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EPA Docket Center
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Mr. Andrew R. Wheeler
Acting EPA Administrator
United States Environmental Protection Agency
EPA Headquarters
Mail Code 1101A, Room 3000
William Jefferson Clinton Building (North)
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Washington, D.C. 20460

RE: Comments on Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 83 FED. REG. 65424 (DEC. 20, 2018), Docket ID No. EPA–HQ–OAR–2013–0495.

Dear Administrator Wheeler:

On behalf of Morning Star Packing Company, Merit Oil Company, and Norman R. "Skip" Brown (the "California Commenters"), Texas Public Policy Foundation ("TPPF") hereby submits comments on the Environmental Protection Agency's ("EPA's" or the "Agency's") proposed amendments to the rulemaking titled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (EGUs)," which EPA promulgated by notice dated October 23, 2015 (the "2015 Rule"), which regulate carbon dioxide emissions from new fossil fuel-fired sources under Section 111 of the Clean Air Act (the "Clean Air Act" or the "Act"). *See* 42 U.S.C. § 7411. The instant comments are made to inform EPA of the significant obstacles to continuing the 2015 Rule, with amendments, as the Agency has proposed in its call for comments. The California Commenters

note that some of the same problems that plagued the 2015 Rule remain with the proposal to amend it.[1]

When read in the context of the object of the Clean Air Act, Section 111(b) requires EPA to make a new endangerment finding each time the Agency regulates an additional pollutant emitted from an already-listed source category. *See Offshore Logistics v. Tallentire*, 477 U.S. 207, 221 (1986) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) ("In expounding a statute, we must not be guided by a single sentence . . . but look to the provisions of the whole law, and to its object and policy."). Congress enacted the Clean Air Act to regulate harmful air pollutants, while regulation of source categories is one of the mechanisms provided by Congress to accomplish that goal. Regulation of source categories is not an end in and of itself. Thus, if all air emissions from a particular source category were wholly benign, there would be no justification for EPA to regulate emissions of that source category under Section 111(b). Only when an air pollutant emitted by an unlisted source category meets the endangerment criteria of Section 111(b) would EPA be authorized under the Act to list the source category and impose restrictions on emissions of that air pollutant from that source category. After the first emission standard for a specific air pollutant is properly promulgated for a source category, any additional air pollutants that EPA seeks to regulate from that source category must also be subjected to the applicable endangerment criteria of Section 111(b) because the purpose of the Act - and of Section 111(b) - is to regulate emissions of harmful air pollutants. That purpose cannot be met unless the statutory criteria is applied to the additional pollutants. Accordingly, it is nonsensical to interpret the Act as authorizing EPA to regulate additional air pollutants from already-listed source categories without reference to whether such additional pollutants meet the applicable endangerment criteria of Section 111(b). *See Chevron, U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 845 (1984) (federal agency may interpret statute only in such a way as "Congress would have sanctioned").

And the meaning of statutory language "must be ascertained in the context of achieving particular [statutory] objectives." *Id.* at 861. Here, the statutory objective is to protect health and welfare from harmful air pollutants that meet the applicable endangerment criteria under Section 111(b). If the specific air pollutant that EPA seeks to regulate does not meet those criteria, that air pollutant should not be regulated under Section 111(b) regardless of whether the source category has already been listed. Accordingly, it is impermissible for EPA to regulate additional pollutants from already-listed source categories without first determining whether those additional air pollutants themselves meet the endangerment criteria.

[1] The California Commenters file these comments in response to EPA's invitation to urge reconsideration of its prior legal justifications for issuing its regulations in this area. *See* 83 Fed. Reg. at 65432 n. 25 ("the Agency will consider comments on the issue of whether it is correct to interpret the 'endangerment finding' as a finding that is only made once for each source category at the time that the EPA lists the source category or whether the EPA must make a new endangerment finding each time the Agency regulates an additional pollutant by an already-listed source category. Further, the EPA will consider comments on the issue of whether GHG emissions are different in salient respects from traditional emissions such that it would be appropriate to conduct a new 'endangerment finding' with respect to GHG emissions from a previously listed source category.").

