Environmental Protection Network

(202) 656-6229
environmentalprotectionnetwork.org
info@environmentalprotectionnetwork.org

EPN Comments on EPA's Proposed Repeal of
Greenhouse Gas Standards for Electric Generating Units
Docket No.: EPA-HQ-OAR-2025-0124
August 7, 2025

The Environmental Protection Network (EPN) harnesses the expertise of more than 700 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

EPN appreciates the opportunity to comment on EPA's proposal, Repeal of Greenhouse Gas (GHG) Emissions Standards for Fossil Fuel-Fired Electric Generating Units. The proposed rulemaking suggests that the Clean Air Act (CAA) requires EPA to make a finding that GHG emissions from fossil fuel-fired power plants contribute significantly to dangerous air pollution before those emissions can be regulated. EPA is also proposing a finding that GHG emissions from fossil fuel-fired power plants do not contribute significantly to dangerous air pollution. In addition and as an alternative, EPA proposes the repeal of a narrower set of requirements that includes the emission guidelines for existing fossil fuel-fired steam generating units, the carbon capture and sequestration/storage (CCS)-based standards for coal-fired steam generating units undertaking a large modification, and the CCS-based standards for new base load stationary combustion turbines, all of which are part of the agency's Carbon Pollution Standards (CPS) promulgated in 2024.

Overview of Major Comments

Potential Harm to Public Health

There are huge public health benefits to the existing CPS. While not relevant to an endangerment finding, the public health benefits of the existing regulations to the public dwarf the special-interest benefits of repealing air pollution controls. The benefit-cost analysis presented in the preamble focuses only on the compliance cost savings (Table 1 and the Regulatory Impact Assessment (RIA) Table 1-1). Additional consideration of the public health benefits (see RIA Table 6-2) shows large negative net benefits. For example, the particulate matter (PM) 2.5- and ozone-related health benefits in terms of Present Value are -$130 billion (2024 dollars, 3% discount rate) and -$76 billion (2024 dollars, 7% discount rate).[1] This huge disbenefit overwhelms the compliance cost savings of $19 billion (3% discount rate) and $9.6 billion (7% discount rate). The disbenefit would be even larger if foregone climate benefits were considered. EPA's proposed repeal of the GHG emissions standards, in part to address Executive Order 14241, is thus calculated to adversely impact public health. It is clear that this proposed action does not, as claimed, "promote the public health or welfare through energy dominance and independence secured by using fossil fuels to generate power."[2]

[1] The foregone health benefits, according to EPA's RIA for the 2024 Carbon Pollution Standards, include 1,200 avoided premature deaths, 870 avoided hospital and emergency room visits, 1,900 avoided cases of asthma onset, and 360,000 avoided cases of asthma symptoms.
[2] 90 FR at 25755.

Furthermore, it is concerning that the agency has not adequately addressed Executive Order 13045 ("Protection of Children From Environmental Health Risks and Safety Risks"). The preamble clearly notes that environmental health or safety risks from the proposed action has a disproportionate effect on children. It further admits that the proposal will result in an increase in pollution which endangers children's health compared to the prior standards. As such, the proposal fails to evaluate the effects of the planned regulation on children and fails to explain why the regulation is preferable to potentially effective and reasonably feasible alternatives.

Significant Harm to Economic Growth

The labor impacts presented in section 5.4 of the RIA indicate the potential for significant job losses resulting from the proposed rule. The RIA cites the reduction in the number of construction-related jobs related to: (1) the installation of new pollution control equipment; (2) constructed new capacity; and (3) constructed battery storage systems. These job losses are estimated to exceed the potential increase in non-construction jobs.[3] While EPA has tried to dismiss its analysis, citing the "significant challenges when trying to evaluate the employment effects from the repeal of an environmental regulation," the calculations certainly indicate the potential for this proposed action to be a major job killer. EPA needs to provide a better explanation of those supposed "significant challenges" and improve its analysis. The agency cannot claim that the rule promotes public health and welfare when it results in increased death and disease and results in fewer jobs for the public.

Flawed Statutory Interpretations

A new endangerment finding is not required here. EPA's proposed interpretation is starkly at odds with the clear meaning of the statute, and with the statutory structure. The best interpretation of significant contribution in CAA section 111 is that contribution involves the relationship between the category's emissions and the level of the air pollution. Significance of the contribution involves characteristics that relate to contribution. Significance does not relate to characteristics of the nature of the endangerment or the kind or impact of standards that would be set if the threshold determination on authority to control emissions is made. Furthermore, as discussed further in the body of our comments, EPA's proposal ignores the clearly established statutory two step process of 1) determining whether a category of sources causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare; and 2) determining an appropriate regulation based on the criteria established in section 111. EPA's proposed interpretation is inconsistent with the text and context of the statute, inconsistent with EPA's past practice over many decades, and the proposal's approach has been rejected in the case law.

The facts are clear - fossil fuel electric generating units (EGUs) are significant contributors to GHG air pollution. Even if EPA's proposed determination were valid, this does not authorize EPA to cancel the current GHG standards. The current standards were lawfully adopted under a valid finding of significant contribution. EPA's proposed negative determination is not a valid basis for EPA to cancel the lawful, pre-existing GHG standards.

Lack of Factual Support for the Proposal's Rationale

In addition to being legally flawed, EPA's proposal is arbitrary and capricious because it is based on statements that are unsupported by evidence. The proposal provides no evidence to support its various

[3] The RIA notes also the analysis did not include the employment losses likely to result from the decrease in development and construction of new transmission and distribution capacity due to the proposed action.

assertions that it uses as the policy basis for this action. There is no evidence to show that this action would promote public health or welfare through energy dominance and independence secured by using fossil fuels to generate power. It claims without evidence that the "attenuated chain of causation" is such that EPA cannot link the reduction in GHG emissions to benefits. In fact, EPA has done just that for over a decade including during the first Trump Administration, as has other governments and organizations. The proposal claims that since 90% CCS is too difficult for sources to achieve, no reductions are reasonably achievable despite the fact that the proposal includes examples of successful CCS projects. In all of these cases, EPN requests the chance to comment on any additional data and options EPA comes up with to support these and other points in the proposal.

