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Docket ID No. EPA–HQ–OAR–2013–0495
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Request for Comments on Endangerment Finding Interpretation

Dear Sir or Madam:

The GPA Midstream Association (GPA Midstream) appreciates this opportunity to submit comments on the Environmental Protection Agency’s (EPA, or the Agency) proposed rulemaking “Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Request for Comments on Endangerment Finding Interpretation,” 83 Fed. Reg. 65424 (Dec. 20, 2018) (proposed rule, or proposal).

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products (NGLs) such as ethane, propane, butane and natural gasoline. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

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Summary

GPA Midstream and its members are committed to gathering and processing natural gas in a manner that minimizes environmental impacts and reduces emissions of valuable natural gas products. Indeed, GPA Midstream members have taken significant steps to reduce methane and volatile organic compound (VOC) emissions from their operations under federal, state, and local laws, as well as under voluntary programs.

In these comments, GPA Midstream is not challenging EPA's authority to establish new source performance standards (NSPS) for greenhouse gas (GHG) emissions under Section 111 of the Clean Air Act (CAA), as long as EPA follows proper procedures when imposing those new regulations. Instead, GPA Midstream confines its comments here to the requirement in the CAA that EPA make an endangerment finding before issuing a regulation under CAA Section 111(b).¹

Specifically, EPA has asked whether Section 111 allows EPA to rely on the findings EPA made when it originally listed a source category (in this case, electric utility generating units (EGUs)), or whether the CAA requires EPA to make a new endangerment finding before the Agency may regulate a new pollutant from an existing source category.² As GPA Midstream articulated in comments on previous EPA rulemakings, Congress has constrained EPA's authority under Section 111 to expressly require EPA to make a new endangerment finding when the Agency proposes to regulate an additional pollutant – even from an already-listed source category. Accordingly, EPA must complete a separate significant contribution endangerment determination before regulating any new pollutant, including GHG emissions, from an NSPS source category.

1. EPA Must Make a Separate Endangerment Finding for Each Additional Pollutant to be Regulated from an Already-Listed Source Category

For reasons GPA Midstream has outlined previously in other contexts,³ EPA should not proceed with this proposed NSPS regulation because it has not satisfied the requirement of first finding that GHG emissions from the EGU sector cause or contribute significantly to an endangerment of public health or welfare as is required to promulgate these NSPS rules under the CAA. Under Section 111(b) of the CAA, Congress clearly provided that EPA may not regulate a pollutant unless and until the Agency makes an endangerment determination that is both source- *and* pollutant-specific and which meets the significance threshold specified in the CAA. Thus, the statute mandates that EPA separately find that an additional pollutant's emissions from the EGU source category (or any other source category that EPA does or would seek to regulate) “causes, or contributes significantly to, air pollution which may reasonably be

¹ 42 U.S.C. § 7411(b)(1)(A).

² 83 Fed. Reg. 65432 n.25 (Dec. 20, 2018).

³ See, e.g., Gas Processors Association Comments on Oil and Gas Sector: Emission Standards for New and Modified Sources, Proposed Rule (Docket EPA-HQ-OAR-2010-0505) (Dec. 4, 2015).

anticipated to endanger public health or welfare.”⁴ Quite simply, under Section 111(b), the EPA Administrator has no discretion. EPA may only seek to regulate “a category of sources ... if in his judgment it causes, or contributes significantly to, air pollution which may be reasonably anticipated to endanger public health and welfare.”