EPA did not make an endangerment finding for carbon dioxide under the applicable criteria of Section 111(b). In fashioning the 2015 Rule, EPA under the previous administration asserted that the endangerment finding it made in 2009 in connection with mobile source emissions under Section 202, under a different standard than that required for endangerment findings under Section 111, was legally sufficient. 80 Fed. Reg. at 64530-31. But the endangerment finding made by EPA under Section 202 is *not* a finding that carbon dioxide emitted by any stationary source, let alone by fossil fuel-fired electric generating units, endangers public health and welfare, as required by Section 111(b). Rather, the 2009 finding is that a *suite* of six greenhouse gases (carbon dioxide combined with five others) emitted from *mobile* sources endangers public health and welfare. Due to the substantial differences in the nature of stationary and mobile sources, Congress created different statutory regimes in which each source category must operate and comply. A finding under Section 111(b) requires that specific emissions from a specific stationary source category endanger public health and welfare, while the finding under Section 202 requires that emissions from all mobile sources combined endanger public health and welfare. It was impermissible for EPA to substitute one standard for the other.

Furthermore, the Section 111(b) language permits regulation of stationary sources only from "a *category of sources* . . . [which] *significantly* causes or contributes significantly to air pollution [that endangers health or welfare]." 42 U.S.C. § 7411(b)(1)(A) (emphasis added). In contrast, the Section 202(a) language broadly includes all mobile emission sources of any given pollutant. 42 U.S.C. § 7521(a)(1). Thus, Section 111(b) is more demanding because it requires EPA to make an endangerment finding that is not only specific to specific air pollutants emitted by each stationary source category that EPA seeks to regulate, but also has a higher "significance" threshold not found in Section 202(a). EPA therefore failed to make the endangerment finding required under Section 111(b) to support its promulgation of the 2015 Rule. Unfortunately, EPA's proposed reconsideration amendments fail to cure the same fundamental omission made by the prior administration, rendering it similarly unlawful. Any replacement seeking to regulate carbon dioxide emissions from fossil fuel-fired sources would have to be preceded by the endangerment finding specifically required by Section 111(b).

Moreover, if EPA is to regulate carbon dioxide emissions from stationary sources, EPA must proceed under Section 108 of the Act and not under Section 111. Section 108 is the regulatory path Congress prescribed for air pollutants in the "ambient air" emitted from "numerous or diverse" sources, while Section 111 is the path for emissions from specific source categories that pose more localized air pollution concerns. Carbon dioxide is a ubiquitous substance that is emitted into the "ambient air" from "numerous or diverse" sources. 42 U.S.C. § 7408(a)(1). Consequently, any regulation of carbon dioxide emissions from stationary sources is required to proceed under Section 108 of the Act rather than Section 111. Accordingly, EPA did not act in the manner required by statute when it promulgated the 2015 Rule; EPA's proposed reconsideration amendments would have to follow the correct statutory avenue under Section 108 to proceed in the manner prescribed by Congress.

The remainder of these comments provide detailed explanations of why EPA's proposed amendments to the 2015 Rule face the same legal obstacles that make the 2015 rule impermissible. Under the Clean Air Act.

EPA's Proposal Fails to Follow the Framework for Promulgating a Lawful Regulation of Carbon Dioxide Emissions from Fossil Fuel-fired Sources

I. In continuing to regulate carbon dioxide emissions from fossil fuel-fired sources, EPA must address the Section 111(b) requirement to make an endangerment finding.

Even if EPA had authority for the 2015 Rule by way of Section 111(b), it failed to follow all the requirements to do so; in fashioning any replacement, the Agency would need to go back and lay the groundwork necessary to follow them. As a prerequisite to regulating emissions under Section 111(b) for new sources, the Clean Air Act requires EPA to make a determination that specific pollutants from the source category it seeks to regulate "cause[s] or contribute[s] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

Under the Act, EPA must make both a source-specific and a pollutant-specific endangerment finding before issuing standards of performance under Section 111(b). To satisfy the endangerment finding requirement, EPA must find that a "category of sources . . . causes, or contributes *significantly* to, *air pollution which* may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411 (emphases added). The plain language requires EPA to make an endangerment determination that is (1), source-specific (2) pollutant-specific, and (3) includes a significance finding with regard to the particular "air pollution," i.e., the particular air pollutant that EPA seeks to regulate from the source category.