Increased Regulatory Uncertainty

One of the goals of the proposed rule is to "resolve a decade's worth of regulatory uncertainty brought on by the Agency's novel attempts to regulate GHG emissions from fossil fuel-fired power plants under Clean Air Act (CAA) section 111." Regulatory stability is a desirable outcome. However, the proposal fails in this effort. Rather than working within the regulatory structures created by the Clean Power Plan, the Affordable Clean Energy Plan, and the Carbon Pollution Standards (CPS), this administration has chosen an even more radical departure and path — no regulation. EPA's proposal would create instability by choosing a path clearly counter to statute and case law. This reality is noted even by the regulated community. Note American Electric Power's statements to EPA that "American Electric Power still believes the advancement of carbon capture and sequestration (CCS) is critical for the sustainability of coal-fired generation."[4] Far from being punitive or a source of uncertainty, regulatory standards resulting in secure management of otherwise-emitted CO_2 are a lifeline to the industry, preserving a place for coal-fired generation in a lower carbon world.

I. EPA is not required to make a substantial contribution/endangerment finding for GHGs [or any other pollutant added after initial source category listing] under Section 111.

EPA proposes that CAA section 111(b) requires a new cause or contribute finding each time EPA regulates an additional air pollutant from a source category already listed under CAA section 111(b)(1). The agency thus maintains that EPA's action in 2015 combining listed categories was a listing of a new category for regulation of GHGs[5] and could be justified only if GHG emissions from the category cause or contribute to the air pollution which endangers. Applying this asserted principle generally, the agency proposes that "to interpret CAA Section 111 as requiring the EPA to determine that emissions of an air pollutant from an existing source category significantly contribute to dangerous air pollution before imposing standards of performance for that air pollutant on the relevant source categories."[6] In the alternative, the agency seeks comment on an alternative that would allow EPA to adopt this approach as within its authorized discretion.

As a "best reading" of the statute, EPA is not mandated to make pollutant-by-pollutant cause or contribute findings. That approach is potentially atextual and also runs counter to the standard principle of statutory construction that Congress, in the CAA, knew how to specify pollutant-by-pollutant threshold listing determinations and didn't do so in section 111(b)1.

[4] 80 FR at 64572.
[5] 90 FR at 25762.
[6] 90 FR at 25763.

The agency also proposes as an alternative that it can adopt its approach as a matter of discretion (the administrator's "judgment" referred to in CAA section 111(b)(1)(A)).[7] The proposal is worded inartfully, such that it is unclear if the agency is referring to taking discretionary action which would not be binding on any future administrator, or if it means that this is the only way its "judgment" can be exercised. If the latter, then this is just the original proposal slightly repackaged, and illegal for the same reasons. If the former — a genuinely discretionary determination stating only what this administrator plans to do — the agency should state so directly.

A. Not a New Listing.

No sources are added to the universe of regulated sources as a result of the 2015 action combining fossil fuel steam generating units (listed in 1971) and fossil fuel combustion turbines (listed in 1979).[8]

B. Pollutant-by-Pollutant Threshold Determinations are not Mandated.

1. "The Administrator shall, within 90 days from, December 31, 1970, publish (and from time to time …revise) a list of *categories of stationary sources.* He shall include *a category of sources* in such list if, in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA section 111(b)(1)(A) (emphasis supplied)

A "category" is simply not an air pollutant. "Air pollutant" is a defined term: "any air pollution agent or combination of such agents … substance or matter which is emitted into or otherwise enters the ambient air."[9] A "category" is not defined in the Act, but is certainly not something which is emitted into the ambient air. A standard dictionary definition is "a class of things having a shared characteristic." Indeed, through decades of CAA regulatory actions EPA has consistently interpreted "category" to be a group of sources with common characteristics.

Moreover, CAA section 111(f)(2) — a provision added in the 1990 amendments which requires EPA to set standards of performance for listed major source categories for which EPA has not set standards — is written only in terms of quantities of air pollutants emitted, and the extent to which "such pollutant" might "reasonably be anticipated to endanger public health or welfare" and, even when setting standards of performance, does not mandate that the listing has to be pollutant specific, and a significant contribution finding made for each pollutant. Indeed, under EPA's proposed interpretation, section 112(f)(2)(B) — which directs EPA to consider "the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare" in promulgating standards of performance — would be essentially superfluous, since EPA would already have been required to make a cause or significant contribution finding for that pollutant. Instead, Congress included a provision to prod EPA's consideration of extent of harm in promulgating standards of performance, since the listing itself was not required to do so. So the text of

[7] 90 FR at 25765.

[8] *American Trucking Ass'n v. EPA* ("ATA I"), 175 F. 3d 1027, 1055 (D.C. Cir. 1999) (reversed on different ground by *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001)) (no new listing of PM2.5 required because PM2.5 was already included within the particulate matter indicator (total suspended particulate); so even though the PM2.5 indicator would occasion more regulation of emitting sources, no new listing required; similarly here, already-listed sources will be subject to regulation for a new pollutant, but no sources are being added to listed source category that weren't there already).

[9] CAA section 302(g).

section 111(b) on its face does not support the proposal, and section 111(f)(2) likewise indicates that new, per-pollutant significant contribution determinations aren't mandated.

2. The structure of the CAA makes clear that pollutant-by-pollutant significance determinations are not mandated under section 111(b).

Congress, in the CAA, knew how to specify pollutant by pollutant findings as the trigger for regulation — including via a listing mechanism tied to amount of contribution — when it wished to. The following provisions are illustrative:

- Pre-1990 section 112 (contemporaneous with section 111), reads:
  Section 112 of the CAA, as amended December 31, 1970 (Public Law 91-604), directs the Administrator of the Environmental Protection Agency to publish, no later than March 31, 1971, and from time to time thereafter revise, *a list of air pollutants which in his judgment may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness and to which no national ambient air quality standard is applicable.* Within 180 days from the inclusion of any air pollutant in the list, the Administrator is required to publish proposed regulations establishing emission standards for such pollutant.[10]

- CAA section 108(a)(1)(A). EPA is to publish "a list which includes *each air pollutant emissions of which*, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health."

