XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

Public: (510) 879-1300
Telephone: (510) 879-0987
Facsimile: (510) 622-2270
E-Mail: Timothy.Sullivan@doj.ca.gov

March 15, 2021

Via Electronic Delivery[1] and First Class Mail

Hon. Michael S. Regan
Administrator
Office of the Administrator
U.S. Environmental Protection Agency
Room 3000, WJC South Building
1200 Pennsylvania Ave. NW
Washington, DC 20460
Regan.Michael@epa.gov

RE: Petition for Reconsideration of "Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories," 86 Fed. Reg. 2,542 (Jan. 13, 2021)
Docket ID No. EPA–HQ–OAR–2013–0495

Dear Administrator Regan:

Please find attached a joint Petition for Reconsideration submitted on behalf of the States of California (by and through Attorney General Xavier Becerra and the California Air Resources Board), Connecticut, Delaware, Illinois, Maine, Maryland, the People of the State of Michigan, the States of Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the District of Columbia; Broward County; and the Cities of Boulder, Los Angeles,

[1] This Petition is submitted electronically where indicated in light of the COVID-19 pandemic and EPA's guidance with respect to hard copy submissions while Agency staff is teleworking. Notice Regarding "Hard Copy" Submissions to EPA During the COVID-19 National Emergency (May 12, 2020), https://www.epa.gov/aboutepa/notice-regarding-hard-copy-submissions-epa-during-covid-19-national-emergency.

New York, and South Miami with respect to the above-referenced action.

Sincerely,

/s/ Timothy E. Sullivan

TIMOTHY E. SULLIVAN
Supervising Deputy Attorney General

For XAVIER BECERRA
Attorney General

Attachment

cc: Christopher Werner
Sector Policies and Programs Division (D243–01)
Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency
Research Triangle Park, NC 27711
werner.christopher@epa.gov

Associate General Counsel for the Air and Radiation Law Office
Office of General Counsel (Mail Code 2344A)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

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BEFORE THE HONORABLE MICHAEL S. REGAN, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN RE PETITION FOR RECONSIDERATION OF POLLUTANT-SPECIFIC SIGNIFICANT CONTRIBUTION FINDING FOR GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED STATIONARY SOURCES: ELECTRIC UTILITY GENERATING UNITS, AND PROCESS FOR DETERMINING SIGNIFICANCE OF OTHER NEW SOURCE PERFORMANCE STANDARDS SOURCE CATEGORIES
86 FED. REG. 2,542 (JAN. 13, 2021).

Docket ID No. EPA–HQ–OAR–2013–0495

Submitted by:
The States of California (by and through Attorney General Xavier Becerra and the California Air Resources Board), Connecticut, Delaware, Illinois, Maine, Maryland, the People of the State of Michigan, the States of Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the District of Columbia; Broward County; and the Cities of Boulder, Los Angeles, New York, and South Miami

INTRODUCTION

On January 13, 2021, the U.S. Environmental Protection Agency ("EPA") published in the *Federal Register* a final action entitled "Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories" ("Final Rule"). 86 Fed. Reg. 2,542 (Jan. 13, 2021). In the Final Rule, EPA adopted a new and previously unannounced interpretation of section 111(b) of the Clean Air Act, 42 U.S.C. § 7411(b), under which EPA seeks to limit its ability to use section 111 to regulate emissions of greenhouse gases ("GHG") from stationary sources. Under this new legal interpretation, EPA deems the GHG emissions from any source category that emits less than three percent of total United States GHG emissions not to "contribute significantly" to air pollution that may reasonably be anticipated to endanger public health or welfare, thereby rendering EPA unable to regulate those emissions under section 111. Despite the clear danger posed by climate change, EPA's new interpretation would permit the agency to regulate only one source category under section 111: fossil-fueled power plants. EPA's new, artificially constrained interpretation of its own authority in the Final Rule would prevent EPA from using section 111 to regulate GHG emissions from source categories that are responsible for more than half of all U.S. GHG emissions from stationary sources.