Thus, in the instant case EPA was required to make an endangerment finding that *carbon dioxide emissions* from fossil fuel-fired power plants cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. EPA did not make that finding in its promulgation of the 2015 Rule. Instead, it took the position that a "rational basis," based on the 2009 endangerment finding for mobile sources (for carbon dioxide combined with five other greenhouse gases), for regulating carbon dioxide emissions from fossil fuel-fired stationary sources is sufficient, thereby impermissibly rewriting the express and unambiguous language of the Clean Air Act. *See Util. Air Regulatory Grp. v. E.P.A.*, 134 S.Ct. 2427, 2444 (2014).

Moreover, the "rational basis" proffered by EPA was anything but. EPA took the position that it could use the endangerment finding it made for new mobile sources under Section 202(a) to support its regulation of new stationary sources under Section 111(b). 80 Fed. Reg. at 64529-32. This was wrong for four reasons.

First, the statutory language authorizing the two findings are not identical. The Section 111(b) language permits regulation of stationary sources only from "a *category of sources* . . . [which] *significantly* causes or contributes significantly to air pollution [that endangers health or welfare]." 42 U.S.C. § 7411(b)(1)(A) (emphases added). In contrast, the Section 202(a) language broadly includes all mobile emission sources of any given pollutant. 42 U.S.C. § 7521(a)(1). Thus, Section 111(b) is more demanding because it requires EPA to make an endangerment finding that is not only specific to each stationary source category that EPA seeks to regulate, but also has a higher "significance" threshold for each source category not found in Section 202(a).

Second, the structure of the Act requires that a mobile-source-specific endangerment finding be made before new mobile sources can be regulated under Section 202(a) of Title II, and that a separate stationary-source-specific finding be made before new stationary sources may be regulated under Section 111(b). If Congress had intended to collapse the two findings into a single, comprehensive endangerment finding for mobile and stationary sources of any particular pollutant, it could have easily done so, but it did not. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (where language is included in one sentence of a statute but excluded in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Third, the plain meaning of the Act requires that the "causes or significantly contributes" language be applied in the first instance to specific emissions from a category of sources. It defies logic that a category of sources could be deemed to cause or significantly contribute to air pollution, thereby triggering an endangerment finding, without reference to the *specific* air pollutant or pollutants that provide the underlying basis for the finding. As suggested above, if a particular category of sources emits wholly benign substances there would be no justification for listing that category under Section 111(b) because there would be no "endangerment" to human health or welfare from those benign emissions. If the initial Section 111(b) endangerment finding for a particular source category requires reference to a pollutant the emission of which requires an endangerment finding, so too, adding additional air pollutants to be regulated from that same source category requires specific reference to the danger posed by those additional pollutants. Otherwise, benign emissions could be regulated after a category of sources is initially listed under Section 111(b) to the same extent as the harmful emissions that provided the basis for the initial endangerment finding. Accordingly, Section 111(b) of the Clean Air Act cannot reasonably be interpreted to allow regulation of additional emissions from already-listed source categories without first determining whether those additional emissions in fact are harmful to human health or welfare under the applicable endangerment criteria. *See U.S. v.* Kirby, 74 U.S. 482, 486 (1868) ("All laws should receive a sensible construction."). Thus, the Section 111(b) endangerment finding must be based upon specific air pollution that actually endangers human health or welfare regardless of whether the endangerment finding is made by EPA for the first time for a source category not previously regulated or subsequently for additional pollutants that EPA wishes to regulate from an already-listed source category. *See King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) (Statutory terms must be read "in their context and with a view to their place in the overall statutory scheme."). Consequently, EPA should not promulgate the proposed Section 111(b) standard unless and until it engages in and completes a regulatory proceeding to determine the extent to which

carbon dioxide emissions from fossil fuel-fired electric generating units meet the endangerment criteria set forth in Section 111(b).

