOR'S STATUTORY AND LEGAL ARGUMENTS DO NOT PROVIDE A LAWFUL BASIS FOR THE REPEAL

A. The Administrator's Claim that the CPP Exceeds EPA's Authority Is Incorrect and Unsupported.

The stated basis for the proposed repeal is the Administrator's claim that the Clean Power Plan is "not within the bounds of [EPA's] statutory authority."[65] The Repeal Proposal contends that the interpretation of "best system of emission reduction" EPA adopted in the CPP "exceeds the EPA's statutory authority," and therefore *must* be repealed.[66]

The Proposal is not clear as to (1) whether the Administrator is claiming that the statute unambiguously prohibits the interpretation underlying the CPP, (2) whether he acknowledges statutory ambiguity but claims the CPP interpretation is not a *permissible* interpretation of the statute, or (3) whether he acknowledges that the CPP rests on a permissible interpretation but deems his proposed interpretation to be preferable as a policy matter to the CPP's interpretation. The Proposal's many references to the claimed lack of statutory "authority," 82 Fed. Reg. at 48,036-38 – and the Administrator's claim that he may repeal the CPP without offering a replacement and with no analysis of the health and environmental consequences – strongly suggest that the Administrator embraces the first or second view, or both.

Regardless, the Repeal Proposal is flagrantly unlawful. The Administrator has not begun to show that the Clean Air Act *precludes* the CPP's approach. The Administrator's effort to find a categorical prohibition in the Clean Air Act's text fails badly. Likewise, he has failed to show that the CPP's statutory interpretation is not a permissible one. Therefore, to the extent the Administrator purports to reject the CPP peremptorily as beyond EPA's authority, he has erred, and the proposed repeal lacks any lawful basis.[67]

The Administrator fails to engage, much less refute, EPA's exhaustive explanation in the CPP rulemaking of how, in light of the extensive record concerning the power sector and its means of reducing CO_2 emissions, the measures identified in the CPP are an available "system of

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[65] 82 Fed. Reg. at 48,038; *see id.* ("[I]t is not appropriate for a rule that exceeds statutory authority … to remain in existence pending a potential, successive rulemaking process").

[66] 82 Fed. Reg. at 48,036-38, 48,048.

[67] See *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Admin.,* 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("'deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that such interpretation is compelled by Congress'") (quoting *PDK Laboratories, Inc. v. DEA,* 362 F.3d 786, 798 (D.C. Cir. 2004) (other citations omitted)); *Peter Pan,* 471 F.3d at 1354 ("*Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face. In precisely those kinds of cases, it is incumbent upon the agency not to rest simply on its parsing of the statutory language"—"[i]t must bring its experience and expertise to bear in light of competing interests at stake.") (citations omitted); *Prill v. N.L.R.B.*, 755 F.2d 941, 947–48 (D.C. Cir. 1985) (agency commits reversible error when it relies upon an erroneous declaration that a decision is mandated by statute, rather than based on its "own judgment").

emission reduction," that performs well given the criteria set out in the statute, including by being effective at "reducing" emissions, at being "adequately demonstrated" and appropriately attentive to "cost." The identification of the CPP's "best system" resulted from a careful review of the realities of the power sector, existing industry practice, and the characteristics of the pollutant at issue. In presenting his proposed new statutory interpretation, the Administrator has not even attempted to apply the statutory factors or paid the slightest heed to the CPP's factual record.

The proposed repeal could not be sustained as a valid exercise of the Administrator's policy judgment. The Administrator has not considered the CPP record, and has not evaluated the facts against the statutory factors. He has not even considered the implications of his proposed reading for public health and welfare, emissions reductions, or cost, or articulated an alternative policy that would allow for reasoned comparison against the implications of the CPP's legal interpretation. In order properly to consider and select among permissible interpretations, the Administrator would need to undertake an analysis of the factual record against the statutory factors that guide EPA's consideration of different systems of emission reduction. The Administrator has failed to perform the empirical work that section 111 directs EPA to perform – to identify, based upon the statutory factors and the record evidence, the "best system of emission reduction" for the pollutant and source category in question. Nor has he provided a reasoned explanation for why, assuming the CPP approach is a permissible one, he proposes to repeal it without having promulgated a replacement.

Administrator Pruitt's entire approach ignores how the source category works and the realities of the air pollutant in question, facts that were central to the CPP's design. Yet he treats those facts as completely irrelevant to EPA's responsibilities. But he has identified no lawful basis for this evidence-blind approach. To the contrary, the Clean Air Act and basic requirements of reasoned decision-making prohibit his approach.

1. The Statutory Text the Proposal Relies Upon Provides No Basis for Concluding that the CPP's Interpretation Is Impermissible

In the CPP proceeding, EPA exhaustively examined the Clean Air Act's text and history bearing on the identification of the "best system of emission reduction."[68] Based on that analysis and an exhaustive review of the power sector, EPA determined that the "best system of emission reduction" for addressing carbon dioxide emissions from power plants consisted of a combination of measures consisting of improving heat-rates at coal-fired plants, substituting generation from lower-emitting gas plants for generation from existing coal plants, and substituting generation from zero-emitting new renewable plants for generation from existing coal and gas plants.[69] Indeed, EPA noted that the measures the CPP identified as the BSER were already very well established and commonly used in the power sector.[70]

As the CPP record demonstrates, the owners and operators of existing power plants across the country can themselves comply with the CPP's "chief regulatory requirement"[71] – uniform

[68] *E.g.*, 80 Fed. Reg. at 64,700-02, 64,710-11, 64,762-71.
[69] 80 Fed. Reg. at 64,666-67; *see also* 80 Fed. Reg. at 64,760-76; Legal Memorandum Accompanying Clean Power Plan for Certain Issues ("Legal Mem.") 5-9, 14-18, 84-117, EPA-HQ-OAR-2013-0602-36872.
[70] 80 Fed. Reg. at 64,667, 64,724-26, 64,762 n.468, 64,768-73, 64,795-811.
[71] 80 Fed. Reg. at 64,823.

emission rates for coal and gas plants – by implementing the building blocks through operations at their own facilities, by obtaining emission credits from another entity, or other arrangements.[72]

In the CPP rulemaking, EPA carefully examined claims that the "best system of emission reduction" and related statutory text required that measures must be incorporated into the design of each individual source, and explained why the statutory text, structure, and history do not impose any such requirement.[73]

In the Repeal Proposal, the Administrator fails to identify anything in the statutory text that prohibits the BSER identified in the CPP – let alone renders it impermissible or beyond EPA's "authority." Importantly, the Administrator appears to acknowledge that the CPP BSER fits within the broad statutory phrase "best system of emission reduction." The Proposal states that that phrase's "scope correlates directly with the breadth of the Administrator's discretion in determining what system is the best for purposes of establishing the degree of emission limitation to be reflected in a standard of performance."[74] But the Administrator does not claim the CPP BSER falls outside the broad phrase "system of emission reduction"; instead he looks elsewhere for disqualifying language, insisting that that the "best system" language "cannot be read in isolation."[75] But the Proposal never delivers anything sufficient to override the acknowledged breadth of the "best system of emission reduction." The Proposal strains to assign dramatic effect to two entirely undramatic prepositional phrases in the Act while ignoring the intentional breadth of the pivotal term "system of emission reduction" and the statutory factors that EPA is mandated to consider in identifying the best system.

The Proposal's statutory analysis, in other words, disregards the statutory terms *directly addressing* how EPA is to establish air pollution limits for stationary sources – including the key, deliberately broad phrase "best system of emission reduction" in light of specific criteria including "cost" and being "adequately demonstrated." Instead it roves elsewhere in a weak attempt to identify different statutory language that would render the CPP illegal despite its fit with the statutory text that directly addresses the question at issue.[76]

In this venture, the Administrator relies on two snippets of statutory text, found in different parts of section 111. First, the Administrator cites the phrase "through the application of the best system of emission reduction" in the definition of "standard of performance" in section 111(a)(1).[77] And second, he invokes the word "for" in the phrase in section 111(d)(1) specifying

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[72] *See*, *e.g.*, 80 Fed. Reg. at 64,724. In the CPP EPA exhaustively demonstrated the multiple means by which the owner and operator could access the measures in the CPP (as well as other measures, where allowed by the relevant state plan) to achieve compliance at each source. *See*, *e.g.*, *id*. at 64,733-35.

[73] 80 Fed. Reg. at 64,762-71; *see also id*. at 64,724-28, 64,751.

[74] 82 Fed. Reg. at 48,039.

[75] 82 Fed. Reg. at 48,039.

[76] *See Michigan v. E.P.A.*, 135 S. Ct. 2699, 2708 (2015). ("*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.").

[77] "The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation *achievable through the application of* the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1) (emphasis added).

that state plans submitted pursuant to EPA's guidelines shall be "for any existing source …"[78] Neither of these terms, alone or in combination, even hints that the widely-employed emission reduction measures underlying the CPP's BSER are ineligible for consideration as part of the "best system of emission reduction." Still less do they deprive EPA of "authority" to adopt and enforce the CPP.

"Application of" in Section 111(a)(1). The Administrator's first and main textual argument rests upon the phrase "through the application of the best system of emission reduction" in section 111(a)(1)'s definition of "standard of performance."[79] The Proposal states that the Administrator now interprets the phrase to require "that the BSER be something that can be *applied to* or *at* the source and not something that the source's owner or operator can implement *on behalf of* the source at another location."[80]

As a matter of ordinary English usage, the Administrator's proposed interpretation of "application" as limiting the scope of "best system" fails. There is nothing about the phrase "application of" that plausibly supports – let alone *requires* – that measures actually employed to reduce emissions of pollutants in a given source category be excluded from consideration as possible components of the "best system of emission reduction." The phrase "application of the best system" does not by itself limit the content of the system that can be "applied;" rather, the characteristics of the "best system" depend upon an evidence-based analysis of measures that can be employed to reduce the source category's pollution effectively, with attention to "cost" and "energy requirements" (*i.e.*, the kind of careful empirical analysis EPA performed in the CPP and entirely avoids in the Repeal Proposal). And any "system of emission reduction" that is actually employed to reduce emissions from covered sources can be "applied" so as to identify a "degree of emission limitation" that is achievable.