Pursuant to Clean Air Act Section 307(b), and for the reasons set forth below, the States of California (by and through Attorney General Xavier Becerra and the California Air Resources Board), Connecticut, Delaware, Illinois, Maine, Maryland, the People of the State of Michigan, the States of Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Massachusetts, Pennsylvania, and

Virginia; the District of Columbia; Broward County; and the Cities of Boulder, Los Angeles, New York, and South Miami (collectively, "States and Municipalities") hereby petition EPA for reconsideration of its Final Rule.

EPA failed to provide the public with notice and an opportunity to comment on its new concept of employing a "natural breakpoint" to justify setting a threshold of significance under section 111 and its new determination that three percent of total U.S. emissions is an appropriate threshold. *See* 86 Fed. Reg. at 2,552. There was no description of such a concept or threshold in the proposed rule. *See* Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 83 Fed. Reg. 65,424 (Dec. 20, 2018) ("Proposed Rule"). This rulemaking thus violated section 307(d)(3)(C) of the Clean Air Act, 42 U.S.C. § 7607(d)(3)(C), which requires EPA to publish in its notice of proposed rulemaking a "statement of basis and purpose" that includes "the major legal interpretations and policy considerations underlying the Proposed Rule." EPA also failed to provide in the Proposed Rule a reasoned explanation for reversing its previous legal position that it need not make a "pollutant-specific significant contribution finding" prior to promulgating a new source performance standard pursuant to section 111(b) of the Clean Air Act when that source category had already been regulated under that section, nor did it propose reversing that position. The public was thus deprived of an opportunity to comment on any such explanation.[1]

[1] The States and Municipalities intend to raise some, if not all, of these procedural and substantive flaws in litigation pursuant to their recently filed petition for review (*California v. EPA*, D.C. Cir. Case No. 21-1035). The States and Municipalities do not concede that any of the issues discussed in this petition for reconsideration require exhaustion or have not been exhausted. To the extent EPA believes the issues discussed in this petition for reconsideration have not been exhausted, EPA should immediately grant this petition to avoid unnecessarily wasting judicial and party resources, as the issues are "of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). Out of an abundance of caution, the States and Municipalities

Reopening the proceedings for reconsideration of these issues would provide the appropriate opportunity to comment on these changes to EPA's prior interpretations of section 111. These issues are consequential on their own, and collectively they require reconsideration and withdrawal of EPA's Final Rule. Reopening the proceedings thus would facilitate a fully informed decision by EPA.

BACKGROUND AND PROCEDURAL HISTORY

On December 20, 2018, EPA published the Proposed Rule. The stated purpose of the Proposed Rule was to replace the GHG standards of performance for fossil-fueled power plants that it had issued in 2015. 80 Fed. Reg. 64,510 (Oct. 23, 2015). EPA had correctly determined in the 2015 rulemaking that it had legal authority to regulate GHG emissions from fossil-fueled power plants under section 111(b)(1)(B). *See id.* at 64,530 ("In this rulemaking, the EPA has a rational basis for concluding that emissions of CO_2 from fossil fuel-fired power plants, which are the major U.S. source of GHG air pollution, merit regulation under CAA section 111."). EPA had also determined in 2015 that the facts in the record were sufficient to support findings under section 111(b)(1)(A) that GHG emissions from this source category significantly contributed to dangerous air pollution, to the extent that such findings were necessary. *Id.* at 64,530-31.

EPA stated in the Proposed Rule that it was not changing its legal interpretation of its authority to regulate emissions from source categories under section 111(b) that were already regulated under that section. After summarizing the legal justifications it relied on in the 2015 rulemaking to regulate GHG emissions from these sources, EPA reaffirmed that it was "proposing to retain the statutory interpretations and record determinations" supporting its authority to promulgate the 2015 standards of performance. 83 Fed. Reg. at 65,432 & n.25.

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protectively submit this petition for reconsideration to bring these issues to EPA's attention before proceeding to brief the merits of its petition for review.