Fourth, EPA's endangerment finding made in 2009 under Section 202(a) covered "six greenhouse gases taken *in combination*." 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (emphasis added). By contrast, EPA's assertion in the promulgation of the 2015 Rule that "[i]n this rulemaking, the EPA has a rational basis for concluding that emissions of *CO2* [carbon dioxide] from fossil fuel-fired power plants, which are the major U.S. source of GHG air pollution, merit regulation under CAA section 111," applies only to carbon dioxide, 80 Fed. Reg. at 64530 (emphasis added), a single component of the aggregate greenhouse gases for which the endangerment finding was made under Section 202(a). Accordingly, EPA's efforts to bootstrap the stationary source finding onto the mobile source finding by inventing a "rational basis" test found nowhere in the Clean Air Act were illegitimate. It is "rudimentary administrative law" that regulatory action must comply with statutory requirements. *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

EPA was not permitted to selectively weave separate provisions of the Act governing entirely different types of sources, or entirely different types of pollutants, into a fabric that is foreign to the text and structure of the Act. "[S]tatutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.*, 134 S.Ct. at 2442 (quoting *Robinson*, 519 U.S. at 341). Were it determined to continue the 2015 Rule (with amendments), EPA would be required to undertake the process to make an endangerment finding under Section 111(b).

II. Any continued version of the 2015 Rule must address why it would not be promulgated under Sections 108-110 of the Clean Air Act, rather than under Section 111 of the Act.

But even following the endangerment finding provisions under Section 111(b) would not save the fate of EPA's proposed amended version of the 2015 Rule, because the structure of the Clean Air Act requires EPA to regulate these types of emissions under Sections 108-110 of the Act. The regulation of carbon dioxide has enormous national implications. Through the 2015 Rule, EPA wrongly used Section 111 to regulate carbon dioxide emissions from fossil fuel-fired sources, with a consequence of regulating an enormous portion of energy production in the United States. Any valid regulation of carbon dioxide emissions from such stationary sources would have to follow a radically different procedural roadmap.

The Clean Air Act establishes a complex regulatory scheme through distinct administrative programs targeted at different types and sources of air pollutants. Stationary sources of air pollution are regulated under Title I of the Act, while mobile sources are regulated under Title II.

EPA promulgated the 2015 Rule under Title I, which contains three regulatory programs, each with its own unique purposes, triggers, and substantive provisions. By regulating carbon dioxide emissions from fossil fuel-fired sources under Section 111 of the Act, which embodies

Title I's source-performance program, rather than under Sections 108-110 of the Act, which embody Title I's ambient air quality program, EPA failed to act according to distinct statutory requirements. But EPA's proposed amendments do not fix this defect.

Title I authorizes EPA to establish National Ambient Air Quality Standards ("NAAQS") under Sections 108 through 110 of the Act. 42 U.S.C. §§ 7408-7410. NAAQS prescribes maximum, uniform ambient air concentrations of particular air pollutants, and no area of the Nation may exceed these prescribed concentrations. *See generally* George F. Allen & Marlo Lewis, *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts v. EPA*, 44 U. Rich. L. Rev. 919 (2010). In turn, states are responsible for attaining and maintaining NAAQS within their jurisdictions. EPA has set NAAQS for six air pollutants, known as "criteria pollutants": lead, nitrogen dioxide, coarse particulate matter (PM10), fine particulate matter (PM2.5), carbon monoxide, ozone, and sulfur dioxide. 40 C.F.R. §§ 50.2-50.16. To designate a particular air pollutant as a criteria pollutant, EPA must first make a finding under Section 108 that the pollutant is emitted from "numerous or diverse" sources and "endangers" public health or welfare. 42 U.S.C. § 7408(a)(4).

The NAAQS regulatory regime is "the engine that drives nearly all of Title I." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Title I also contains the source-performance program of Section 111, under which EPA regulates air emissions from specific categories of sources for which a unique, source-category endangerment finding is made. 42 U.S.C. § 7411(b)(1)(A).

Generally, Section 111(d) regulates existing sources, while section 111(b) regulates new and modified sources. Pollutants regulated under Section 111 are referred to as "designated pollutants" and are regulated under guidelines "developed for specialized types of emission sources that emit discrete types of pollutants." *See generally* 40 C.F.R. § 62. EPA justified its promulgation of the 2015 Rule under Section 111(b).

The third regulatory program under Title I, set forth in Section 112, authorizes EPA to regulate hazardous air pollutants deemed particularly dangerous to human health by imposing strict national emissions standards for specific source categories of such pollutants. 42 U.S.C. § 7412.