- CAA section 213(a)(2) (non road engines and vehicles): "[AX} shall determine …*whether emissions of [CO], [NOx], and [VOC] from* nonroad engines and nonroad vehicles (other than locomotives….) are significant contributors to ozone or [CO] concentrations in more than one [non-attainment area for each pollutant]."

- CAA section 202(a)(1) requires standards *for any air pollutant* from new motor vehicles or new motor vehicle engines which causes, or contributes to, air pollution which endangers.

So Congress could have written a provision like one of these, e.g., "The Administrator shall list a source category which emits a pollutant which causes or contributes to air pollution which endangers, and shall from time to time determine if additional air pollutants emitted by that category cause or contribute to air pollution which endangers." Congress knew how to write such a provision if it wanted that result and chose not to do so.

EPA requests whether its proposed interpretation that a pollutant-specific contribution finding is mandated to avoid implicating the major question doctrine, and specifically, whether "the proposed interpretations …are necessary to prevent the Agency from improperly expanding its regulatory authority by determining that emissions of de minims amounts of air pollutants … should be regulated under CAA section 111."[11] The premise of this question is false. EPA itself states that there have been "prior EPA decisions not to regulate certain air pollutants under CAA section 111 on grounds that they had little impact or that no

[10] 36 FR 5931 (the original list of hazardous air pollutants (HAP)).
[11] 90 FR at 25778.

effective controls were available," which determinations were upheld by the D.C. Circuit.[12] The D.C. Circuit's decision in Portland Cement Ass'n v. EPA. 665 F. 3d 177, 193 (D.C. Cir. 2011) likewise upholds an EPA decision under section 111(b)(1) not to regulate an air pollutant emitted from a listed source category. Thus, if pollutant emissions from a source category listed in section 111(b) are de minimis, if controls are too costly, if controls would result in unacceptable non-air environmental impacts, etc., EPA may choose not to regulate at all per CAA section 111(a). Consequently, listing a source category does not compel standards of performance for each pollutant emitted by the category.[13] So EPA's solicitation addresses a non-issue, and it is perplexing that the agency even solicits this comment.

More generally, the major question doctrine applies in situations where an agency asserts unheralded power of vast significance, based on obscure statutory provisions heretofore never invoked for that purpose, extending to issues and policies outside the agency's delegated area of expertise, and possibly also including Congressional rebuffs of the regulatory approach at issue.[14] None of these factors are present here. West Virginia itself notes that EPA has implemented CAA section 111(a) for decades by requiring at-the-source improvements.[15] Regulating harmful air pollutant emissions from a source, per the criteria and constraints of section 111(a), does not assert "unprecedented authority over industry" or somehow set' national energy policy."[16] There have been no Congressional rebuffs over EPA's decades of regulation in this manner. The major question doctrine has no applicability here.

II. EPA's Justification for Mandated Reading Lack Merit

In addition to being atextual, the agency's asserted justifications simply don't make sense. EPA proposes that since "standard of performance" is pollutant specific, the cause or contribute finding must be as well for each regulated pollutant.[17] This is both an ipse dixit ('it is so because I say it is'), and reads the statute backwards. It puts the best system of emission reduction (BSER) cart before the categorical listing horse. The statute does the opposite. The fact that EPA must set standards of performance with respect to individual pollutants does not tell us anything about which pollutants it may regulate and, importantly here, does by no stretch of the imagination require that those pollutants have been singled out in the original endangerment and contribution findings under section 111(b) (1)(A).

EPA states that the 'standard of performance' and categorical listing need to be read as a cohesive whole.[18] In addition to being atextual, Congress knew how to write a provision where the contribution finding was determinative of standards. A good example is CAA section 110(a)(2) (D), the Good Neighbor provision, whereby a state implementation plan (SIP) is to prohibit emissions which contribute significantly to non-attainment out of state. It didn't adopt this approach in section 111.

EPA also states that "not adopting the approach reads cause or contribute out of the statute for any

---

[12] 90 FR at 25764, citing *National Lime Ass'n v. EPA*, 627 F. 2d 416, 428 and n. 27 (D.C. Cir. 1980) (upholding EPA determination not to regulate NOx, SO2, and CO from lime plants per CAA section 111(a)).
[13] See also 80 FR at 64259-31 (October 23, 2015) (EPA must have rational basis to establish NSPS for pollutants emitted by a listed source category).
[14] West Virginia, 597 U.S. 697, 724, 730.
[15] 597 U.S. at 734.
[16] 597 U.S. at 724, 729.
[17] 90 FR at 25763.
[18] Ibid.

additional pollutant not initially cited as a basis, evading the cause or contribute finding after that initial listing." This results in a situation where all pollutants emitted by the source get regulated, and "[N]othing in CAA section 111 suggests that Congress intended the EPA to regulate emissions of any and all air pollutants regardless of the magnitude of emissions (i.e., including de minimis emissions)."[19] But this proves too much. EPA is perfectly capable of determining not to regulate an emitted air pollutant in determining BSER, as even the proposal acknowledges.[20] So this argument is a strawman. It could easily make sense for a BSER to encompass air pollutants not initially tied to contribution to air pollution which endangers. BSER isn't tied directly to the basis for listing, but rather to considerations of available control technology at reasonable cost, energy considerations, non-air effects of the pollution control, etc.

The proposal is inconsistent with EPA's past practice. Even for this source category before the 2015 rule, EPA has added pollutants without altering the initial basis for listing the source category.[21] In its GHG-centric proposal, EPA ignores the implications of its proposal for all other section 111 standards of performance.