Nevertheless, in a single footnote EPA invited comment on whether, in fact, it lacked the authority to regulate GHG emissions from coal-fired power plants, the very thing it was proposing to continue doing in the proposal. That footnote did not propose—nor even mention—that EPA could require a numerical threshold for a "contributes significantly" finding, establish that threshold through a "natural breakpoint" theory, or set that threshold at three (or any other) percent of total U.S. GHG emissions. *See id.*

More than two years after issuing the Proposed Rule, EPA published a final rule that dramatically departed from the proposal. Instead of revising the 2015 New Source Performance Standards as it had proposed in 2018, the Final Rule did not address those standards at all and left them untouched. But although EPA reaffirmed its 2015 finding under section 111(b)(1)(A) that fossil-fueled power plants contributed significantly to dangerous air pollution, in the Final Rule EPA issued new legal interpretations of its authority under section 111 that were not even mentioned in the Proposed Rule and were contrary to its previous interpretations. Specifically, EPA declared in the Final Rule that before issuing GHG performance standards for any source category (including one already regulated under section 111), it must determine that GHG emissions from those sources contribute significantly to dangerous air pollution, and, in making that determination, EPA must deem emissions that constitute less than three percent of all U.S. GHG emissions not to be significant. The result is that EPA has prevented itself from regulating GHG emissions from all source categories other than fossil-fueled power plants. Further, to settle upon this new three-percent threshold, EPA used a theory it had never before even mentioned and still fails to justify: that a threshold should be set where EPA felt it saw a "natural breakpoint" among sources.

Six days after EPA published the Final Rule setting out for the first time a mandatory numerical threshold to be used for determining when a source category contributes significantly to dangerous air pollution, the D.C. Circuit Court of Appeals upheld EPA's 2015 finding that fossil-fueled power plant GHG emissions contributed significantly to dangerous air pollution and were subject to control under section 111—a finding EPA made without considering any numerical threshold. The court rejected claims of petitioners in that case that "contributes significantly" in section 111(b)(1)(A) must always "be measured by a 'simple percentage criterion' or another metric," concluding that nothing in the Clean Air Act or precedent mandated such a determination. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 977 (D.C. Cir. 2021).

The States and Municipalities filed a timely petition for review of the Final Rule in the D.C. Circuit on January 19, 2021 (*California v. EPA*, D.C. Cir. Case No. 21-1035).

LEGAL STANDARD

EPA must convene a reconsideration proceeding if a person raising an objection shows that (1) it was "impracticable" to raise the objection during the public comment period, or grounds for the objection arose after the public comment period; and (2) the objection "is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). Impracticability turns on whether the notice of proposed rulemaking provided "adequate notice" of the final rule. *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2018). An objection is "of central relevance" if it provides "substantial support for the argument that the regulation should be revised." *Chesapeake Climate Action Network v. EPA*, 952 F.3d 310, 322 (D.C. Circ. 2020).

ARGUMENT

I. IT WAS IMPRACTICABLE FOR THE STATES AND MUNICIPALITIES TO RAISE OBJECTIONS TO EPA'S NEW LEGAL INTERPRETATIONS BECAUSE EPA FAILED TO PROVIDE ADEQUATE NOTICE OF THEM IN THE PROPOSED RULE, IN VIOLATION OF THE CLEAN AIR ACT.

EPA impermissibly adopted new statutory interpretations of the requirements of Clean Air Act section 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A), for the first time in the Final Rule. Specifically, without providing notice, EPA (1) reversed its previous interpretation that it need not make a new "contributes significantly" finding before regulating pollutants from a source category already regulated under section 111, (2) determined it must establish a numerical threshold as a prerequisite for a "contributes significantly" finding for GHG emissions, (3) employed a "natural breakpoint" principle to ascertain that threshold, and (4) found that the threshold must be three percent of total U.S. GHG emissions.