Sections 108-110, as well as the structure of Title I of the Clean Air Act, make clear that air pollutants emitted from "numerous or diverse" sources into the "ambient air" that endanger public health or welfare must be regulated, if at all, as criteria pollutants under the NAAQS program and not under the source-performance program of Section 111. The Act explicitly provides that EPA "shall" regulate under the NAAQS program air pollutants "the presence of which in the ambient air results from numerous or diverse" sources where such pollutants "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1).

After EPA makes an endangerment finding under Section 108 and issues air quality criteria for pollutants subject to that finding, Section 109 requires EPA to "publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date." 42 U.S.C. § 7409(a)(1). Thus, promulgation of ambient air quality standards under the NAAQS program is the specific regulatory mechanism that EPA is required to use when regulating air pollutants emitted from "numerous or diverse" sources that "endanger public health or welfare."

Importantly, under Section 111 "emission source control is a supplement to air quality standards, not an alternative to them." *Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 327 (2d Cir. 1976). Because carbon dioxide is a ubiquitous substance in the "ambient air" emitted from "numerous or diverse" sources, if it is to be regulated under Title I of the Act, the mechanism by which EPA may do so is limited to the NAAQS program under Sections 108-110. EPA's proposed amended version of the 2015 Rule suffers the same flaws as its predecessor by failing to act under the required statutory mechanism.[2]

Relatedly, the 2015 Rule was unlawful because EPA failed to make the requisite endangerment finding under Section 108 of the Clean Air Act. Although there are provisions for making endangerment findings in both Title I and Title II of the Act, only the provision in Section 108 authorizes EPA to regulate pollutants in the "ambient air" emitted by "numerous or diverse" sources. 42 U.S.C. § 7408(b). On the other hand, the Section 111(b) endangerment language, which was not created for ubiquitous substances like carbon dioxide, permits regulation of stationary sources only from a specific "*category* of sources . . . [which] causes, or *contributes significantly* to, air pollution [that endangers health or welfare]." 42 U.S.C. § 7411(b)(1)(A) (emphases added). The endangerment finding provision of Section 111(b) differs from that set forth in Section 108 because the former requires EPA to make an endangerment finding that is not only specific to *each stationary source category* that EPA seeks to regulate but also requires a higher "significance" threshold for each source category.

In addition to these two distinct endangerment finding provisions in Title I applicable only to stationary sources, such as the new fossil fuel-fired sources regulated here, there are two other endangerment finding provisions in Title II. The first, set forth in Section 202, 42 U.S.C. § 7521(a)(1), is applicable to mobile sources such as cars and trucks. Section 202(a)(1) of the Clean Air Act states that "The Administrator shall by regulation prescribe (and from time to time revise) . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." The second, set forth in Section 211, 42 U.S.C. § 7545(c)(1), is applicable to fuel additives.

[2] In the instant proposed rule, EPA asserts that "GHG [greenhouse gases] are not criteria pollutants" regulated under NAAQS, though it notes that fossil-fired stationary sources "are units whose emissions of criteria pollutants are [regulated under NAAQS]." 83 Fed. Reg. at 65428 n.10. This assertion reflects exactly what the California Commenters are demonstrating is the fatal flaw in how EPA has proceeded to regulate in this area.

Each of these Title II endangerment provisions requires a unique "significance" regulatory threshold determination that differs from the endangerment finding of Section 108. Indeed, none of the endangerment finding provisions spread across Titles I and II of the Act is identical with any other, and the differences between them show that Congress intended each to apply to the specific circumstances addressed in each distinct regulatory program established by the Act. *See Rodriguez*, 480 U.S. at 525 (where language is included in one sentence of a statute but excluded in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). An endangerment finding made under one section, for a particular purpose, cannot substitute for an endangerment finding made under another section for a different purpose.

EPA's proposed continuation, with amendments, of the 2015 Rule relies on the provisions of Section 111 as authorization for the regulation of carbon dioxide emissions from fossil fuel-fired sources, and would therefore be contrary to the structure of the Act, because Section 111 was meant to function as a supplement to the NAAQS program under Sections 108-110 and not as a substitute for it. *See generally* Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron Set the EPA Free?*, 29 Stan. Envtl. L.J. 283 (2010) (the structure of the Act makes EPA's effort to regulate carbon dioxide emissions outside of the NAAQS program impermissible); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (internal citations and quotation marks omitted). The California Commenters point to the interrelated nature of these issues as providing an appropriate basis for comment.