EPA cites CAA section 111(b)(3) as equating categories and air pollutants.[22] That provision does no such thing. It requires the agency to publish information about control technology for source categories and air pollutants. This can readily be done separately. For instance, wet scrubbers can work for every source in a category to remove PM. The category doesn't do anything to control certain HAP, but control technologies exist which are effective for that HAP (e.g. certain emerging types of Hg control). In any case, this tangential provision hardly nullifies the plain text of section 111(b)(1)(A). EPA also cites the work practice provision of CAA section 111(h), and an innovative technology waiver provision in section 111(j) as support.[23] Section 111(h) by its terms relates to when a "standard of performance" isn't enforceable. It has nothing to do with categorical listing. And allowing certain allowances for an innovative technology for a particular pollutant again has nothing to do with the initial listing determination. Far from being a "best interpretation," EPA's proposal is outright legally untenable.

III. EPA's proposed interpretation and finding of no significant contribution is unlawful.

EPA proposes to interpret the term "significantly" contribute in section 111(b) to include consideration of "effectiveness of emissions reduction controls, cost-reasonableness of those controls, impacts on the affected industry, and impacts of the emissions on public health and welfare. EPA proposes to conclude that "significantly contributes" incorporates background legal principles of proximate cause that inform both whether an air pollutant contributes to dangerous air pollution and the extent of contribution required to trigger regulation based on the particular form of dangerous air pollution identified."[24]

---

[19] Ibid.
[20] Fn. 95, 90 FR at 25762. See also 73 FR at 35858 (June 24, 2008) ("The Agency has always interpreted [the requirement to establish standards of performance] as providing the Administrator with significant flexibility in determining which pollutants are appropriate for regulation under section 111(b)(1)(B)").
[21] See 77 FR 9453 (February 16, 2012) (adding alternative standard for CO to 40 CFR Part 60 subpart Da standards); 78 FR 28606 (May 18, 2005) (adding mercury to then-existing 40 CFR part 60 subpart HHHH, ultimately vacated on other grounds).
[22] 90 FR at 25764.
[23] Ibid.
[24] 90 FR at 25765.

The text and context of section 111 make clear that issues related to standard setting only become relevant *after* EPA makes an affirmative contribution/endangerment finding. They are not relevant to determining significant contribution. The Supreme Court in *Massachusetts* and the D. C. Circuit in *Coalition for Responsible Regulation* are clear – EPA's "judgment" is constrained, EPA can only consider factors that are legally relevant under the statute, and these kinds of policy considerations are not legally relevant to determining contribution.[25]

Section 111 is just one of many provisions where Congress followed a two-step process, with the first step a threshold identifying whether EPA has authority to adopt federal controls on emissions, and a second step where Congress specifies what kind of controls EPA can adopt. This pattern throughout the CAA clearly indicates that the two steps involved are separate and apart and involve consideration of different factors. Factors relating to endangerment and factors relating to standard setting are not relevant for determining contribution or significance of contribution.

The term "significant" does not change this. EPA's interpretation is inconsistent with the ordinary meaning of "significant" as it is used in Section 111. In addition, factors that are legally irrelevant for determining contribution are irrelevant for determining significant contribution - significant contribution is a subset of the universe of contributions.

EPA points to the Clean Air Act's "Good Neighbor" SIP provision for support, but this is of no help. Under that provision determining significant contribution establishes two things - whether a State must control emissions and exactly what amount of emissions it must control. That is very different from section 111. The Good Neighbor provision and other SIP provisions addressing transport make it clear Congress knew how to authorize EPA to consider factors related to emission controls when it makes a significant contribution determination. Congress did not do that in Section 111.

EPA seeks support in the common law principles of "proximate cause" to argue various uncertainties heighten the threshold for determining significant contribution. Proximate cause is a creature of tort law, and it arises when one party sues another for damages, claiming their injuries were caused by the other party's unlawful conduct. Proximate cause has nothing to do with a statutory provision addressing when EPA, an administrative agency, has authority to adopt emissions controls under Section 111.

The facts are clear – fossil-fueled EGUs are significant contributors to GHG air pollution.

a. The U.S. is still the second largest emitter of GHGs in the world.
b. EGUs are still a very large percentage of total US GHG emissions - 25%. EGU emissions are the second largest source of GHG emissions in the U.S., just behind transportation at 28%.
c. EGUs emit more GHGs than all of the U.S. industry sectors combined.
d. Globally, the power sector is the largest source of GHG emissions, outranking industry, transport, buildings, agriculture, and other sectors. The U.S. power sector emits 11% of the global power sector's GHG emissions.

[25] Massachusetts v. EPA, 549 U.S. 497 (2007), Coal. for Responsible Regul., Inc. v. E.P.A., 684 F.3d 102 (D.C. Cir. 2012), aff'd in part, rev'd in part sub nom. Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302 (2014), and amended sub nom. Coal. for Responsible Regul., Inc. v. Env't Prot. Agency, 606 F. App'x 6 (D.C. Cir. 2015)

e. U.S. EGUs emit more GHGs than all of the countries in the world, with the exception of three countries – China, India, and Russia. Again – only three countries in the world emit more GHGs than the U.S. EGUs.

The global nature of air pollution has not changed. As the D. C. Circuit said:

> While the percentage contribution of this sector may appear relatively small in comparison to total emissions worldwide, '[t]he global nature of the air pollution problem means that '[a] country or a source may be a large contributor, in comparison to other countries or sources, even though its percentage contribution may appear relatively small' in the context of total emissions worldwide.[26]

EPA proposes to "repeal all greenhouse gas standards for the power sector" based on its negative determination on significant contribution. Even if EPA's proposed determination were valid, it does not authorize EPA to cancel these GHG standards. The current GHG standards were lawfully adopted under a valid finding of significant contribution. EPA's proposed negative determination is not a valid basis for EPA to cancel the lawful, pre-existing GHG standards.

A. Analysis of text and context of CAA Section 111.

1. The text of Section 111 does not support EPA's proposed interpretation.

(a) Section 111 requires EPA to establish a list of categories of stationary sources.

A category is included in the list if in EPA's judgment it causes or contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.[27] Once a category is listed, EPA is required to adopt federal "standards of performance" for new sources within the category. A standard of performance is defined as "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."[28] Congress spelled out the timeline for EPA to establish the standards and specified that EPA was to review and revise the standards at least every eight years.