Section 307(d)(3) of the Clean Air Act, 42 U.S.C. § 7607(d)(3), requires EPA to issue a specific notice of a "proposed rule" as a focal point for public comments, which "shall be accompanied by a statement of its basis and purpose" that includes "the major legal interpretations and policy considerations underlying the proposed rule." The Proposed Rule, however, did not propose or discuss the legal positions EPA adopts for the first time in the Final Rule, nor did it provide any basis for developing a numerical significance threshold. At most, in a single footnote, the Proposed Rule solicited comments on the general concept of whether EPA should consider various approaches to regulating sources under section 111(b) other than what it was therein proposing. Contrary to EPA's passing reference to that footnote in the Final Rule,[2]

[2] *See* 86 Fed. Reg. at 2,550 ("While EPA proposed to retain the position that it stated in the 2015 Rule that a pollutant-specific significant contribution finding is not required, it solicited comment on whether such a finding is required, and that comment solicitation provided adequate notice.").

the public did not receive notice of nor opportunity to comment on EPA's new legal interpretations.

In *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005), the D.C. Circuit rejected a similar attempt by EPA to finalize what it had not even proposed. There, EPA proposed to codify its interpretation of the rules through an amendment of regulatory text, but wound up adopting a conflicting interpretation in the final action. In finding that EPA violated the Administrative Procedure Act, the court observed that "[w]hatever a 'logical outgrowth' of this proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse." *Id.* at 998. The court explained that mentioning in the proposal the converse of the Agency's proposed position—as EPA did in footnote 25 of the Proposed Rule—does not satisfy basic administrative rulemaking requirements:

> EPA argues that it met its notice-and-comment obligations because its final interpretation was also mentioned (albeit negatively) in the Agency's proposal. However, this argument proves too much. If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration. A contrary rule would allow an agency to reject innumerable alternatives in its Notice of Proposed Rulemaking only to justify any final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy "notice." Such an exercise in "looking over a crowd and picking out your friends," does not advise interested parties how to direct their comments and does not comprise adequate notice . . . .

Id. at 998 (citations omitted); *see also See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("EPA must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment."); *id.* at 523 ("At a minimum, failure to observe the basic APA procedures, if reversible error under the APA, is reversible error under the Clean Air Act as well."); *Shell Oil Co. v. EPA*, 950 F.2d 741, 760 (D.C. Cir. 1991) ("[W]hen a final rule bears little resemblance to the one proposed, the parties are deprived of

their [Administrative Procedure Act] rights to notice and comment.").

Because EPA did not include its new interpretations in the Proposed Rule, it was impracticable for the public to comment on EPA's new positions. *See Chesapeake Climate Action Network*, 952 F.3d at 320 (explaining that because nothing in the proposed rule indicated EPA would set standards based on certain criteria, the final rule's reliance on the criteria was not a logical outgrowth of the proposal, and "[t]hus, it was impracticable for Petitioners to have raised this challenge during the comment period").

II. IT WAS IMPRACTICABLE FOR THE STATES AND MUNICIPALITIES TO RAISE OBJECTIONS TO THE FACTUAL AND METHODOLOGICAL BASES OF THE FINAL RULE BECAUSE EPA FAILED TO PROVIDE NOTICE OF THEM IN THE PROPOSED RULE, IN VIOLATION OF THE CLEAN AIR ACT.

Clean Air Act section 307 mandates that, in a proposed rule itself, EPA must provide the public with the "factual data on which the proposed rule is based," and "the methodology used in obtaining the data and in analyzing the data." 42 U.S.C. § 7607(d)(3). Section 307 also mandates that "[a]ll data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule." *Id.*

Notice and comment rulemaking requires an agency to disclose the bases for its proposed regulations, and "serves three distinct purposes." *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547. These include "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 938 (D.C. Cir. 2007); *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 442 (D.C. Cir. 2018). The public can only meaningfully analyze and comment on a proposed rule if it has sufficient access to the data supporting the proposed rule. *See Prometheus Radio Project v. FCC*,

652 F.3d 431, 450 (3d Cir. 2011). Congress enacted section 307(d) of the Clean Air Act to provide for even more rigorous requirements than under the Administrative Procedure Act to ensure that the public and regulated community will have an adequate basis on which to comment on EPA proposals. *See*, *e.g.*, *Schiller v. Tower Semiconductor, Ltd.*, 449 F.3d 286, 300 n.14 (2d Cir. 2006).