The Administrator fails to identify any plausible ground for reading "through the application" in section 111(a)(1) to preclude EPA from selecting a "system of emission reduction" that is "adequately demonstrated" and otherwise in conformity with the statute. It is perfectly natural to talk about "applying" a wide variety of "systems of emission reduction" that might be found to reduce emissions from various kinds of source categories, whether one that employs computer code to optimize production processes; cuts emissions by operating a factory at lower capacity or for fewer hours per day; uses filters to capture pollutants in the smokestack; employs incentives for lower-emitting, interconnected facilities to operate instead of dirty ones; or requires switching of fuels or raw materials in order to reduce pollution. While other statutory constraints might limit some of these systems in particular circumstances, any such systems of emission reduction, and many more, can be "applied" so as to yield (in section 111(a)(1)'s phrase) a "degree of emission limitation." As a matter of plain English, "through the application of" in section 111(a)(1) just cannot reasonably do the job of disqualifying otherwise valid "systems of emission reduction."[81]

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[78] "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 …" 42 U.S.C. § 7411(d)(1) (emphasis added).

[79] 82 Fed. Reg. at 48,039-40.

[80] 82 Fed. Reg. at 48,039.

[81] "Application" is an implausibly nonspecific word to import the various limitations that the Proposal posits, such as that the BSER consist of "physical or operational" changes, or be "technological" or the like. *Cf. Sierra Club v.*

The measures reflected in the CPP's building blocks 2 and 3, which EPA found are readily available to the owner/operators of each regulated source, are manifestly a "system of emission reduction." They are measures many sources actually employ every day to reduce their emissions of carbon dioxide.[82] Nor does the Administrator question EPA's extensive demonstration in the 2015 rulemaking that the CPP BSER measures are "adequately demonstrated" within the meaning of the statute – a demonstration that is only possible if the system can be applied to regulated sources.[83]

The Administrator fails to suggest how the CPP's BSER *cannot* be "applied" to yield an emission limitation for power plants. The Proposal's claims that a proper BSER must be "technological," "physical," "operational," or involve "retrofits" gain no support from any ordinary sense of the term "application." In other parts of the Clean Air Act – and even in other parts of section 111 itself – Congress has explicitly imposed such limitations. *See*, *e.g.*, 42 U.S.C. 7411(a)(4) (defining a source "modification" to require a "physical change" or change in the "method of operation" of a source); *id.* 7411(a)(7) ("technological system of continuous emission reduction"); *see also* 80 Fed. Reg. at 64,767. It is just not credible that Congress silently imported such readily expressed qualifications to the "best system of emission reduction" by using the phrase "through the application." *See also Landgraf v. USI Film Products,* 511 U.S. 244, 262 (1994) ("[P]etitioner's statutory argument would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message."). The Proposal seeks to invent limitations that Congress deliberately chose not to include in the relevant provisions of the statute.[84]

Furthermore, contrary to the Proposal's characterization, EPA specifically explained in the CPP rulemaking (including in passages highlighting this same "through the application of" language), that the CPP's BSER is designed to produce emissions reductions *at (and only at) the affected sources*. EPA recognized, for example, that "because the affected EGUs must be able to achieve their emission performance rates through the application of the BSER, the BSER must be controls or measures that the EGUs themselves can implement."[85] EPA repeatedly emphasized the "application of the best system of emission reduction" language and explained that the CPP comports with this language because regulated sources can employ the BSER measures (directly at facilities they own or by obtaining credits on the market) to achieve the emission rates.[86] The Proposal gives no grounds for departing from this reasoning.

E.P.A., 375 F.3d 537, 541 (7th Cir. 2004) ("'Applicable' is a protean word that takes color from context; it lacks a single, enduring meaning.").

[82] *See* 80 Fed. Reg. at 64,725, 64,769-72.

[83] *See* 80 Fed. Reg. at 64,667, 64,724-26, 64,762 n.468, 64,768-73, 64,795-811.

[84] In the D.C. Circuit briefing, Mr. Pruitt (in his prior role as Oklahoma Attorney General) and other challengers to the CPP cited *other* occurrences of forms of the term "apply" that appear in section 111 – namely, "applicable to" in section 111(a)(2) and 111(e), and asserted that these terms likewise precluded the CPP's BSER. Opening Brief of Petitioners on Core Legal Issues *West Virginia v. EPA*, D.C. Cir. No. 15-1363 (filed April 22, 2016) (Doc. 1610010) (Joint Appendix, Attachment A8). In response, EPA and the CPP's supporters correctly noted that standards of performance developed by states in conformity with CPP guidelines unquestionably "apply" to existing sources. *See* EPA CPP Br. at 61. The Repeal Proposal does not rely upon these instances of "apply" in Section 111, but its invocation of the term as used in section 111(a)(1) is no more convincing.

[85] 80 Fed. Reg. at 64,776.

[86] *See* 80 Fed. Reg. at 64,720, 64,762.

As the Proposed Repeal notes, the word "application" is used in other Clean Air Act standard-setting provisions.[87] But contrary to EPA's claim that "application" "signals a physical or operational change to a source,"[88] the word itself implies no limitation based on physical attachment. The Administrator cites differently worded Clean Air Act provisions that contain language suggesting that those Clean Air Act standards are intended to be based on *technology* alone. But far from lending support to EPA's construction, these references only underline the lack of support for the Administrator's position in the text of section 111(a) itself. The CAA sections EPA references discuss *application* of a broad range of measures including processes, methods, systems, techniques, technology, and controls,[89] and contain no language which implies that the measures must be limited to equipment that can be physically bolted on to each affected source. Other sections that do reference "technological" controls implemented on-site at each source actually undermine the Administrator's argument. Their significance is that Congress did not impose such limitations in section 111.[90]

"For" in Section 111(d)(1). The Administrator's other statutory snippet is the word "for" in a different paragraph of Section 111, namely, section 111(d)(1)'s phrase that state plans must establish standards of performance "*for* any existing source." The Proposal asserts that this word indicates that "such standards would be predicated on measures that can be applied to or at those same individual sources."[91] This second effort to provide a textual basis for rejection of the CPP, however, is every bit as weak as the first one.

The Proposal's reliance on "for" in 111(d)(1) ignores how the statute works. Under the statute, it is standards of performance (promulgated by states or, failing that, by EPA) that are "for" existing sources. There is no dispute that, under the CPP, state (or EPA-imposed) standards of performance implementing the CPP's numerical limits apply to each affected source, and are "for" them in every meaningful sense (as would be a federal standard of performance promulgated in the absence of a valid state plan).[92] Standards of performance thus are "for" affected sources "for the simple reason that they will impose emission limits to which the sources will be subject."[93] The word "for" in section 111(d)(1), thus, does not import some unspoken limitation on what measures may be considered to constitute the BSER – a topic that is explicitly addressed in the section 111(a)(1) language describing the criteria governing the best system of emission reduction.

The statute's requirement that states (or, failing that, EPA) establish standards of performance "for" any existing source says nothing about what systems of emission reduction those standards may be based on. Moreover, the CPP's "chief regulatory requirement," 80 Fed. Reg. at 64,823 – the emission performance rates – are "for" and "applicable to" the regulated sources. Approvable states plans (or, in their absence, federal plans) must include standards of

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[87] 82 Fed. Reg. at 48,039.
[88] 82 Fed. Reg. at 48,040.
[89] S*ee* 42 U.S.C. §§ 7412(d)(2), 7479(e), 7521(a)(3)(A)(i), 7521(a)(3)(D).
[90] *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").
[91] 82 Fed. Reg. at 48,039 (citing 42 U.S.C. § 7411(d) (emphasis added in Federal Register citation).
[92] *See* 40 C.F.R. § 60.5740(a)(2)(i) (state plan required to "impose[] emission standards on [sources]"); 80 Fed. Reg. at 64,826.
[93] EPA D.C. Cir. Br. 67. *See* 80 Fed. Reg. at 64,776; *see also* 40 C.F.R. § 60.5740(a)(2)(i) (state plan required to "impose[] emission standards on [sources]"); 80 Fed. Reg. at 64,826.

performance, based on these rates, that are also manifestly "for" (and "applicable to") each individual power plant.

Under the text the Administrator cites, it is these standards of performance that must be "for" individual sources, and the Clean Power Plan fulfills that requirement. No entities other than affected sources will be subject to these performance standards, and no outside entity can assume the compliance obligations of an affected entity. In cases where plants use emission credits in order to meet that target, the legal obligations – and the risks of non-compliance – fall entirely on each affected source. Nothing about the CPP offends this section 111(d)(1) language.[94]

In short, the Administrator's efforts to identify a textual prohibition that renders the CPP unlawful are completely implausible and unsuccessful. These arguments do not begin to show that the statute deprives EPA of "authority" to adopt the CPP – the central claim of the Proposal, and the ostensible basis by which the Administrator seeks to repeal a major rule with no attention to statutory obligations or policies or to record facts.

2. The Legislative and Administrative History Do Not Support the Proposed Repeal

The laundry list of further arguments presented in the Proposal do not remotely demonstrate that the CPP is beyond EPA's authority.