Congress established a two-step approach that EPA must follow. These steps address different questions, *on a different timeline*. The first step is a requirement that EPA list categories that meet the contribution/endangerment criteria. This is a threshold determination. It identifies when EPA has authority to adopt federal controls on emissions from source categories. Unless and until EPA makes an affirmative determination, EPA has no authority to adopt federal controls on emissions from the category.

The second step is a requirement that EPA adopt emissions standards for the listed categories. Assuming an affirmative determination is made in the first step, Congress spelled out the timing and nature of federal controls EPA must adopt. EPA is required to propose controls within one year, receive comment on the

[26] Am. Lung Ass'n. v. Env't Prot. Agency, 985 F.3d 914, 977 (D.C. Cir. 2021) (rev'd on other grounds sub nom West Virginia v. EPA, 597 U.S. 697 (2022).
[27] Section 111(b)(1)(A).
[28] Section 111(b)(1)(B), (a)(1).

proposal, and issue a final rule within one year of the proposal. In addition, EPA is required to review and revise the standards every eight years. Congress also specified the nature of the controls EPA is to adopt, in the definition of "standards of performance." Setting the appropriate standards involves evaluating complex questions of availability and performance of emissions control technology, cost, and the like. EPA has been conducting this kind of standard setting for decades.

The text and structure of section 111 make clear that the two steps are separate and distinct. They call for consideration of different factors. For the first step, the factors EPA must consider involve questions on the level of air pollution and the risks and severity of adverse effects on public health and welfare from the air pollution. It also involves questions of the relationship between emissions from the source category and the levels of air pollution. EPA is to exercise its judgment in evaluating these questions and making the determination called for in the first step. However, EPA's judgment is not free ranging. EPA's judgment is constrained by the text of section 111, with Congress directing EPA to focus only on the threshold issues of contribution and endangerment in the first step.

(i) EPA has no authority to establish federal controls on a source category unless and until EPA makes a final affirmative determination on the threshold issue of contribution and endangerment. That means when EPA is making the contribution and endangerment determinations, EPA has no authority to adopt federal controls for that source category, either then or in the future. Such authority only arises after EPA has finished making these determinations. Thus, when EPA is making these determinations, it solely focuses on the question of contribution and endangerment. Issues related to future controls — their timing, cost, impact on emissions reductions, and so on — are irrelevant to EPA's threshold determination and cannot be considered in making that determination.

This makes eminent sense. The first threshold step calls for analyzing the risks and severity of adverse effects from air pollution and analyzing emissions contribution from a source category to levels of the air pollution. That judgment can be made without consideration of means of control, the issues of contribution and endangerment can readily be assessed without any consideration of the potential impacts of future controls. The scientific and technical issues involved in determining contribution and endangerment can be fully considered without any consideration of the impacts of future controls.

Taking the cost, effectiveness, and impacts of future emissions controls into account when making the threshold contribution or endangerment finding short-circuits the two-step process Congress required. EPA's proposed approach requires two different "decisions" on standard setting. The first is a projection of future decisions based on projections of many technical and other conditions and circumstances. This provisional analysis and decision would be considered in the first threshold step. The second decision on standard setting would be based on the rulemaking process called for by Congress, involving a proposal based on detailed analyses, a comment period, and a final decision. It would result in actual standards the affected sources have to meet. Of course, the second decision on standards would only occur if EPA made an affirmative determination in the first step. If the provisional, projected future standards considered in the first threshold step led to a negative determination at the first step, there would be no actual future decision on standards. This is a convoluted commingling of the two separate steps Congress specified in section 111. This commingling effectively puts the BSER cart in front of the listing determination horse.

(ii) Congress also constrained EPA's judgment on whether a category's contribution to the air pollution levels is "significant." The term significant modifies contribution. It does not modify endangerment and

does not modify anything about the standard setting process. The factors and issues that EPA can consider in determining significance must relate to the issue of contribution - the relationship between the amount of emissions from the category and the air pollution that endangers. Significant contribution is a subset of the universe of situations that are considered contribution. Factors that are irrelevant to determine contribution are by definition irrelevant for purposes of considering significance of the contribution.

(iii) The Supreme Court confirmed these points in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, EPA refused to make a determination whether emissions of GHGs from motor vehicles cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare, under section 202(a)(1) of the Act. EPA "refused to comply with this clear statutory command," relying on "a laundry list of reasons not to regulate." For example, EPA based its decision on various policy reasons – the administration preferred other ways to address climate change ("a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming"), EPA considered the emissions controls that would be adopted ineffective and inappropriate as a remedial measure ("curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue""), and adoption of emissions controls on motor vehicles would interfere with other important policies of the administration ("regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions").[29]

The Court made clear that the use of the term "judgment" constrained EPA and was not a vehicle to go beyond the terms of the statute. The Court said:

> While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U.S.C. § 7521(a)(1), that *judgment must relate to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger *533 public health or welfare,"* ibid. Put another way, the use of *the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits*." 549 U.S. at 532-33. … But once EPA has responded to a petition for rulemaking, its *reasons for action or inaction must conform to the authorizing statute*. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. Ibid. *To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design*. (emphasis added) 549 U.S. at 532-533.

The Court made clear that the various policy reasons relied upon by EPA were not relevant to the determination of cause or contribute to endangerment.

> The *alternative basis for EPA's decision*—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—*rests on reasoning divorced from the statutory text*. … Although we have neither the expertise nor the authority to evaluate *these policy judgments*, it is evident they *have nothing to do with whether greenhouse gas emissions contribute to climate change*. Still less do they amount to a reasoned justification for declining to form a scientific judgment. … *Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time*. See 68 Fed.Reg. 52930–52931. If the scientific

[29] 549 U.S. at 533.

> uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. *That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty*—which, contrary to Justice SCALIA's apparent belief, post, at 1466 – 1468, is in fact all that it said, see 68 Fed.Reg. 52929–52930 ("We do not believe ... that it would be either effective or appropriate for EPA to establish [greenhouse gas] standards for motor vehicles at this time" (emphasis added))—*is irrelevant*. (emphasis added) 549 U.S. at 533-34.