EPA did not even mention in the Proposed Rule the concept of basing a significance threshold on a "natural breakpoint," provide any rationale for a "natural breakpoint" principle, nor discuss what data or methodology would be used to determine where an appropriate "natural breakpoint" is located. EPA did not propose that significance under section 111(b)(1)(A) would be determined based on whether the source category's GHG emissions were above or below three percent of the U.S. total and did not supply any data nor propose any methodology to support the three-percent threshold as being related to the requirements of the statute. EPA's failure to propose or supply data or methodologies supporting its new positions render this rulemaking illegal under the Clean Air Act.

Similarly, a final rule must not be based in part or in whole on information or data that had not been placed in the rulemaking docket as of the time it is published. 42 U.S.C. § 7607(d)(6)(C). The rulemaking docket here does not include information or data analyzing the "natural breakpoint" theory nor the three-percent threshold. Instead, EPA offered only circular conclusions such as, in comparison to a 1.5-percent breakpoint, "EPA determined that 3 percent of the U.S. GHG emissions was the best threshold," and "EPA is determining that a threshold in the form of a percentage is both reasonable and more appropriate for making the significance determination in this rule based on a percent's relative nature." 86 Fed. Reg. at 2,553. It appears from the absence of supporting analysis in the rulemaking docket that EPA simply invented these

concepts immediately prior to finalizing the rule, choosing a percentage threshold just high enough to exclude the oil and natural gas source category from regulation.

As stated previously, EPA's failure to even mention, let alone actually explain in the Proposed Rule, the "natural breakpoint" principle and the three-percent threshold mean that the Final Rule is not a logical outgrowth of the proposal, and it was impracticable for the States and Municipalities to raise these objections during the comment period. EPA must, at a minimum, convene a reconsideration proceeding to accept comments on its new determinations.

III. THE OBJECTIONS OF THE STATES AND MUNICIPALITIES ARE OF CENTRAL RELEVANCE TO THE OUTCOME OF THE FINAL RULE.

The objections of the States and Municipalities are of central relevance to this rulemaking because they provide substantial support for the argument that the Final Rule should be revised.

First, as described above, EPA failed to comply with the notice-and-comment requirements of the Clean Air Act in issuing its new legal interpretations and in implementing its arbitrary three-percent threshold for regulating GHG emissions. These improperly noticed new positions are of central relevance to the Final Rule's adoption because, given that EPA left the 2015 fossil-fueled power plant performance standards unchanged, they are in fact the only operative provisions of the Final Rule. The Final Rule does not merely *contain* elements for which the agency failed to provide adequate notice and opportunity for comment—the entire basis and findings in the Final Rule lacked notice. Thus, if those new legal interpretations and findings for which EPA failed to comply with the Clean Air Act's rulemaking requirements were stripped out, there would be no Final Rule remaining.

Second, EPA fails to provide a reasoned basis for its decision to apply a numerical significance threshold to GHG emissions only, thereby carving out a new, atextual exception to its authority under section 111 of the Clean Air Act. In the past five decades, EPA routinely

applied the language of section 111(b)(1)(A) on a case-by-case basis to the factual circumstances of specific source categories to determine which sources and pollutants could be regulated; it never suggested that it could not carry out its obligations without first developing and then applying a numerical threshold to constrain its judgment. *See Am. Lung Ass'n v. EPA*, 985 F.3d at 977 (upholding section 111(b) significance finding for GHG emissions that was not based on numerical threshold). In the Final Rule, however, EPA needlessly creates a barrier to regulation of GHG emissions by interpreting the Clean Air Act to require the agency to set a numerical threshold for regulating GHG emissions, but not any other air pollutants. There are no differences between GHG and other air pollutants that would require EPA to create an exception to its previous position that no such numerical threshold is required. Adopting an arbitrary numerical cut-off would be especially unwarranted where EPA already found GHG emissions to endanger public health and welfare, findings EPA has never rejected. *See*, *e.g.*, 81 Fed. Reg. 35,763, 35,839-41 (June 3, 2016) (methane emissions from oil and gas sources); 80 Fed. Reg. at 64,530-31 (carbon dioxide emissions from fossil-fueled power plants).