The Proposal briefly suggests that the legislative history supports repeal, but does not identify anything in it that contradicts the *statutory* language broadly authorizing EPA to consider, in identifying the BSER, all available, demonstrated systems of emission reductions for a given source category. In fact, as is detailed in the organizations' individual comments, the legislative history supports the CPP.[95] That history underscores §111(d)'s breadth by emphasizing that standards for existing sources need "not necessarily [be] technological."[96] The legislative history of section 111 demonstrates that Congress deliberately rejected terms that were more restrictive than "best system of emission reduction," and that Congress wanted EPA to have flexibility in identifying solutions to reduce emissions from existing sources. EPA's strained parsing of the legislative history is inconsistent with Congress' intention to provide EPA with the tools to tailor the "best system of emission reduction" to the unique characteristics of each source category and each pollutant.

The Administrator also claims that "prior agency practice" under section 111 supports invalidating the CPP. 82 Fed. Reg. at 48,040. Again, EPA is wrong.

First, even if there were not in fact extensive precedent for the CPP's approach in prior rulemakings, that would hardly be determinative, particularly given that EPA has never previously adopted regulations of emissions of CO_2 from power plants. In the CPP, EPA

[94] EPA's further "textual" argument that the provision in the Clean Air Act's preamble that controlling air pollution "at its source" is the "primary responsibility of States and local governments," 82 Fed. Reg. 48,039 (quoting 42 U.S.C. § 7401(a)(3)), provides no support at all for EPA's repeal effort. The CPP is designed to reduce pollution "at its source" – fossil-fired power plants – through state-implemented compliance plans. In contrast, the proposed repeal would leave that pollution unabated.

[95] *See* EDF Comments 47-55.

[96] H.R. Rep. No. 95-294, 195 (1977). *See* 80 Fed. Reg. 64,702; *see also* 80 Fed. Reg. 64,764 (discussing broad "system" language in Senate 1970 version of §111(d), which prevailed over House Bill that would have restricted performance standards to technical controls).

emphasized the unique features of the electric power grid and of CO_2 as a pollutant that critically influenced EPA's BSER determination.[97] EPA's task under the statute is to examine the facts and circumstances of the particular pollutant and source category – indeed, *failing* to take into consideration new or distinctive circumstances would be unlawful. Confronting an industry and a pollutant with different characteristics than those presented in prior Section 111(d) rulemakings, the Administrator cannot reasonably insist that the statute allows only imitation of previous regulatory approaches. Indeed, as EPA noted in the CPP, the agency's past section 111(d) rulemakings paid close attention to the particular characteristics of the relevant source category and pollutant[98] – it is the Proposal, and its lack of interest in such evidence, that departs from past practice.

In any event, as was discussed in detail in the CPP rulemaking, in fact EPA's prior regulations – particularly involving the power sector – provide direct precedent for the CPP's approach.[99] As EPA noted, shifting generation toward lower-emitting electricity production has been the regular effect – and often deliberate objective – of numerous Clean Air Act programs.[100] The Rule is in line with effective and lower-cost regulatory approaches EPA has employed for decades in the power industry and other sectors. Richard L. Revesz, *et al.*, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 ENVTL. L. REP. 10,190 (2016) (Joint Appendix, Attachment G7).[101]

3. EPA's Invocation of Statutory "Context" Is Misguided

The Administrator's further claim that other Clean Air Act programs –in particular the Prevention of Significant Deterioration ("PSD") permitting program for stationary sources, 42 U.S.C. §§ 7475-79 – are incompatible with the CPP's approach to BSER are just wrong. Section 169(3) provides that BACT standards shall not "result in emissions of any pollutants which will exceed the emissions allowed by any *applicable* standard established pursuant to section 7411." 42 U.S.C. 7479(3). But it is only *new* source performance standards issued under section 111(b) that "apply" to the same sources that are subject to BACT: new and modified facilities. Section 111(d) emission guidelines, such as the Clean Power Plan, pertain only to existing sources, so they are generally not "applicable" within the meaning of section 169(3). In any event, EPA has not begun to show any incompatibility between any source's ability to comply with any

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[97] 80 Fed. Reg. at 64,723-36, 64,744-55. *See also* Legal Mem. 120-127. In its recent ANPR on a potential CPP replacement rule, EPA noted that greenhouse gases like CO_2 have unique characteristics, 82 Fed. Reg. at 61,509 (quoting Justice Alito's statement that "[b]ecause the Clean Air Act cannot necessarily be applied to GHGs in the same manner as other pollutants." *UARG,* 134 S. Ct. at 2455 (Alito, J., concurring in part and dissenting in part)). But the uniqueness of GHGs is not a one-way ratchet, relevant only where that uniqueness is invoked to favor *reducing* regulatory protections. In the CPP, EPA properly took account of the distinctive characteristics of CO_2 in order to identify a regulatory approach that would be environmentally effective, practical, and cost-reasonable.

[98] 80 Fed. Reg. at 64,724. *See also* EPA CPP Br. at 69 (noting that in the CPP EPA took "the same approach it took in prior Section 111 rules, which was to develop the Best System based on what was appropriate for the particular industry and air pollutant.") (citing 80 Fed. Reg. at 64,724-26).

[99] 80 Fed. Reg. at 64,678, 64,696-97.

[100] *See*, *e.g.*, 80 Fed. Reg. 64,772, 64,780-81; Legal Memo 62-82.

[101] The Administrator's brief and highly selective account of the prior agency practice is unavailing. EPA's submission appears to be that the 1975 regulations limit EPA guidelines to "technology-based" measures, in the irrationally cabined sense that they limit BSER to add-on retrofit technologies. 82 Fed. Reg. at 48,041. But that has no support in the 1975 regulations, let alone in the statute, which plainly lack any such requirement. *See* EDF Comments at 56-59.

applicable standards of performance adopted under section 111(d) and its BACT obligation under Section 165.[102]

4. The Proposal's Reliance on "Broader Policy Concerns" Is Arbitrary and Unfounded

The Administrator also attempts to bolster his Proposal by reference to "broader policy concerns of the Agency and stakeholders" regarding the CPP's allegedly far-reaching "economic," "policy," and "political" significance.[103] The Administrator does not provide references, but his arguments resemble arguments raised by state and industry litigants challenging the Clean Power Plan. The Proposal also asks "whether the interpretations underlying the CPP violated the 'clear statement' rule." 82 Fed. Reg. at 48,042 (citing *Util. Air Regulatory Grp.* v. *EPA,* 134 S. Ct. 2427, 2444 (2014) ("*UARG*"), and *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 160 (2000)).

The "clear statement" precedents to which the Administrator refers hold that courts should avoid interpretations of statutes that would cause a "transformative" expansion in an agency's regulatory authority, *UARG*, 134 S. Ct. at 2444, with "vast" consequences that Congress could not have intended, *Brown & Williamson*, 529 U.S. at 160, unless the statute makes unmistakably clear its intent to delegate the relevant decision-making authority to the agency. They provide no support at all for the proposed repeal of the CPP.[104]

As the Supreme Court has confirmed, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants." *AEP*, 564 U.S. at 426. The Act, and section 111(d) in particular, *constitutes* a clear statement that Congress wanted public health and environmental consequences of air pollution to be addressed. *Id.* at 424 (stating that section 111(d) "speaks directly" to carbon dioxide emissions from existing power plants). In their (greatly exaggerated) protests about the CPP, opponents ignore that *any* regulation of EGU emissions of carbon dioxide (or *any other pollutant*) will necessarily have implications for the economy and state and federal power regulation. Given the Clean Air Act's core focus on protecting public health and welfare–including the "climate," 42 U.S.C. § 7602(h) – from dangerous pollution and given a statutory provision that "speaks directly" to the very pollutant and very sources at issue, *AEP*, 564 U.S. at 424, invocations of such economic and regulatory effects alone do not trigger special interpretive rules. *See Massachusetts*, 549 U.S. at 512, 530-31 (distinguishing *Brown & Williamson* and noting that "there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter"). Whatever their proper scope in other circumstances, the cited "clear statement" precedents do not provide any basis for courts to second-guess or nullify express statutory delegations. Nor do they prescribe some unusual, strict form of judicial review of agencies' implementation of such delegations. In the Clean Air Act, Congress decreed that EPA take action to protect public health and the environment, including from dangerous emissions from existing

[102] *See* EDF Comments 62-66; Comments of Sierra Club and Earthjustice 18-19 (submitted in this CPP Repeal docket on April 26, 2018) ("Sierra Club/Earthjustice Comments").
[103] 82 Fed. Reg. at 45,042.
[104] *See* Comments of the Natural Resources Defense Council on EPA's Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 11-13 (submitted April 26, 2018) ("NRDC Comments"); Joint Comments of Clean Air Task Force, Clean Air Council, Center for Biological Diversity, and Minnesota Center for Environmental Advocacy on Proposed Repeal 25-26 (submitted April 26, 2018) ("CATF Comments").

power plants, and the standards for reviewing EPA's implementation are set out in sections 111 and 307(d) of the Act.

Second, the "clear statement" cases are irrelevant to the particular statutory interpretation issues addressed in the proposed repeal. Whether a system is defined as "source oriented" or not has nothing to do with the stringency of the rule and thereby its economic (let alone "political") impact. The Administrator provides no basis for his apparent *assumption* that repealing the CPP and replacing it with nothing or some different rule will have lesser "economic," "policy," or "political" significance. And the Administrator's argument that the CPP's BSER is insufficiently "source-oriented" is also unconnected to the cited concerns about economic impacts. For example, a rule that requires every existing plant to install 100 percent carbon capture and sequestration would be "source oriented" but much more stringent and costly than a generation-shifting or trading rule that sought to reduce emissions by some lesser percentage. Indeed, without comparing the CPP to a specific replacement regime (which the Administrator has not clearly identified, let alone examined), he cannot make any such determination.