Accordingly, when EPA seeks to regulate an omnipresent air pollutant such as carbon dioxide, emitted from "numerous or diverse" sources, it must make any endangerment finding under the NAAQS program for criteria pollutants rather than under the Section 111 program governing emissions from specific categories of stationary sources. To hold otherwise would permit EPA to cherry-pick particular terms out of the Act to support actions inconsistent with the Act's structure. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) ("In expounding a statute, we must not be guided by a single sentence . . . but look to the provisions of the whole law, and to its object and policy.") (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)).

The specific language of Section 108 is clear. Emissions from "numerous or diverse" sources that endanger human health or welfare must be regulated as NAAQS criteria pollutants under Sections 108-110, and there is no ambiguity in the language. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If 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." *Chevron, U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 842-43 (1984). An agency interpretation that is inconsistent "with the design and structure of the statute as a whole" is illegitimate. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013). Title I authorizes EPA to institute controls over pollutants in the "ambient air" emitted by

"numerous or diverse" sources under the NAAQS program *only* when it follows the regulatory steps set forth in Sections 108-110. As a supplement to the NAAQS program, and not as a replacement for it, Congress authorized EPA to regulate air pollutants for specific categories of sources under the source performance standards of Section 111. *Train*, 545 F.2d at 327.

Accordingly, carbon dioxide emissions, which are emitted into the ambient air from numerous or diverse sources, were illegitimately regulated by the 2015 Rule under the source-specific performance standards of Section 111, rather than under the means Congress mandated under Sections 108-110. *See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994) (statutory meaning is based "not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes"); *Corley v. United States*, 556 U.S. 303, 314 (2009) (no statute should be read to render any part "inoperative or superfluous, void or insignificant") (citation omitted). EPA's proposed amendments continue to suffer from the same fundamental defect.

The Clean Air Act's legislative history only reinforces this analysis. For any valid version of the 2015 Rule, EPA must proceed under the NAAQS program with regard to "all those pollutant agents or combinations of agents which have, or can be expected to have, an adverse effect on health and welfare and which are emitted from widely distributed mobile or stationary sources." Legislative History, Clean Air Act Amendments, Vol. 1 at 454.

American Electric Power v. Connecticut, 564 U.S. 410 (2011) ("*AEP*") is not at odds with this analysis. In that case, the Supreme Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id.* at 424. The Court specifically found that the Clean Air Act displaces federal common law with regard to carbon dioxide emissions regardless of whether EPA actually regulates such emissions. *Id.* at 425-26. ("The plaintiffs argue . . . that federal common law is not displaced until EPA actually exercises its regulatory authority. . . . We disagree."). In *dicta*, the Court observed that, after making a *proper* endangerment finding under section 111(b) for carbon dioxide emissions from fossil-fuel fired power plants, EPA could then regulate new and existing sources of carbon dioxide from those plants. But here, as set forth in detail above, there was no proper endangerment finding with regard to carbon dioxide. And the precise issue of whether EPA could circumvent the requirements of Sections 108-110 of the Act for any air pollutant emitted into the ambient air from numerous or diverse sources was never addressed by the *AEP* Court, nor was it raised by the parties. Judicial decisions do not stand as binding precedent for points not raised, not argued, and hence not analyzed. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990); *Hagans v. Lavine*, 415 U.S. 528, 533, n.5 (1974); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *United States v. More*, 7 U.S. 159, 172 (1805).

Conclusion

To move forward in a way that is permissible under the Clean Air Act, EPA's proposed amended regulation must thoroughly address and overcome some of the same legal flaws leading to the promulgation of the 2015 Rule, as described in detail above. In sum, to the extent that emissions of carbon dioxide from new, modified, or reconstructed electric utility generating units are to be subjected by EPA to regulation under the Clean Air Act, the proper path would be to regulate such emissions as part of a broader effort to regulate carbon dioxide emissions from "numerous or diverse" sources under Sections 108-110 of the Clean Air Act. Alternatively, if EPA is adamant in engaging in the dubious path of regulating such emissions under Section 111(b), at the very least EPA must complete a specific endangerment finding for carbon dioxide emissions from such facilities under the applicable criteria set forth in Section 111(b), which EPA has failed to do to date. Either way, the proposed rule amendment is *ultra vires* of the Clean Air Act.

Respectfully submitted,

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