Third, EPA provides no scientific, statistical, or statutory basis for employing a "natural breakpoint" principle to circumscribe its Clean Air Act authority. EPA derives its new three-percent threshold entirely from what it contends is a "natural breakpoint" among source category emissions, but it never explains how it determined what a "natural breakpoint" is. The rulemaking docket does not reflect any analysis by EPA of how a "natural breakpoint" is to be determined either in general or with respect to source category GHG emissions data, nor does it include any analysis of why it is permissible or useful to employ such a "natural breakpoint" in this manner once it is determined.

Fourth, setting a numerical threshold so high that EPA cannot use section 111 to regulate GHG emissions from any source category except one is not supported by the U.S. Supreme Court's interpretation of the Clean Air Act. In *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), the Court held that GHG meet the definition of "air pollutant" under the Clean Air Act, and it premised its decision in *American Electric Power v. Connecticut*, 564 U.S. 410, 424 (2011), on its view that section 111 applies to GHG emissions. *See id.* at 426-27 (Clean Air Act "directs EPA to establish emissions standards for categories of stationary sources" where pollution from those sources endangers public health or welfare). There is no reason to construe Congress's mandate in section 111(b)(1)(B) that EPA "shall" regulate sources that contribute significantly to dangerous air pollutants to mean that EPA can limit its responsibility by creating a numerical threshold that renders every source category but one beyond the scope of that section. Instead, it is normal and proper for EPA to ground its determinations on the language of the Clean Air Act instead of on extra-statutory benchmarks. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 122-23 (D.C. Cir. 2012) (rejecting claim that EPA must establish threshold of risk or harm before determining whether air pollutant endangers public health or welfare), *aff'd & rev'd in part on other grounds*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014).

Finally, EPA must take into consideration how the new three-percent threshold in the Final Rule affects its ability to regulate GHG emissions from source categories that EPA says are now beyond its reach. For example, the oil and natural gas source category, which EPA says is just under the three-percent threshold it arbitrarily created, is the largest industrial emitter of methane in the United States. 85 Fed. Reg. at 57,021-22. In 2018, existing oil and natural gas sources emitted 163 million tons of methane in terms of carbon-dioxide equivalent. *Id.* at 57,022. Methane is a potent greenhouse gas that, pound for pound, warms the earth 84 to 86 times more

than an equivalent amount of carbon dioxide for the first two decades after release. "Methane . . . contributes to warming of the atmosphere, which, over time, leads to increased air and ocean temperatures, changes in precipitation patterns, melting and thawing of global glaciers and ice, increasingly severe weather events, such as hurricanes of greater intensity and sea level rise." 77 Fed. Reg. 49,490, 49,535 (Aug. 16, 2012). EPA fails to analyze how depriving itself of section 111 authority over this and other source categories interferes with its ability to protect the public from air pollution that "endanger[s] public health or welfare." *See Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021) (holding that where EPA "ignored the environmental and public health effects of" delaying GHG regulation through a rule implementing section 111(d), it failed to consider an important aspect of the problem, "indeed, arguably the most important aspect," warranting vacatur of the rule). Furthermore, EPA's determination in the Final Rule that it lacks authority under section 111 to regulate GHG emissions from any source category other than fossil-fueled power plants is contrary to the 2010 Settlement Agreement between EPA and many of the States and Municipalities in which EPA agreed to issue a proposed rule pursuant to section 111(b) to control GHG emissions from the petroleum refinery source category. EPA has repeatedly represented that it is continuing to determine how to comply with that Settlement Agreement. *See*, *e.g.*, Status Report, *New York v. EPA*, No. 08-1279 (D.C. Cir. Jan. 26, 2021), ECF No. #1881958. EPA must reconsider the Final Rule to analyze the effect the three-percent numerical threshold first adopted in the Final Rule will have on GHG emissions from source categories other than fossil-fueled power plants.