Finally, the Administrator cites no evidence for claims that the CPP would have "transformative" impact or vast "economic," "policy" or "political" implications.[105] As noted above, since the CPP was finalized (and well prior to its initial compliance period, and while the rule has been subject to a judicial stay) the trends in the power sector that underlie the CPP have been driving emissions downward such that current emissions are 27 percent below 2005 emission levels – most of the way toward the 32 percent the CPP was expected to produce. *See* n. 4, *supra*. Multiple studies conducted since 2015 have found that the costs of CPP compliance are even lower now than when the CPP was adopted, and that compliance will require less effort.[106] Earlier suggestions by "stakeholders" that the CPP would be unduly disruptive of the industry or the overall economy were clearly flat wrong. In fact, the evidence suggests that the CPP can and should be strengthened, not repealed.

Moreover, the Proposal ignores the far-reaching health and environmental – and "economic," "policy" and "political" – consequences of further delaying action on climate change. If broad presumptions of social-economic impact have any relevance, they counsel overwhelmingly in favor of regulatory action to control emissions and provide a pathway to a lower-risk future. This proposed repeal is every bit as consequential as the CPP's promulgation ever was – if not more so, given the regulatory delay it creates and the disruption associated with overthrowing the CPP's flexible framework.

Contrary to the Administrator's claim, there is nothing in the CPP's design that changes the allocation of regulatory responsibility over electric power generators as between states, the

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[105] Furthermore, in contrast to the circumstances in *UARG* or *Brown & Williamson,* the CPP does not regulate a vast universe of previously unregulated entities or regulate in a way that is clearly contrary to Congressional command. The power plants covered by the CPP have been part of a regulated source category under section 111 since 1971. The determination of an appropriate "best system of emission reduction" for carbon pollution from existing power plants has been expressly delegated to EPA pursuant to that same provision, and the CPP's approach is designed to be less costly and burdensome than alternative approaches to reducing carbon emissions from power plants.

[106] *See*, *e.g.*, *Power Sector Trends*; Denise A. Grab & Jack Lienke, Institute for Policy Integrity, New York University School of Law, *The Falling Cost of Clean Power Plan Compliance* (Oct. 2017) (Grab & Lienke, "*Falling Cost*") (Joint Appendix, Attachment J11); M.J. Bradley & Associates, *Coal-Fired Electricity Generation in the United States and Future Outlook* (Aug. 2017) (Joint Appendix, Attachment J41); American Petroleum Institute, Natural Gas Solutions: Power Generation, *EPA Clean Power Plan Compliance Pathways – Modeled Generation, Capacity and Costs* (2016) (Joint Appendix, Attachment J2).

Federal Energy Regulatory Commission ("FERC") and EPA.[107] As former FERC Commissioners have commented in this proceeding: "The CPP is fully consistent with EPA's traditional regulatory role, is similar in form and function to prior Clean Air Act ("CAA") programs affecting the power sector, and preserves the authority of FERC in the field of energy policy."[108] The CPP does not implicate state or FERC authority differently than do many other, longstanding Clean Air Act rules for power plants.

5. The Proposal Badly Mischaracterizes the CPP.

In an effort to posit an alleged inconsistency with the statute, the Proposal mischaracterizes the CPP. For example, the Administrator vaguely describes his proposed interpretation as "source-oriented," thus suggesting that the CPP's interpretation is not "source-oriented."[109]

But the CPP *is* "source-oriented," as EPA itself exhaustively explained in the CPP rulemaking. As the EPA emphasized, the CPP was designed to achieve emissions reductions at (and only at) affected sources, and to operate through limits applicable to each source. As the CPP preamble explains: "Because the emission guidelines for the existing sources must reflect 'the degree of emission limitation achievable *through the application of* the best system of emission reduction … adequately demonstrated,' the system must be limited to measures that can be implemented—'appl[ied]'—by the sources themselves."[110] EPA also "clarified that the components of the BSER must be implementable by the affected EGUs" and "show[ed] that all the components of the BSER have been demonstrated to be achievable on that basis." 80 Fed. Reg. at 64,736. And EPA indicated that "system[s] of emission reduction" would include actions "designed to reduce emissions from [the] affected source … actions [that] enable the affected source to achieve its emissions limitation."[111] Further defining these limitations, EPA also stated that its "interpretation of 'system of emission reduction' does not include emission reduction measures that the states have authority to mandate without the affected EGUs being able to implement the measures themselves."[112] The Proposal again fails to acknowledge this key feature of the CPP.

Under the CPP, the "chief regulatory requirement" consists of uniform emission rates which establish the emissions targets for coal- or gas-fired electric generating units. 80 Fed. Reg. 64,811-12. State (or federal) standards of performance apply these emission rates to each individual source. Under a typical state plan, a source's owner can comply with the prescribed standard either by reducing the source's own emissions or by obtaining emission reduction credits created by increased output by lower-emitting generators. The increased generation by those units will necessarily (by operation of the electric grid) reduce emissions from the set of regulated sources. Each regulated source must comply with the applicable standard, under which the source's "adjusted" emissions are the measure of compliance.

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[107] *See* EPA CPP Br. at 55-57; *see also* Brief of Amici Curiae Former State Environmental and Energy Officials in Support of Respondents 18-25, *West Virginia v. EPA*, D.C. Cir. No. 15-1363, ECF No. 1606565 (filed March 22, 2016).

[108] Comments of Former FERC Commissioners Norman C. Bay, *et al*. 1 (March 27, 2018), EPA-HQ-OAR-2017-0355-19640; *see also id*. 2-6.

[109] *See* 82 Fed. Reg. at 48,039, 48,040.

[110] 80 Fed. Reg. at 64,720.

[111] 80 Fed. Reg. at 64,761.

[112] 80 Fed. Reg. at 64,736.

The Proposal incorrectly states that the CPP interpreted BSER in a way that would result in emissions standards that are "for other sources or entities," rather than "for any existing source" covered by the Rule.[113] To the contrary, EPA repeatedly emphasized that the standards will require emissions reductions from (and only from) covered sources.[114]

The Administrator attempts to recharacterize these arrangements as somehow improperly requiring the owner/operator of one source to manage the operations of other sources. This is just incorrect. Regardless whether they are under common or separate management, the other electric generation facilities take voluntary actions that generate credits. They are not being compelled by the CPP or operated by the source that obtains the credit.

B. The Administrator's Proposed Alternative Interpretation Is Neither Coherent Nor Adequately Explained

The Repeal Proposal founds the repeal on the claim that EPA has identified a different reading of the Clean Air Act that is inconsistent with the CPP. But the Proposal fails to explain EPA's ostensibly new and putatively different interpretation in a clear and coherent manner that would allow it to be evaluated on its merits and meaningfully compared to the CPP's interpretation.

In the Notice, the Administrator employs a variety of terms to characterize his new, preferred interpretation of "best system of emission reduction," including "source-oriented," 82 Fed. Reg. at 48,039, 48,040; "implementable at the level[] of the individual source," *id*. 48,040; "physical or operational change to the source," *id*. 48,040, 48,041, 40,042, 40,043; "technological or operational," *id*. 48037; "retrofit technology," *id*. 48037; "something that can be *applied to* or *at* the source," *id*. 48,039; see also *id*. 48,037; and "something … that is taken at or applied to individual, particular sources," *id*. 48,041.

These respective terms, however, have significantly different scopes. The proposal fails to distinguish among them, or to elaborate on the practical implications of the variously expressed formulations. None of these terms, moreover, is found in the relevant provisions of section 111. And the Proposal fails to provide a sound basis for any of these formulations in the statute or congressional objectives.

Furthermore, most of the Administrator's characterizations (excepting "retrofit technology") would readily appear to fit the CPP itself. The CPP is clearly "source-oriented," and, as noted above, the CPP was based upon a BSER limited to measures "that can be implemented—'appl[ied]'—by the sources themselves."[115] And if BSER were limited to "physical and operational changes," the Administrator fails to explain why the CPP's means of providing incentives for cost-effective emissions reductions from regulated sources fails to meet his test, and has ignored the means by which the CPP emission reductions are secured.[116] Reduced generation fits even the most restrictive conception of "source-orientedness" (and can be used as the sole means of compliance in a state that adopted the CPP's mass-based plan option).[117] The Proposal never explains why each source's compliance with its standard of

[113] 82 Fed. Reg. at 48,039.
[114] *See*, *e.g.*, 80 Fed. Reg. at 64,720, 64,720, 64,745.
[115] 80 Fed. Reg. at 64,720.
[116] *See* 80 Fed. Reg. at 64,732.
[117] *See* CATF Comments 8-12.

performance under the CPP – whether by reducing its own emissions or obtaining credits that represent real emissions reductions from another regulated power plant – fails to apply "at or to" the source.

EPA's most direct efforts to show why the CPP falls afoul of the Administrator's asserted new interpretation fail badly. The Proposal asserts:

> That the CPP depends on the employment of measures that cannot be applied at and to an individual source is evident from its treatment of coal-fired power plants. The rule established performance standards for coal-fired plants assuming a uniform emissions rate well below that which could be met by existing units *through any retrofit technology* of reasonable cost available at the time.[118]

But the Act does not limit the permissible scope of BSER to "retrofit technologies." Indeed, as EPA noted in the CPP rulemaking, section 111(a)(1) notably lacks "retrofit," "technological," or other limiting language that is present in some other Clean Air Act provisions. *See*, *e.g.*, 80 Fed. Reg. at 64,767 (discussing Clean Air Act provisions that demonstrate "that Congress knew how to constrain the basis for emission limits to measures that are integrated into the design or operation of the affected source, and that its choice to base CAA section 111(d)(1) and (a)(1) standards of performance on a 'system of emission reduction' indicates Congress' intent to authorize a broader basis for those standards"). The Proposal refers to, and offers as supposed proof of the CPP's defects, a "retrofit" requirement that has no basis at all in the applicable CAA provisions.