The Court was clear – policy judgments concerning the appropriateness of future emissions controls that could be adopted under the Act are irrelevant to the scientific judgment needed to determine cause or contribute and endangerment. Likewise, policy concerns over interference with other administration policies are irrelevant, as are concerns over uncertainty of the science. Scientific uncertainty is relevant only if the uncertainty is so high that a reasoned determination cannot be made.

The policy concerns EPA relies upon in the proposal are of the same nature as those rejected by the Court in *Massachusetts*. They are irrelevant to the scientific judgment required for the threshold first step determination. Since they are irrelevant, the *Massachusetts* Court decided they could not be relied upon to justify refusing to make a determination. For the same reasons, they are irrelevant for purposes of making a negative determination on significant contribution or endangerment.

Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012) follows the same approach. In that case, industry argued that:

> EPA *improperly interpreted* CAA § 202(a)(1) *as restricting the Endangerment Finding to a science-based judgment devoid of considerations of policy concerns and regulatory consequences*. They *assert* that CAA § 202(a)(1) *requires EPA to consider, e.g., the benefits of activities that require greenhouse gas emissions, the effectiveness of emissions regulation triggered by the Endangerment Finding, and the potential for societal adaptation to or mitigation of climate change*. They maintain that eschewing those considerations also made the Endangerment Finding arbitrary and capricious. (emphasis added) 684 F.3d at 117.

The D.C. Circuit was clear – EPA has no authority to consider such policy considerations when making the science-based judgment on contribution and endangerment.

> This language requires that the endangerment evaluation "relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Massachusetts v. EPA,* 549 U.S. at 532–33, 127 S.Ct. 1438. At bottom, § 202(a)(1) requires EPA to answer only two questions: whether particular "air pollution"—here, greenhouse gases—"may reasonably be anticipated to endanger public health or welfare," and whether motor-vehicle emissions "cause, or contribute to" that endangerment.
>
> *These questions require a "scientific judgment" about the potential risks greenhouse gas emissions pose to public health or welfare—not policy discussions*. *Massachusetts v. EPA,* 549 U.S. at 534, 127 S.Ct. 1438. In *Massachusetts v. EPA,* the Supreme Court rebuffed an attempt by EPA itself to inject considerations of policy into its decision. At the time, EPA had "offered a laundry list of reasons not to regulate" greenhouse gases, including that a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions, and that curtailing

> motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue." *Id.* at 533, 127 S.Ct. 1438 (citations omitted). The Court noted that "these policy judgments…have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment." *Id.* at 533–34, 127 S.Ct. 1438. In the Court's view, EPA's policy-based explanations contained "no reasoned explanation for [EPA's] refusal to decide" the key part of the endangerment inquiry: "whether greenhouse gases cause or contribute to climate change." *Id.* at 534, 127 S.Ct. 1438.
>
> *As in Massachusetts v. EPA, a "laundry list of reasons not to regulate" simply has "nothing to do with whether greenhouse gas emissions contribute to climate change." Id.* at 533–34, 127 S.Ct. 1438. The additional exercises State and Industry Petitioners would have EPA undertake—*e.g., performing a cost-benefit analysis for greenhouse gases, gauging the effectiveness of whatever emission standards EPA would enact to limit greenhouse gases, and predicting society's adaptive response to the dangers or harms caused by climate change—do not inform the "scientific judgment"* that § 202(a)(1) requires of EPA….. *The statute speaks in terms of endangerment, not in terms of policy*, and EPA has complied with the statute." (emphasis added) 684 F.3d at 117-118.

The courts could not be clearer – the policy considerations that EPA proposes to rely upon to justify its negative determination on significant contribution are irrelevant to determining contribution under section 111.

The term "significant" does not change this. It modifies contribution, with significant contribution a subset of the universe of situations covered by contribution. Factors that are irrelevant for determining contribution are by definition irrelevant for determining the subset of contributions that are considered significant.

(iv) Congress used the same basic two-step structure employed in section 111 throughout various provisions addressing EPA authority to adopt federal controls on emissions sources. See section II.2. below. Congress used this structure to answer two different questions – do the circumstances involving emissions from sources and air pollution levels warrant authorizing EPA to adopt federal controls? If so, what kind of federal controls is EPA to adopt? The consistent use of the same basic statutory structure throughout the Act supports the interpretation discussed above.

In other provisions of the Act Congress addressed when and to what extent EPA should require states to control certain emissions in their SIPs. In various provisions Congress explicitly made levels of emissions control a factor in determining significant contribution. Congress knew how to authorize EPA to consider future emissions control when determining contribution, and it did not take this approach in section 111. For example, when Congress addressed interstate transport of air pollution it specified that a state SIP must contain provisions that prohibit sources from emitting amounts of emissions which contribute significantly to nonattainment in downwind states. Section 110(a)(2)(D)(i)(I). As explained above, the significant contribution finding in the Good Neighbor provision is distinctly different from the significant contribution finding in section 111. In the SIP provision, the contribution finding performs two functions – it identifies whether the state has to include provisions in its SIP to control emissions, and it identifies the amount of emissions that must be controlled. This is distinctly different in substance from section 111. The SIP provision combines two questions (duty to adopt controls and amount of reductions required by the controls), while these two questions are kept separate in section 111 (authority to adopt controls, based on

contribution/endangerment determination, and amount of reductions to achieve through the controls based on the separate standard setting provision, BSER).

In making the significant contribution determination under this SIP provision, EPA considered factors related to emissions control, such as cost, because EPA had to determine the amount of emissions reductions that the state had to achieve. Determining the amount of required emissions reductions is a core part of emissions standard setting, and it is logical to consider standard setting factors such as cost of emissions controls in making this kind of determination. The cases considering EPA's authority under this SIP provision recognize the dual role the significant contribution determination plays in the good neighbor SIP provision.