RELIEF REQUESTED

For the foregoing reasons, the States and Municipalities respectfully request that the Administrator withdraw the Final Rule, immediately convene a proceeding for reconsideration of

the Final Rule under Clean Air Act section 307(d)(7)(B), and afford the interested public the procedural rights due them under section 307(d)(3) through (5).

Dated: March 15, 2021

Respectfully Submitted,

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California
ROBERT BYRNE
DAVID A. ZONANA (Acting)
Senior Assistant Attorneys General
GARY E. TAVETIAN
Supervising Deputy Attorney General
JONATHAN A. WIENER
M. ELAINE MECKENSTOCK
ELIZABETH B. RUMSEY
THEODORE A.B. MCCOMBS
Deputy Attorneys General

/s/ Timothy E. Sullivan
TIMOTHY E. SULLIVAN
Supervising Deputy Attorney General
1515 Clay St., 20th Floor
Oakland, CA 94602
(510) 879-0987
timothy.sullivan@doj.ca.gov

Attorneys for Petitioner State of California, by and through its Attorney General Xavier Becerra and the California Air Resources Board

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General
MATTHEW I. LEVINE
Deputy Associate Attorney General

/s/ Scott N. Koschwitz
SCOTT N. KOSCHWITZ
Assistant Attorneys General
165 Capitol Avenue
Hartford, CT 06106
(860) 808-5250
Matthew.Levine@ct.gov
Scott.Koschwitz@ct.gov

Attorneys for Petitioner State of Connecticut

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General

/s/ Christian Douglas Wright
CHRISTIAN DOUGLAS WRIGHT
Director of Impact Litigation
RALPH K. DURSTEIN III
VALERIE S. EDGE
JAMESON TWEEDIE
Deputy Attorneys General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8600
Christian.Wright@delaware.gov
Ralph.Durstein@delaware.gov
Valerie.Edge@delaware.gov
Jameson.Tweedie@delaware.gov

Attorneys for Petitioner State of Delaware

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General

/s/ Daniel I. Rottenberg
MATTHEW J. DUNN
Chief, Environmental Enforcement/
Asbestos Litigation Division
DANIEL I. ROTTENBERG
Assistant Attorney General
Office of the Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-3816
drottenberg@atg.state.il.us

Attorneys for Petitioner State of Illinois

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General

/s/ Laura E. Jensen
LAURA E. JENSEN
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333
(207) 626-8868
Laura.Jensen@maine.gov

Attorneys for Petitioner State of Maine

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General

/s/ John B. Howard, Jr.
JOHN B. HOWARD, JR.
Special Assistant Attorney General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6970
jbhoward@oag.state.md.us

Attorneys for Petitioner State of Maryland

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General

/s/ Megan M. Herzog
CHRISTOPHE COURCHESNE
Assistant Attorney General and Deputy Chief
MEGAN M. HERZOG
DAVID S. FRANKEL
Special Assistant Attorneys General
Energy and Environment Bureau
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
megan.herzog@mass.gov

Attorneys for Petitioner Commonwealth of Massachusetts

FOR THE PEOPLE OF THE STATE OF MICHIGAN

DANA NESSEL
Attorney General

/s/ Gillian E. Wener
GILLIAN E. WENER
Assistant Attorney General
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
wenerg@michigan.gov

Attorneys for Petitioner People of the State of Michigan

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota

/s/ Peter Surdo
PETER SURDO
Special Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 757-1061
peter.surdo@ag.state.mn.us

Attorneys for Petitioner State of Minnesota

FOR THE STATE OF NEVADA

AARON D. FORD
Attorney General

/s/ Heidi Parry Stern
HEIDI PARRY STERN
Solicitor General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3420

Attorneys for Petitioner the State of Nevada

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

/s/ Robert F. Lundin
ROBERT F. LUNDIN
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 303-1790
rlundin@nmag.gov

Attorneys for Petitioner State of New Mexico

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General

/s/ Michael J. Myers
MICHAEL J. MYERS
Senior Counsel
ANDREW G. FRANK
Assistant Attorney General
Environmental Protection Bureau
Office of the Attorney General
The Capitol
Albany, NY 12224
(518) 776-2392
michael.myers@ag.ny.gov