The Administrator cannot just concoct new limitations, unmentioned in the statute (and contrary to its broad terms), then decree that the CPP fails to satisfy those concoctions.[119] The Proposal fails to explain how the Administrator's various cited limitations on the scope of BSER comport with the statute and record, and is bereft of the empirical and policy analysis that would be required to show that the limitations, even assuming they were *permitted* by the statute, are reasonable and better as a matter of policy.[120]

C. The Proposal Reflects No Consideration of Statutorily Relevant Factors

One of the most obvious and important flaws in the new position the Administrator proposes regarding the scope of "best system of emission reduction" as applied to power plants is his utter failure to consider its *implications* for the factors that the Clean Air Act directs the Administrator to consider in setting the BSER.

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[118] 82 Fed. Reg. at 48,037 (emphasis added). The Proposal does not explain the basis for its assertion regarding the costs of retrofit technologies or explain what metric of "reasonableness" the agency would apply if it construed the Act to require that all emissions reductions be achieved by means of retrofit technologies.

[119] The arbitrary, *ad hoc* nature of the Proposal's limitations are evident in its discussion of a separate provision of section 111 defining "technological system of continuous emission reduction" as "including precombustion cleaning or treatment of fuels." 42 U.S.C. § 7411(a)(7). The Proposal acknowledges that such pretreatment can be conducted remotely from a regulated source and can be accomplished by third parties, 82 Fed. Reg. 48,040 n.13. This explicit indicium – which applies to a narrower ("technological") *definition* than the section 111(a)(1) "system of emission reduction" definition at issue in the CPP– refutes the sorts of limitations the Administrator is attempting to impose here. In response, the Administrator weakly claims that such pretreatment need not "necessarily" occur offsite, and that the express designation of what the definition "includes" shows other measures are not included. 82 Fed. Reg. at 48,040 n.13. This theory unreasonably rewrites "includes" to mean "are limited to."

[120] See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 42-44 (1983) ("*State Farm*"); *FCC v. Fox Television Stations*, 566 U.S. 502, 515-16 (2009) ("*Fox*").

First, as noted above, faced with the most serious environmental hazard, and a statute directing him to identify the best system of "emission reduction" for pollution that "endangers public health and welfare," including "climate," the Administrator has not even considered the potential adverse impacts of his proposed construction on emissions of CO_2 from the power sector. *See Sierra Club* v. *Costle,* 657 F.2d 298, 326 (D.C. Cir. 1981) (''we can think of no sensible interpretation of the statutory words ''best . . . system'' which would not incorporate the amount of air pollution as a relevant factor to be weighed when determining the optimal standard for controlling . . . emissions''). *See also Michigan v. E.P.A*., 135 S. Ct. 2699, 2707 (2015) ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."); NRDC Comments 17-18.

The Administrator has failed to consider the broader implications of an interpretation that would construe the section 111(a)(1) definition of "standard of performance" to embrace only "technological" or "retrofit" or "physical/operational" measures (in the irrationally cabined way in which he interprets these terms) for the effective (and efficient) control of pollution from the electric power sector. Failing to take account of the electric grid's interconnected character; of the fungible character of the good it produces; and of the regular practice of reducing emissions by substituting generation at lower-emitting for higher-emitting facilities would be wildly irrational and counterfactual. Doing so could risk greatly reducing the ability to control dangerous pollution, greatly increasing costs and burdens of achieving pollution control, or both.

Second, the Act requires that EPA consider the "cost" of potential systems of emissions reduction. In the CPP, EPA repeatedly found that interpretations like the ones that the Administrator appears to be supporting would likely mean that emissions reductions would be more costly to attain.[121] Again, the Proposal does not make any effort to identify its proposed alternative "system" or to assess its costs and benefits. Without having done so, the Administrator lacks a valid basis to prefer some other "system" over the CPP's. Moreover, the fact that the Administrator appears to prefer a system that EPA has already determined would make each ton of emission reductions more costly than under the CPP is, without further explanation (and none has been provided), arbitrary and capricious. In the Proposal, the Administrator considers none of this. In these respects, the Administrator has ignored his obligation to consider the specific factors Congress identified, and to engage in a reasoned examination of the relevant facts.[122]

Indeed, in its Regulatory Impact Analysis ("RIA") for the proposed repeal, EPA includes no information on the amount of emission reductions that could be achieved under the Administrator's proposed new interpretation or the costs and benefits associated with such an approach. Instead, and as explained in more detail in the Organizations' joint comments,[123] the

[121] 80 Fed. Reg. at 64,727-28, 64,795-811.

[122] Agencies must consider the "relevant factors," certainly including those that Congress has expressly described as relevant to the agency's decision. *See*, *e.g*., *Earth Island Institute v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007) ("An agency may not ignore factors Congress explicitly required be taken into account."); *see also Michigan v. E.P.A*., 135 S. Ct. at 2706 ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. It follows that agency action is lawful only if it rests on a consideration of the relevant factors.") (citations and internal quotation marks omitted)).

[123] Joint Comments of Environmental and Public Health Organizations Regarding the "Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 82 Fed. Reg.

RIA for the Repeal Proposal misrepresents the costs and benefits of the proposed repeal of the Clean Power Plan, abandoning the "best available science" in service of its proposed repeal of a duly promulgated rule. As we show in those comments, the RIA is not based upon sound methodology and its analysis is manifestly deficient.[124] Neither in the RIA, nor anywhere else, has EPA performed a candid consideration of the costs and benefits of the proposed repeal. *See Michigan v. E.P.A*., 135 S. Ct. at 2707. And the fact that the Administrator has attempted to divorce the repeal of the CPP from consideration of alternative rules precludes a reasoned comparison of the costs and benefits of repeal compared to alternatives.

The Clean Air Act directs EPA to identify systems of emission reduction that are "adequately demonstrated" in the source category. Notably lacking from the Proposal, however, is any serious discussion of what measures are actually adequately demonstrated within the power sector to reduce emissions. Rather, the Proposal attempts to construct abstract, arbitrary limits that would both rule out the CPP's approach and preclude EPA from regulating power-sector emissions in the very manner that existing practice in industry and states that regulate carbon dioxide shows to be feasible and cost effective. The Administrator seeks to tailor a reading of the statute that would foreclose EPA from considering the interconnected grid, and to foreclose developing a rule that makes sense in light of the realities of the power sector. But "[a] statute should ordinarily be read to effectuate its purposes rather than frustrate them." *United States v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002) (citation and internal quotation marks omitted). And although the Proposal professes concern about interaction with state and federal electricity regulation, an approach to Clean Air Act regulation that is blind to the facts and circumstances of the sector would be much *more* likely to interfere with these separate regulatory regimes because it would be less likely to harmonize with existing practices in the power sector.

The Repeal Proposal does not consider other potentially far-reaching implications of the proposed interpretation that is the basis of the proposed repeal. For example, the Administrator has not considered the implications of his proposed interpretation on regulated entities' means of compliance under Section 111 – an issue that loomed large in the CPP litigation and that EPA itself, as well as power companies, states, and others emphasized. As noted, the Proposal bases its interpretation principally on the "through the application" phrase in section 111(a)'s definition of "standard of performance."[125] That statutory definition governs both EPA-promulgated new source standards under section 111(b) and state-promulgated standards of performance under section 111(d). If, under EPA's proposed construction of "standard of performance," the agency cannot take account of opportunities for generation-shifting, emissions trading or averaging, where otherwise appropriate, in identifying the BSER when developing the emission rates in the emission guidelines, then there would be no basis for allowing sources to use such credits for compliance with state standards of performance that adopt those emission rates.

But in the CPP rulemaking and litigation, EPA and stakeholders thoroughly considered the relationship between what measures may be considered in determining the BSER and what

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48,035 (Oct. 16, 2017): Comments Specific to the *"Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal*" (October 2017) (submitted in this docket on April 26, 2018).

[124] Joint Comments of Environmental and Public Health Organizations Regarding the "Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 82 Fed. Reg. 48,035 (Oct. 16, 2017): Comments Specific to the*"Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal*" (October 2017) (submitted in this docket on April 26, 2018).

[125] 82 Fed. Reg. at 48,039.

measures states can permit and sources can use for compliance. State and industry parties – including those that opposed the CPP – overwhelming urged that crediting, trading, averaging and similar measures should be allowed for purposes of compliance.[126] Many such parties recognized that it would be anomalous to use such measures for compliance but to ignore them in setting the performance levels that sources must comply with. Some commenters wished to have it both ways – to use these measures for compliance but to blind EPA and states to them when setting performance standards. EPA's brief before the D.C. Circuit expressly called out this "have it both ways" approach.[127] And at the en banc argument in the CPP case, one judge asked the challengers about the apparent asymmetry, and counsel for the industry groups acknowledged that the petitioners were "somewhat divided" on whether they could have it both ways.[128] The Proposal entirely ignores these central issues.

Again, EPA's proposal fails to provide minimally adequate explanation concerning (1) the nature of its ostensibly new interpretation, (2) the grounding of that interpretation in the statute, (3) the appropriateness of that interpretation given statutory considerations such as emissions-reduction efficacy, cost, and relationship to emissions-reduction measures demonstrated in the source category, and (4) the effect of the new interpretation on the public health and welfare and on the successful operation of the power sector.

It is no answer to say that EPA will punt all these issues to a separate rulemaking to consider potential replacements for the CPP. In order to make a rational decision whether to repeal, modify, or retain the CPP, the Administrator needs to know, among other things, what the alternatives are and how effective they would be at reducing pollution, their cost and other relevant impacts on the affected industry, and more. By bifurcating his rulemaking and attempting to consign most issues about how he would apply the statute to a later rulemaking, Administrator Pruitt seeks to bypass obligations that must precede any modification or repeal of the CPP. "Repeal first, ask questions later" is not a rational or lawful approach to implementing EPA's affirmative mandate to protect public health and welfare, and it flouts core administrative law requirements that the agency's reasoned judgment and explanation must precede, not follow, its action.