In contrast, other provisions of the CAA such as Section 202 allow EPA to consider all emissions sources for a given pollutant, authorizing the Administrator to regulate emissions “which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁵ Thus, Section 111(b) is more demanding than other provisions of the CAA, because it requires EPA to make an endangerment determination that is specific to each source category. Moreover, Section 202(a) of the CAA lacks the more stringent “significance” requirement imposed by the NSPS program under Section 111(b). As EPA has acknowledged, Section 111(b) is different than Section 202 because it requires a source-based determination of endangerment that includes a specific finding that emissions from that source category comprise a *significant* contribution to endangerment.⁶

2. EPA’s “Rational Basis” Test is Unsupported as a Matter of Law and Cannot Be Used to Circumvent the CAA’s Requirement that the Agency Make an Endangerment Finding for Each New Pollutant within a Source Category

As an alternative to making the statutorily required endangerment finding for carbon dioxide emissions from fossil fuel-fired electricity-generating units, EPA in this proposal advances its alternative “rational basis” test, as it has in the past.⁷ EPA has specifically asked for comments on “whether the Agency does have a rational basis for regulating CO₂ emissions from new coal-fired electric utility steam generating units and whether it would have a rational basis for declining to do so at this time, in light of, among other things” market shifts in electricity production.⁸

Respectfully, EPA’s belief that it has authority to engage in a “rational basis” test as to whether there is endangerment is unsupported as a matter of law. First, Congress did not create a “rational basis” test for EPA to apply under Section 111(b) of the CAA – and Section 111(b)(1)(A) does not leave a statutory gap for EPA to fill because the statute is not ambiguous. Section 111(b)(1)(A) expressly limits EPA’s authority under NSPS to regulate emissions of

⁴ 42 U.S.C. § 7411(b)(1)(A).

⁵ 42 U.S.C. § 7521(a)(1); *see also id.* § 7408(a)(1)(A).

⁶ See 74 Fed. Reg. 66496, 66506 (Dec. 15, 2009) (“[T]he statutory language in CAA section 202(a) does not contain a modifier on its use of the term contribute. Unlike other CAA provisions, it does not require a ‘significant’ contribution. *See, e.g.,* CAA section 111(b); 2013(a)(2), (4).”).

⁷ 83 Fed. Reg. at 65432 (stating “even if it were required to make an endangerment finding for those emissions in order to regulate them, the same facts that provided the rational basis would qualify as an endangerment finding” because “the CO₂ emissions from fossil fuel-fired EGUs are almost three times as much as the emissions from the next 10 source categories combined, and that the CO₂ emissions from even a single new coal-fired power plant may amount to millions of tons each year.”).

⁸ 83 Fed. Reg. at n.25.

significant “air pollution” that “endanger[s] public health and welfare.”⁹ In contrast to this explicit direction by the Congress, EPA’s “rational basis” test would rewrite the statute to authorize the Agency to subject source categories to costly regulations under the NSPS program even if those emissions do not significantly endanger public health and welfare. Thus, the plain language of Section 111(b) of the CAA requires EPA to make a significance endangerment determination that is both pollutant- and source-specific.

Second, the EPA’s rational basis test would not be entitled to *Chevron* deference even if the statute were ambiguous.¹⁰ By continuing to rely on this alternative “rational basis” argument to sidestep the CAA’s plain language, EPA ignores the “significance” requirement in Section 111(b) and replaces it with a less stringent standard that is based on EPA’s subjective evaluation of health and welfare. This interpretation is so far removed from the text of Section 111(b) that EPA is not entitled to *Chevron* deference.

Further, EPA cannot simply describe the amount of emissions from a given source category as evidence of a significant contribution to endangerment without providing some quantitative standard against which those emissions can be evaluated. Simply referencing the size of the emissions and asserting that, for example, carbon dioxide emissions from fossil fuel-fired electricity-generating sources “are almost three times as much as the emissions from the next 10 source categories combined,”¹¹ cannot provide a reasoned basis for the EPA to determine that those emissions are “significant” within the meaning of Section 111(b).¹²

3. Regulating Emissions of Greenhouse Gases, like Methane and Carbon Dioxide, Particularly Highlights the Necessity of Issuing a Pollutant- and Source-Specific Endangerment Finding, As Required by CAA Section 111

In the current proposal EPA has also asked for comments on whether “GHG emissions are different in salient respects from traditional emissions such that it would be appropriate to conduct a new ‘endangerment finding’ with respect to GHG emissions from a previously listed source category.”¹³ This request is misplaced. Section 111(b) requires EPA to conduct pollution-specific endangerment findings, regardless of whether the pollutant is a “conventional” pollutant or a GHG. Nothing in the statute authorizes different treatment for GHGs.