The Supreme Court addressed this as follows:

> Under the Transport Rule, *EPA employed a "two-step approach" to determine when upwind States "contribute[d] significantly to nonattainment,"* id., at 48254, *and therefore in "amounts" that had to be eliminated.* At step one, called the "screening" analysis, the Agency excluded as de minimis any upwind State that contributed less than one percent of the three NAAQS3 to any downwind State "receptor," a location at which EPA measures air quality. See id., at 48236–48237.4 If all of an upwind State's contributions fell below the one-percent threshold, that State would be considered not to have " contribute [d] significantly" to the nonattainment of any downwind State. Id., at 48236. States in that category were screened out and exempted from regulation under the rule. […]
>
> *Taken together, the screening and control inquiries defined EPA's understanding of which upwind emissions were within the Good Neighbor Provision's ambit.* In short, under the Transport Rule, an upwind State "contribute[d] significantly" to downwind nonattainment to the extent its exported pollution both (1) produced one percent or more of a NAAQS in at least one downwind State (step one) and (2) could be eliminated cost-effectively, as determined by EPA (step two). See id., at 48254. *Upwind States would be obliged to eliminate all and only emissions meeting both of these criteria.* […]
>
> We conclude that the Good Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in Chevron. *The statute requires States to eliminate those "amounts" of pollution that "contribute significantly to nonattainment" in downwind States.* 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). Thus, EPA's task15 is to reduce upwind pollution, but only in "amounts" that push a downwind State's pollution concentrations above the relevant NAAQS. As noted earlier, however, the nonattainment of downwind States results from the collective and interwoven contributions of multiple upwind States. See supra, at 1593 – 1594. *The statute therefore calls upon the Agency to address a thorny causation problem: How should EPA allocate among multiple contributing upwind States responsibility for a downwind State's excess pollution?* […]
>
> Persuaded that the Good Neighbor Provision does not dictate the particular allocation of emissions among contributing States advanced by the D.C. Circuit, we must next decide whether the allocation method chosen by EPA is a "permissible construction of the statute." Chevron, 467 U.S., at 843, 104 S.Ct. 2778. As EPA interprets the statute, upwind emissions rank as "amounts [that] ... contribute significantly to nonattainment" if they (1) constitute one percent or more of a relevant NAAQS in a nonattaining downwind State and (2) can be eliminated under the cost threshold set by the Agency.

> See 76 Fed.Reg. 48254. In other words, *to identify which emissions were to be eliminated, EPA considered both the magnitude of upwind States' contributions and the cost associated with eliminating them.* […]
>
> Using costs in the Transport Rule calculus, we agree with EPA, also makes good sense. *Eliminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address.* Efficient because EPA can achieve the levels of attainment, i.e., of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution. Upwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution. They will have to bring down their emissions by installing devices of the kind in which neighboring States have already invested. […]
>
> *Obligated to require the elimination of only those "amounts" of pollutants that contribute to the nonattainment of NAAQS in downwind States, EPA must decide how to differentiate among the otherwise like contributions of multiple upwind States.* EPA found decisive the difficulty of eliminating each "amount," i.e., the cost incurred in doing so. *Lacking a dispositive statutory instruction to guide it, EPA's decision, we conclude, is a "reasonable" way of filling the "gap left open by Congress."* (emphasis added) *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 500-504, 513-514, 6518-520 (2014).

This SIP provision and section 111 differ dramatically in terms of substance. Section 111 calls for EPA to determine significant contribution to air pollution. If and only if EPA makes an affirmative determination, EPA is to adopt controls that reduce emissions using technology that is BSER. The determination of significant contribution to the air pollution and the determination of BSER in the standard setting are two separate decisions. The SIP provision is different. The determination of significant contribution requires EPA to determine the amount of emissions from an upwind state that must be reduced. The decision on contribution and the decision on what reductions must be achieved are one and the same. This is substantively different from section 111, and the factors EPA can consider under the good neighbor SIP provision do not support their consideration under section 111.

It would be a different situation if section 111 was phrased along the lines of "EPA shall prohibit a source category from emitting amounts of an air pollutant that significantly contribute to air pollution that may reasonably be anticipated to endanger public health or welfare." That would be analogous to the good neighbor SIP provision. Of course, in that case Congress would not have prescribed BSER as the standard setting provision. The significant contribution determination would have already determined what amount of emissions had to be reduced. Congress did not use this approach in section 111, and EPA's interpretation of the substantively different Good Neighbor provision is not relevant for purposes of section 111. Congress also adopted other SIP provisions that took an approach somewhat similar to the Good Neighbor provision when it addressed issues of visibility transport (EPA can remove a State or portion of a State from a visibility transport region if the control of emissions will not significantly contribute to protection or enhancement of visibility in Class I areas, section 169B) and the interstate transport commission (EPA may remove a State or portion of a State from the commission where EPA determines control of emissions in the State will not significantly contribute to attainment of the NAAQS in downwind areas, section 176A).

These SIP provisions show that Congress knew how to specify when the contribution finding includes consideration of future emissions controls, such as the amount of reductions that future controls would achieve. It did not include such considerations in section 111's contribution finding.

(b) EPA improperly relies on the irrelevant principles of "proximate cause."

EPA proposes that when Congress used the term "significant contribution" in section 111 it "incorporate[d] background legal principles of proximate cause that inform both whether an air pollutant contributes to dangerous air pollution and the extent of contribution required to trigger regulation based on the particular form of dangerous air pollution identified."[30] The "global scale of that analysis and attenuated chain of causation" meant that the "threshold for significant contribution … is heightened by the multiple intervening actors, uncertainties, and extrapolations necessary to draw a connection between emissions by a source category and dangerous air pollution in the form of adverse effects in the U.S. from anthropogenic climate change, as discussed further below. Under the EPA's proposed interpretation, this attenuated causal chain would require a greater volume and percentage of contribution than a more direct causal relationship to account for the degree of uncertainty and extrapolations involved. In other words, emissions of an air pollutant by a source category cannot be said to contribute significantly to a third or fourth order adverse consequence involving multiple independent domestic and global actors unless the contribution is sufficiently significant that regulation would have a discernible impact on the potential danger."[31] EPA based its proposed finding of no significant contribution in part on "considerations of … the attenuated nature of the causal chain between the volume of GHG emissions from the EGU source category and potential danger to public health and welfare arising from anthropogenic climate change."[32]

EPA's proposal is flawed in several ways. EPA is not interpreting the term "cause," EPA is interpreting "significant contribution." The meaning of the term cause is not before EPA. The background principles of proximate causation are not relevant to evaluate contribution.