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[126] *See* 80 Fed. Reg. at 64,733 n.380; Legal Mem. at 14-18.

[127] *See*, *e.g.*, EPA CPP Br. 48-49 ("Petitioners seek to have it both ways. They agree *states* have discretion to promulgate 'standards of performance' that authorize and incentivize sources to use generation-shifting measures to lower pollution. Yet they disagree that *EPA* can consider the same cost-efficient measures as part of the Best System that informs the stringency of the standards. But if states can properly craft standards designed to accommodate and encourage the use of generation-shifting as a suitable pollution-control strategy, then EPA can likewise reasonably interpret the phrase 'system of emission reduction' to encompass the same suitable strategy. Section 111 does not dictate the provision of maximum flexibility for the purpose of achieving the most minimal emission limitation. Petitioners' comments contradict their representation that Section 111(d) does not authorize trading programs."). *See also* Dominion Amicus Br. 10 (power company's amicus brief, urging that, under narrow theory like that the Proposal appears to be embracing here: "Owners of regulated power plants would not be able to avail themselves of the cost-saving strategies of emissions trading or averaging with other generation assets.").

[128] Transcript of Oral Argument, *West Virginia v. EPA*, No. 15-1363 at 13 (Sept. 27, 2016) (Joint Appendix, Attachment A9).

IV. THE PROPOSAL UNLAWFULLY IGNORES THE EXTENSIVE FACTUAL RECORD ON WHICH THE CPP IS BASED, FAILS TO CONSIDER RELEVANT FACTORS, AND FAILS TO EXPLAIN ITS DEPARTURES FROM EPA'S DETERMINATIONS IN THE CPP

Among the Proposal's most egregious flaws is its total failure to address the CPP's extensive evidentiary record, and EPA's own determinations on which the CPP is based. As demonstrated above, the CPP is not precluded by statute or otherwise impermissible – and the Administrator's arguments to that effect are frail and unsupported. Thus, the Administrator has no valid basis to ignore the CPP's massive factual record or to refuse to address the well-founded and amply explained policy determinations upon which the CPP rests.

The Administrator's failure to consider the relevant statutory factors and the record evidence relevant to them, and his failure to explain his departures from EPA's determinations on these matters in the CPP rulemaking, render the proposed repeal unreasonable as a matter of statutory construction and also arbitrary and capricious.[129]

The factual record was integral to EPA's determination in the CPP that the "best system of emission reduction" for carbon pollution from existing power plants reasonably encompasses building blocks 2 and 3, which harness the capacity to reduce emissions from covered sources by shifting generation to lower-emitting facilities, and which EPA found fit the section 111 statutory criteria, including performing well on "cost." The CPP's massive evidentiary record was also central to EPA's rejection, in the CPP rulemaking, of an interpretation of the "best system of emission reduction" that would preclude building blocks 2 and 3.

The Proposal ignores the extensive record underlying the original interpretation of the statute in the CPP. The Administrator's disregard for the record underlying the CPP is reflected in the very docket for this Proposal, which included virtually none of the materials from the original CPP record.[130] The Repeal Proposal's preamble does not acknowledge EPA's prior findings, let alone explain why EPA now takes a different view of the evidence. (If the Administrator's view is that he *need* not consider the record because the CPP's approach is impermissible, as explained above, he is wrong.) EPA's failure to confront the record, and its own prior determinations, renders its proposed reversal of position both contrary to the statutory

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[129] *See Judulang v. Holder*, 565 U.S. 42, 52, n.7 (2011) (stating, while applying arbitrary and capricious, that had the Supreme Court applied *Chevron*, the "analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance"); *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 204 (D.C. Cir. 2015) (noting that it is "often the case" that an agency's "interpretation of its authority under *Chevron* Step Two overlaps with our arbitrary and capricious review"); *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000) ("The second step of *Chevron* analysis and *State Farm* arbitrary and capricious review overlap, but are not identical."); *General Am. Transp. Corp. v. ICC,* 872 F.2d 1048, 1053 (D.C. Cir. 1989) (Both statutory reasonableness and arbitrary and capricious review require court to determine whether agency has "rationally considered the factors deemed relevant by the Act").

[130] That EPA considered none of the vast evidentiary record supporting the CPP is confirmed by the absence of any of this material from the docket for the Proposal. *See* 42 U.S.C. § 7607(d)(3) (requiring that every proposed rule covered by section 307(d) be accompanied by a summary of "factual data on which the proposed rule is based" and the "policy considerations underlying the proposed rule," and states that "[a]ll data, information, and documents" specified in in section 7607(d)(3) "on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule"). *Compare* 79 Fed. Reg. 34,830, 34,835 (June 18, 2015) (proposed CPP discussing "extensive input from states and a wide range of stakeholders" that preceded proposal and noting the "additional detail" to be found in "several technical support documents (TSDs) and memoranda, which are available in the rulemaking docket").

requirement that the BSER be reality-based and that it rest on consideration of factors like emissions-reduction efficacy and cost and arbitrary and capricious (because EPA has failed to connect "facts found" and "choice made,"[131] and because EPA's approach is unsupported by substantial evidence).

Indeed, as discussed above, although the Repeal Proposal cites unspecified "policy concerns" and "potentially serious economic and political implications" about the CPP's supposed consequences (apparently based on claims of parties who opposed the CPP in administrative proceedings or litigation),[132] the Proposal cites no evidence to support these claims. It fails even to cite where or by whom the claims were made, and makes no effort to evaluate whether they have merit – or how they compare to concerns that might be raised by alternative interpretations. An agency acts arbitrarily when it accepts contentions by outside entities without independently verifying the validity of those contentions. *Susquehanna International Group v. SEC*, 866 F.3d 442, 446-48 (D.C. Cir. 2017) (in approving plan, agency "effectively abdicated" to the proponent of the plan the agency's own decisionmaking responsibility; the agency's decision "reflects little or no evidence of the basis for the [plan proponent]'s own determinations—and few indications that the SEC even knew what that evidence was"; "to decide whether the dividend level was reasonable, the SEC took [the plan proponent]'s word for it"; "the SEC's unquestioning reliance on [the plan proponent]'s defense of its own actions is not enough to justify approving the Plan. Instead, the SEC should have critically reviewed [the plan proponent]'s analysis or performed its own").

The Administrator has flouted his obligations to explain the record basis for the change in policy. He has failed to provide a "reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"[133] to show that the new policy is itself "based upon a consideration of the relevant factors," and supported with "rational connection[s] between the facts found and the choice made";[134] to provide a reasoned explanation for "disregarding facts and circumstances that underlay" the prior rule;[135] to consider those relevant alternatives reflected in the prior rule's record; to explain why agency is not adopting them in the new rule;[136] and to address "serious reliance interests" grounded on the prior policy.[137] The

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[131] *State Farm,* 463 U.S. at 43 (internal quotation marks omitted).

[132] 82 Fed. Reg. at 48,042.

[133] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). *See also AMB Onsite Services-West v. NLRB*, 849 F.3d 1137, 1146 (D.C. Cir. 2017) (agency "cannot 'turn[] its back on its own precedent and policy without reasoned explanation'") (quoting *Dupuy v. NLRB*, 806 F.3d 556 563 (D.C. Cir. 2015)); *Pub. Citizen*, 733 F.2d at 98; *Verizon v FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014).

[134] *See State Farm*, 463 U.S. at 43 (agency decision must be "based on a consideration of the relevant factors" and agency cannot have "relied on factors which Congress has not intended it to consider") (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962); *Pub. Citizen v. Fed. Motor Carrier Safety Admin*., 374 F.3d 1209 (D.C. Cir. 2004); 42 U.S.C. 7607(d)(9). An agency acts arbitrarily when it takes action that is not supported by substantial evidence. *See*, *e.g.*, *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1310 (D.C. Cir. 2010); *Fl. Gas Trans. Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010); *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984).

[135] *Fox*, 556 U.S. at 516; *Pub. Citizen*, 733 F.2d at 98 (agency must "'cogently explain'" basis for suspending rule) (quoting *State Farm*, 463 U.S. at 48); *Organized Village of Kake v. U.S. Dep't f Agric.,* 795 F.3d 956, 968-969 (9th Cir. 2015); *AMB Onsite Services-West v. NLRB*, 849 F.3d 1137, 1146 (D.C. Cir. 2017).

[136] *State Farm*, 463 U.S. at 51 (finding that NHTSA had arbitrarily failed to explain its rejection of option of requiring airbags despite its prior finding "that airbags are an effective and cost-beneficial life-saving technology"); *Public*, 733 F.2d at 100 (setting aside suspension of rule because NHTSA "failed to explain why alternatives, which

Proposal's complete flight from facts and evidence and abdication of the Administrator's decision-making responsibility render the Proposal unlawful and arbitrary and capricious.

A. The CPP's BSER Is Centrally – and Properly – Based Upon a Detailed Analysis of the Facts Concerning the Relevant Pollutant and Source Category

In the preamble to the CPP, EPA explained that in past section 111 rulemakings for power plants, landfills and other sources, it interpreted and applied the BSER by first *examining the particular characteristics of the source category and the pollutant to be regulated.*[138] EPA cited a large body of evidence supporting its BSER determination for the CPP – including the "unique characteristics of CO_2 pollution"; the "unique characteristics of the utility power sector;" "broad trends" in the power sector towards replacement of coal-fired generation with zero- and lower-emitting sources of generation; state and company programs to reduce CO_2 from fossil fuel-fired power plants; and state and federal programs for other pollutants from the power sector.[139]

Consistent with this view, the agency concluded that its "interpretation [of the BSER] is also reasonable" because "[b]uilding blocks 2 and 3 fit well within the structure and economics of the utility power sector,"[140] and because "[f]ossil fuel-fired EGUs are already implementing the measures in these building blocks for various reasons, including for purposes of reducing CO_2 emissions."[141]

The extensive CPP record demonstrates, among other things, that owners and operators of affected EGUs routinely use the measures in the CPP's BSER to reduce emissions and maintain affordable, reliable electricity;[142] that owners and operators of affected EGUs have supported the use of the building block measures to comply with the CPP and other Clean Air Act programs;[143] that the performance rates based on the CPP BSER are readily achievable and secure far greater emission reductions, at lower costs, than other "systems of emission reduction" considered by EPA;[144] and that regardless of the "system" that EPA ultimately designates as the BSER, affected EGUs operating in the interconnected power sector would most likely seek to comply largely–indeed, probably almost entirely–through the measures in building blocks 2 and 3.[145]

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the rulemaking record indicates were available to the agency, could not correct" problem agency relied on as basis for suspending rule); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 816 (D.C. Cir. 1983) (agency impermissibly failed to consider alternatives to repeal "raised in [the] original notice and the comments"); *Office of Comm'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1439 (D.C. Cir. 1983).