⁹ 42 U.S.C. § 7411(b)(1)(A).

¹⁰ Under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), courts apply a two-step test to determine whether an agency’s interpretation is entitled to deference. First, “[i]f the intent of Congress is clear, that is the end of the matter, for the court as well as the agency must give effect to the unambiguously expressed intent of Congress.” *Id.* at 843-43. But, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

¹¹ 83 Fed. Reg. at 65432.

¹² See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).

¹³ *Id.* at n.25.

In all events, to the extent GHG emissions are different, it is the unique history of how GHG emissions have been addressed that further highlights the need to apply the statute as it is written and conduct an endangerment analysis for any new pollutant before regulating the pollutant under the NSPS requirements. Here, as it did when it promulgated the 2016 OOOOa methane rule,¹⁴ EPA is attempting to base its authority to regulate carbon dioxide emissions from fossil fuel-fired EGUs on an endangerment finding made “at the time the EPA list[ed] the source category and to broadly concern emissions from the source category.”¹⁵ Yet, EPA first listed fossil fuel-fired electric steam generating units as a source category in 1971—nearly 50 years ago.¹⁶ EPA subsequently listed fossil-fuel combustion turbines as a source category in 1977—42 years ago.¹⁷ And EPA has not issued a new endangerment finding for the fossil fuel-fired electric steam generating units or combustion turbines since.¹⁸ It would be illogical for EPA to base an NSPS for GHG emissions on a decades-old finding that did not even consider whether GHG emissions were harmful to the environment.

Greenhouse gas emissions like carbon dioxide and methane were not even considered pollutants under the CAA until 2007 at the earliest,¹⁹ decades after EPA’s original Section 111(b) endangerment determination for EGUs. This original endangerment finding did not contemplate GHG emissions, which have specific characteristics that must be evaluated and considered. Without conducting an endangerment finding specific to GHGs from the source category it is regulating, EPA cannot articulate the benefit to reducing GHG emission from the source category as Congress requires in the Act.

Conclusion

In short, we respectfully urge EPA to adjust its interpretation of the Section 111 endangerment finding requirement to conform to the procedural requirements established by the Congress under the Clean Air Act. EPA’s authority is limited the statutory grant provided by the Act, and it should follow those procedures before adopting new regulations of GHG emissions.

¹⁴ See, e.g. Gas Processors Association Comments on Oil and Gas Sector: Emission Standards for New and Modified Sources, Proposed Rule at 5-7.

¹⁵ *Id.* at 65432.

¹⁶ See 79 Fed. Reg. 1430, 1454 (Jan. 8, 2014) (providing the NSPS regulatory history for these source categories and indicating that fossil fuel-fired electric steam generating units were originally listed as a source category in 1971 (“Air Pollution Prevention and Control: List of Categories of Stationary Sources,” 36 Fed. Reg. 5931 (March 31, 1971))).

¹⁷ 42 Fed. Reg. 53657 (Oct. 3, 1977).

¹⁸ 83 Fed. Reg. at 65434 (“In the 2015 Rule, the EPA promulgated standards for CO₂ emissions from sources in two source categories, fossil fuel-fired electric utility steam generating units and combustion turbines. The EPA explained that because it was not listing a new source category, it was not required to make a new endangerment finding with regard to the affected sources, and the EPA added that in any event, the required endangerment finding concerned the source category, and not individual pollutants.”).

¹⁹ See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matt Hite". The signature is written in a cursive, flowing style.

Matt Hite
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GPA Midstream Association