Attorneys for Petitioner State of New York

FOR THE STATE OF NORTH CAROLINA

JOSHUA H. STEIN
Attorney General
DANIEL S. HIRSCHMAN
Senior Deputy Attorney General

/s/ Asher P. Spiller
ASHER P. SPILLER
TAYLOR H. CRABTREE
Assistant Attorneys General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 716-6600
aspiller@ncdoj.gov
tcrabtree@ncdoj.gov

Attorneys for Petitioner State of North Carolina

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

/s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593
Paul.Garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

Attorneys for Petitioner State of Oregon

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General
MICHAEL J. FISCHER
Chief Deputy Attorney General

/s/ Ann R. Johnston
ANN R. JOHNSTON
Senior Deputy Attorney General
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(717) 857-2091
ajohnston@attorneygeneral.gov

Attorneys for Petitioner Commonwealth of Pennsylvania

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General

/s/ Alison B. Hoffman
ALISON B. HOFFMAN
Special Assistant Attorney General
Rhode Island Office of the Attorney General
150 South Main Street
Providence, RI 02903
Phone: (401) 274-4400 ext 2116
AHoffman@riag.ri.gov

Attorneys for Petitioner State of Rhode Island

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

/s/ Nicholas F. Persampieri
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3171
nick.persampieri@vermont.gov

Attorneys for Petitioner State of Vermont

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
Attorney General

/s/ Paul Kugelman, Jr.
PAUL KUGELMAN, JR.
Senior Assistant Attorney General
Chief, Environmental Section
Office of the Attorney General
Commonwealth of Virginia
202 North 9th Street
Richmond, VA 23219
(804) 786-3811
pkugelman@oag.state.va.us

Attorneys for Petitioner Commonwealth of Virginia

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

/s/ Christopher H. Reitz
CHRISTOPHER H. REITZ
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504
(360) 586-4614
chris.reitz@atg.wa.gov

Attorneys for Petitioner State of Washington

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General

/s/ Loren L. AliKhan
LOREN L. ALIKHAN
Solicitor General
Office of the Attorney General
400 Sixth Street, NW, Suite 8100
Washington, D.C. 20001
(202) 727-6287
Loren.AliKhan@dc.gov

Attorneys for Petitioner District of Columbia

FOR BROWARD COUNTY

ANDREW J. MEYERS
County Attorney

/s/ Michael C. Owens
MICHAEL C. OWENS
Senior Assistant County Attorney
Broward County Attorney's Office
115 S. Andrews Avenue, Room 423
Fort Lauderdale, FL 33301
(954) 357-7600
mowens@broward.org

Attorneys for Broward County

FOR THE CITY OF BOULDER

TOM CARR
City Attorney

/s/ Luis A. Toro
LUIS A. TORO
Senior Assistant City Attorney
City Attorney's Office
1777 Broadway, Second Floor
Boulder, CO 80302
(303) 441-3020
ToroL@bouldercolorado.gov

Attorneys for Petitioner City of Boulder

FOR THE CITY OF LOS ANGELES

MICHAEL N. FEURER
City Attorney

/s/ Michael J. Bostrom
MICHAEL J. BOSTROM
Assistant City Attorney
Los Angeles City Attorney's Office
200 N. Spring St., 14th Floor
Los Angeles, CA 90012
(213) 978-1867
michael.bostrom@lacity.org

Attorneys for Petitioner City of Los Angeles

FOR THE CITY OF NEW YORK

JAMES E. JOHNSON
Corporation Counsel

/s/ Christopher G. King
CHRISTOPHER G. KING
Senior Counsel
SHIVA PRAKASH
Assistant Corporation Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2074
cking@law.nyc.gov

Attorneys for Petitioner City of New York

FOR THE CITY OF SOUTH MIAMI

THOMAS F. PEPE
City Attorney

/s/ Thomas F. Pepe
City of South Miami
1450 Madruga Avenue, Ste 311
Coral Gables, Florida 33146
(305) 667-2564
tpepe@southmiamifl.gov

Attorneys for Petitioner City of South Miami