[137] *E.g.*, *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Fox,* 556 U.S. at 515); *see also Smiley v. Citibank S.D.*, 517 U.S. 735, 742 (1996); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

[138] 80 Fed. Reg. at 64724; Legal Mem. at 6.

[139] 80 Fed. Reg. at 64,725-26.

[140] 80 Fed. Reg. at 64,761.

[141] 80 *Id.* at 64,726.

[142] *See, e.g.,* 80 Fed. Reg. at 64,678-79, 64,728-30, 64,744-51.

[143] *See, e.g.,* 80 Fed. Reg. at 64,733 n.380, 64,784 n.617; Legal Mem. at 14-18 (describing comments submitted by a variety of power companies and power sector trade associations prior to proposing the CPP), 114-16 (describing comments filed by power companies and trade associations on the Mercury and Air Toxics Standards, supporting the interpretation of the term "install controls" to encompass a variety of measures including construction of off-site replacement generation).

[144] 80 Fed. Reg. at 64,727-28, 64,751; 64,769

[145] 80 Fed. Reg. at 64,728.

Recent developments in the power sector and analyses produced since the CPP was finalized have only strengthened each of these conclusions.[146] The evidence that underpinned EPA's interpretation of the BSER in the CPP, and subsequent developments that buttress and strengthen the record findings in the CPP, make an overwhelming case that the CPP BSER is not only the "system of emission reduction" that the industry predominantly relies upon to reduce carbon emissions, but also that it would achieve reductions at lower costs than available alternative approaches.

In the CPP rulemaking, EPA also made clear that its record-based findings were important grounds for *rejecting* a narrow interpretation like what the Repeal Proposal attempts to advance. As EPA explained in the CPP, the "narrow interpretation" like that now reflected in the proposed repeal of the CPP "would be inconsistent with CAA section 111's specific requirement that standards be based on the 'best' system of emission reduction" and with section 111's statutory purpose, because it "would permit consideration only of potential CO2 reduction measures that are either more expensive than building blocks 2 and 3 … or measures capable of achieving far less reduction in CO_2 emissions."[147] EPA also explained that "it is reasonable … to reject an interpretation of the term 'system of emission reduction' that would exclude building blocks 2 and 3 from consideration in this rule … especially since the record and other publicly available information makes clear that the measures in the two building blocks are effective in reducing emissions and are already widely used."[148] It further concluded that if the word "system" did not include building blocks 2 and 3, the "only controls available that can reduce CO_2 emissions from existing power plants in the amounts commensurate with the problems they pose" are "far more expensive."[149] EPA reiterated this finding in 2017, when it found–in denying various reconsideration petitions – that "no other technology or method for reducing emissions has emerged that achieves reasonable amounts of emission reduction more cost-effectively than generation shifting."[150] Therefore, "interpreting the 'system of emission reduction' provisions in CAA section 111(d)(1) and (a)(1) to allow the nation to meaningfully address the urgent and severe public health and welfare threats" from that climate change "is consistent with what the CAA was designed to do."[151]

In short, in the CPP, EPA recognized that the problem of carbon pollution from the power sector has unique characteristics that must inform the interpretation and appropriate scope of the BSER, just as similar characteristics have shaped prior BSER interpretations under section 111. Indeed, as EPA explained in the final CPP, the statutory language of section 111(a)(1)

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[146] *See also* Reconsideration Denial, Appendix 2 at 8-42, 45-55, 58-65; Reconsideration Denial, App. 3, 7-19; Grab & Lienke, *Falling Cost*.
[147] 80 Fed. Reg. at 64,769.
[148] 80 Fed. Reg. at 64,769.
[149] 80 Fed. Reg. at 64,775. *See also* EPA, "Regulatory Impact Analysis for the Clean Power Plan Final Rule," Doc. No. EPA-HQ-OAR-2013-0602-36791, at 3-23 -24 (Aug. 2015) (finding shifting generation significantly cheaper in most cases than more aggressive emission rate reduction measures at the power plant) [hereinafter "Clean Power Plan RIA"] (Joint Appendix, Attachment F23); EPA, "Greenhouse Gas Mitigation Measures," Doc. No. EPA-HQ-OAR-2013-0602-36748 (Aug. 2015) (finding that an emission standard requiring full CCS "would involve higher costs (and less flexibility) than the approach identified as the best system of emission reduction") (Joint Appendix, Attachment F32).
[150] EPA, "Basis of Denial of Petitions to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units," Doc No. EPA-HQ-OAR-2013-0602-37338, at 55 (Jan. 2017) ["*Reconsideration Denial*"] (Joint Appendix, Attachment F8).
[151] 80 Fed. Reg. at 64,775.

strongly indicates that *factual considerations unique to the regulated pollutant and source category* must guide the scope of the "system of emission reduction" for a given source category. That recognition, and the exhaustive empirical analysis EPA constructed based on it, was central in crafting the BSER interpretation in the CPP – and drew on extensive record findings captured in the preamble to the final CPP, the Legal Memorandum, the RIA, and the technical support documents. The proposed repeal unlawfully ignores all this.

B. The Proposed Repeal Unlawfully and Arbitrarily Disregards the CPP Record and Fails to Address the Record-Based Determinations that Were Central to EPA's Identification of the BSER in the CPP

EPA's proposed rule utterly fails to acknowledge the factual record that underpins the current BSER. The Administrator's failure in the Repeal Proposal to meaningfully address (or even mention) the record evidence that supports the CPP BSER is further reason that its proposed repeal is unlawful. The Proposal is inconsistent with the Clean Air Act – which contemplates that BSER determinations will be based upon the facts prevailing in the affected source category. It is also arbitrary and capricious.

Reasoned decision-making in the context of a change in policy or legal interpretation requires that an agency demonstrate awareness of, and fully explain any departure from, the "facts and circumstances that underlay or were engendered by a prior policy."[152] Where an agency is operating against a factual record that contradicts its new policy, reasoned decision-making also requires that the agency "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[153] The Proposal falls short of those standards.

Similarly, the Administrator has considered *none* of the statutory factors – including the capacity to "reduc[e]" emissions, cost, and whether given systems are "adequately demonstrated" – in justifying its new, proposed interpretation of the term "best system of emission reduction" and in proposing to discard the CPP BSER. He has completely ignored the massive record that supported EPA's conclusions that the CPP's BSER, including the measures in Building Blocks 2 and 3, best fit the statute's requirements. EPA's proposed new interpretation – designed to undo the CPP –ignores the very considerations that prompted EPA, in the CPP, "to reject an interpretation of the term 'system of emission reduction' that would exclude building blocks 2 and 3 from consideration in this rule," namely, that "the record and other publicly available information makes clear that the measures in *the two building blocks are effective in reducing emissions and are already widely used.*"[154]

The Proposal's flight from evidence renders it unlawful and arbitrary. An agency taking regulatory action 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."[155] The Repeal Proposal is arbitrary and capricious because EPA "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, [and] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[156] In changing course from a policy it previously

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[152] *Fox*, 556 U.S. at 516.
[153] *Fox*, 556 U.S. at 516.
[154] 80 Fed. Reg. at 64,769 (emphasis added).
[155] *State Farm*, 463 U.S. at 43 (internal citations omitted).
[156] *State Farm*, 463 U.S. at 43 (internal citations omitted).

adopted, the agency must "provide a more detailed justification than would suffice for a new policy…when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters."[157] "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."[158] EPA must therefore provide "reasoned analysis to cogently explain why its [proposed interpretation] satisfies the [Clean Air Act's] requirements."[159]

Reasoned decisionmaking requires that the agency "weighed competing views, selected a [solution] with adequate support in the record, and intelligibly explained the reasons for making that choice."[160] To that end, the agency must examine the relevant information and show that the data on which it relies are accurate and defensible.[161] Moreover, the APA requires agencies to use "the best information available" in reaching their conclusions,[162] and an agency acts arbitrarily when it takes action that is not supported by substantial evidence.[163] EPA cannot make a rational decision whether to retain, modify, or repeal the CPP without engaging with the record on which the CPP was based.

Similarly, EPA cannot faithfully apply or interpret the statutory criteria without consideration of the facts concerning the pollutant and source category in question. For example, section 111 requires EPA to determine the *best* system of emission reduction – a term that makes the quantum of emissions reductions a central consideration for the agency.[164] EPA exhaustively explained in the CPP why the designated BSER was the "best system," because *inter alia* it allowed for significant emissions reductions at less cost than alternatives. Both in the final Clean Power Plan, and in its denial of reconsideration, EPA emphasized that limiting the BSER to heat rate improvements would be unreasonable and contrary to the Clean Air Act, since any resulting emission reductions would be "grossly insufficient to address the public health and environmental impacts from CO_2," and may, in fact, lead to emission *increases*.[165] To properly revise its interpretation of "system", EPA must engage with these findings from the Clean Power Plan rulemaking and provide a "more detailed justification" explaining why those findings were incorrect.[166] Yet the Proposal completely ignores the prior determinations. The "fail[ure] to consider [these] important aspect[s] of the problem" – including on matters exhaustively addressed in the CPP proceeding – renders the proposed repeal arbitrary and capricious.[167]

Further, without such a careful empirical analysis, EPA has no way of determining whether and to what extent repealing the CPP and reinterpreting "system" will (or will not) sufficiently protect the Clean Air Act's intended beneficiaries: public health and the

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[157] *Fox*, 566 U.S. at 515-16 (internal citation omitted).
[158] *Fox*, 566 U.S. at 537 (Kennedy, J., concurring).
[159] *NRDC v. Daley*, 209 F.3d 747, 755-56 (D.C. Cir. 2000).
[160] *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016).
[161] *See Dist. Hosp. Partners v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015).
[162] *Catawba County v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009).
[163] *E.g.*, *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1310 (D.C. Cir. 2010); *Fl. Gas Trans. Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010); *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984).
[164] 42 U.S.C. § 7411(a)(1).
[165] *Reconsideration Denial*, at 55, n. 75; *see also* 80 Fed. Reg. at 64,787.
[166] *Fox*, 566 U.S. at 515-16.
[167] *State Farm,* 463 U.S. at 43.

environment. The public health and environmental damages from emissions of GHGs and other pollutants from power plants (and the large economic benefits of reducing those emissions), the amount of air pollution reduced, and the cost that those reductions would entail, are pivotal factors in interpreting section 111 and designing a rule to control GHGs from existing power plants.[168] Yet EPA has done none of that work.

Indeed, perhaps the most obvious gap in the Administrator's discussion of the CPP and his proposed alternative approach is a complete failure to consider impacts on public health and welfare from increases or decreases in emissions associated with alternative approaches. Ignoring the Clean Air Act's core concern when proposing to repeal a major Clean Air Act regulatory protection is unlawful. Another statutory requirement under section 111(a) is that EPA's selection of BSER must be "adequately demonstrated.[169] To select an adequately demonstrated system, it is essential for EPA to assess what the source category actually is doing to reduce the relevant emissions in the real world. EPA found in the CPP rulemaking that generation- shifting among power plants is an "everyday occurrence,"[170] and that "fossil fuel-fired EGUs have long implemented, and are continuing to implement, the measures in building blocks 2 and 3 for various purposes, including for the purpose of reducing CO_2 emissions."[171] Further, EPA found that a variety of prior EPA rules have relied upon the capacity for generation shifting.[172]

By refusing to "look out the window" and consider the predominant method by which the covered sources *actually* reduce their CO_2 emissions, EPA has ignored "significant and viable and obvious alternatives" to its proposed reinterpretation of "system" and has thus engaged in arbitrary and capricious rulemaking.[173] Agency analysis must exhibit a "rational relationship" with "known behavior."[174] The known behavior of the electric system is that it has been, is, and will continue to shift generation from higher-emitting resources to lower- and zero-emitting sources in order to reduce emissions. EPA's failure to consider this phenomenon an adequately demonstrated "system" is fatal to the proposed rulemaking.

In short, the Administrator has failed to address the EPA's record determinations that underlay the CPP's BSER and that supported EPA's conclusion in the CPP rulemaking that an approach like what the Administrator now favors did not represent the "best system of emission reduction" or sound policy because, among other reasons, it would produce less emissions reductions or would be more costly, or both.

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[168] *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d at 326 (D.C. Cir. 1981) (construing §111(a)(1): "we can think of no sensible interpretation of the statutory words 'best technological system' which would not incorporate the *amount* of air pollution as a relevant factor to be weighed when determining the optimal standard for controlling sulfur dioxide emissions") (emphasis added)

[169] 42 U.S.C. § 7411(a)(1). *See Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973) ("An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way.").

[170] 80 Fed. Reg. at 64,728-29.

[171] *Id*. at 64,769, n. 520 (citing utility climate mitigation plans utilizing generation shifting for pollution reduction).

[172] *Id*. at 64,729.

[173] *Nat'l Shooting Sports Found. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013).

[174] *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994); *see API v. EPA*, 862 F. 3d 50, 68 (D.C. Cir. 2017).

The Administrator's failure to acknowledge the CPP record and findings and justify his dramatic change of position renders the proposed repeal thoroughly unlawful. Among other core flaws, the Administrator, having ignored the CPP record, has not (1) begun to show that the CPP is *unlawful*, even though that is the core premise for the proposed repeal,[175] (2) provided any sound basis for preferring his proposed new policy to the CPP or for proposing the extreme step of repeal to an alternative rule that would preserve the CPP's health and environmental benefits,[176] (3) provided a "reasoned explanation of why [the Administrator] chose" his proposed "new" interpretation,[177] or (4) offered a "satisfactory explanation for [his] action including a rational connection between the facts found and the choice made."[178] Far from being supported by substantial evidence, the Administrator's proposed approach runs overwhelmingly counter to the massive evidence in the CPP record concerning the electric power sector, the urgency of climate impacts, and other factors discussed in these comments. The Proposal's flight from evidence and fact – and from EPA's own exhaustive CPP record – renders it hopelessly flawed.

[175] *See*, *e.g.*, *Prill.*, 755 F.2d at 947–48 (agency commits reversible error when agency concludes that particular regulatory action is mandated by statute, rather than based on its "own judgment"); see n. 67, *supra*.
[176] *Delaware Department of Natural Resources v. EPA*, 785 F. 3d 1, 11 (D.C. Cir. 2015) ("To be regarded as rational, an agency must … consider significant alternatives to the course it ultimately chooses.").
[177] *Village of Barrington v. STB*, 636 F.3d 650, 660 (D.C. Cir. 2011) (discussing agencies' obligations under step 2 of *Chevron*).
[178] *State Farm,* 463 U.S. at 43 (internal quotation marks omitted). *See also U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 663 (D.C. Cir. 2016) ("even where EPA's construction satisfies *Chevron*, [the court] still must ensure that its action is not otherwise arbitrary and capricious."). *See*, *e.g.*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (in addition to requirement that agency construction reflected in regulations be reasonable under step two of *Chevron*, agency must, under APA's arbitrary and capricious standards, provide a "rational justification" and "persuasive justification" for regulations); *Environmental Defense v. EPA* 509 F. 3d 553, 560 (D.C. Cir. 2007) ("Even assuming (B)(iii) is ambiguous, EPA's reliance on the SIP process would appear to be arbitrary and capricious."); *Confederated Tribes v. Jewell*, 830 F.3d 552, 559 (D.C. Cir. 2016) ("Of course, agency action is always subject to arbitrary and capricious review under the APA, even when it survives *Chevron* Step Two.").

CONCLUSION

EPA should withdraw this misconceived and unlawful proposal and redirect its energies to fulfilling its statutory duties to protect public health and welfare, including by implementing and strengthening the Clean Power Plan.

APPALACHIAN MOUNTAIN CLUB
CENTER FOR BIOLOGICAL DIVERSITY
CLEAN AIR COUNCIL
CLEAN AIR TASK FORCE
CLEAN WISCONSIN
COALITION TO PROTECT AMERICA'S PARKS
CONSERVATION LAW FOUNDATION
EARTHJUSTICE
ENVIRONMENTAL DEFENSE FUND
ENVIRONMENTAL LAW AND POLICY CENTER
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY
NATIONAL PARKS CONSERVATION ASSOCIATION
NATURAL RESOURCES DEFENSE COUNCIL
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UNION OF CONCERNED SCIENTISTS[179]

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ADDENDUM:

LIST OF ADDITIONAL COMMENTS SUBMITTED IN THIS DOCKET BY THE SIGNATORY ORGANIZATIONS

Comments of Environmental Defense Fund; Appalachian Mountain Club; Center for Biological Diversity; Clean Air Council; Clean Air Task Force; Clean Wisconsin; Conservation Law Foundation; Earthjustice; Environmental Law and Policy Center; National Parks Conservation Association; Sierra Club; and the Union of Concerned Scientists on EPA Administrator Scott Pruitt's Improper Prejudgment of Outcome of Proposed Repeal of Clean Power Plan, EPA-HQ-OAR-2017-0355 (submitted Jan. 29, 2018)

Joint Comments of Environmental and Public Health Organizations Regarding the "Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 82 Fed. Reg. 48,035 (Oct. 16, 2017): Comments Specific to the *"Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal*" (October 2017) (submitted on April 26, 2018)

Joint Comments of Environmental and Public Health Organizations Regarding the Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Comments Specific to Climate Change (submitted April 26, 2018)

Joint Comments of Clean Air Task Force, Clean Air Council, Center for Biological Diversity, and Minnesota Center for Environmental Advocacy on Proposed Repeal (submitted April 26, 2018)

Comments of Environmental Defense Fund on EPA's Proposed Rule: Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017) (submitted April 26, 2018)

Comments of Environmental Law & Policy Center, Alliance for the Great Lakes, Hoosier Environmental Council, Illinois Environmental Council, Iowa Environmental Council, Michigan Climate Action Network, Michigan Environmental Council, Minnesota Environmental Partnership, and Ohio Environmental Council (submitted April 26, 2018)

Comments of Environmental Organizations Regarding the Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Comments Specific to the Endangered Species Act (submitted April 26, 2018)

Comments of National Parks Conservation Association (NPCA), Appalachian Mountain Club (AMC) and Coalition to Protect America's National Parks (CPANP) (submitted April 26, 2018)

Comments of the Natural Resources Defense Council on EPA's Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (submitted April 26, 2018)

Comments of Natural Resources Defense Council (submitted April 26, 2018)

Comments of Sierra Club and Earthjustice (submitted April 26, 2018)

Comments of Union of Concerned Scientists (submitted April 26, 2018)