In addition, principles of proximate cause are not relevant to the judgments EPA must make under section 111. Proximate cause is a creature of the common law of torts. The law of torts involves determining when one person is liable to pay damages to a second person for injuries they caused to the second person. That has nothing to do with the scope of EPA's authority under section 111, including its obligation to determine contribution of GHG emissions from fossil fuel fired EGUs to global air pollution. The cases cited by EPA make this clear. All of the cases involve private parties suing other parties. They allege one party's conduct was prohibited by statute, that conduct caused injuries to the other party, and the other party now seeks monetary damages.

EPA cites various cases to support its approach. *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189 (2017) involves a city suing a bank for damages from injuries caused by discriminatory lending practices, conduct prohibited by the Fair Housing Act. The Court said:

> The remaining question is one of causation: *Did the Banks' allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services*? The Eleventh

[30] 90 FR at 25765.
[31] 90 FR at 25757.
[32] 90 FR at 25767.

Circuit concluded that the answer is "yes" because the City plausibly alleged that its financial injuries were foreseeable results of the Banks' misconduct. We conclude that foreseeability alone is not sufficient to establish proximate cause under the FHA and therefore vacate the judgment below.

It is a " 'well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.' " *Lexmark,* 572 U.S., at ——, 134 S.Ct., at 1390. We assume Congress "is familiar with the common-law rule and does not mean to displace it *sub silentio* " in federal causes of action. *Ibid. A claim for damages under the FHA—which is akin to a "tort action," Meyer v. Holley,* 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003)*—is no exception to this traditional requirement. "Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits*." *Lexmark, supra,* at ——, 134 S.Ct., at 1390.

In these cases, the "conduct the statute prohibits" consists of intentionally lending to minority borrowers on worse terms than equally creditworthy nonminority borrowers and inducing defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms. The City alleges that the Banks' misconduct led to a disproportionate number of foreclosures and vacancies in specific Miami neighborhoods. *These foreclosures and vacancies purportedly harmed the City*, which lost property-tax revenue when the value of the properties in those neighborhoods fell and was forced to spend more on municipal services in the affected areas. (emphasis added) 581 U.S. at 201-202.

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) involves one business suing another for damages from injuries caused by false advertising, conduct prohibited by the Lanham Act. The Court said:

Second, we *generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute.* For centuries, it has been "a well established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause." *Waters v. Merchants' Louisville Ins. Co.,* 11 Pet. 213, 223, 9 L.Ed. 691 (1837); see *Holmes,* 503 U.S., at 287, 112 S.Ct. 1311 (SCALIA, J., concurring in judgment). That venerable *principle reflects the reality that "the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." Associated Gen. Contractors,* 459 U.S., at 536, 103 S.Ct. 897. Congress, we assume, is familiar with the common-law rule and does not mean to displace it *sub silentio. We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation.* See, *e.g., Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 346, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (securities fraud*); Holmes, supra,* at 268–270, 112 S.Ct. 1311 (RICO); *Associated Gen. Contractors, supra,* at 529–535, 103 S.Ct. 897 (Clayton Act). No party disputes that it is proper to read § 1125(a) as containing such a requirement, its broad language notwithstanding. (emphasis added) 572 U.S. at 132.

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) involves an employee suing their employer for damages for injuries caused by conduct prohibited by the Civil Rights Act of 1964. The Court said:

When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts. This case requires the Court to define those rules in the context of Title VII

> of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* which provides remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers. […]
>
> This case requires the Court to define the proper standard of causation for Title VII retaliation claims. *Causation in fact—i.e.,* proof that the defendant's conduct did in fact cause the plaintiff's injury—*is a standard requirement of any tort claim,* see Restatement of Torts § 9 (1934) (definition of "legal cause"); § 431, Comment *a* (same); § 279, and Comment *c* (intentional infliction of physical harm); § 280 (other intentional torts); § 281(c) (negligence). *This includes federal statutory claims of workplace discrimination. Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (In intentional-discrimination cases, "liability depends on whether the protected trait" "actually motivated the employer's decision" and "had a determinative influence on the outcome"); *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (explaining that the "simple test" for determining a discriminatory employment practice is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" (internal quotation marks omitted)). (emphasis added) 570 U.S. at 342.

All of these cases involve one party suing another party for damages, alleging injuries caused by conduct that was prohibited by a federal statute. In all of these cases the Court pointed to the common law of torts as a background to determine the causation requirement implied by the statute. These cases are irrelevant to interpreting the scope of EPA's authority under section 111. EPA's rulemaking under section 111 has nothing to do with someone suing someone else to collect damages for injuries caused by conduct prohibited by a federal statute. It should be obvious these cases and the tort principles they rely upon are irrelevant here.

EPA improperly relies on this tort law principle to claim the alleged uncertain link between GHG emissions from EGUs and damage from climate change mean there is not significant contribution. For example, EPA improperly analogizes section 111's contribution determination to ""[t]he proximate-cause analysis [asking] 'whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits'," and claiming that under the principles of proximate cause, the appropriate analysis "asks whether the air pollutant emissions have a sufficiently close connection to the endangerment caused by the air pollution."[33] EPA seemingly is asking whether EGU emissions (the analogy to prohibited conduct under tort analysis) have a direct enough causal link to the damage caused by the air pollution (the analogy to harm to a private party under tort analysis). But this is not a tort case. This is not a case of one party suing EGUs for damages caused by emissions that the statute prohibits, where the directness of the link between the emissions and the injuries is relevant. Section 111 does not call for the kind of analysis EPA points to. Proximate cause and other aspects of tort law are of no import here.

EPA's proposal also unlawfully mixes the contribution determination and the separate endangerment determination. Section 111, like many other provisions in the Act, establishes a two-step analysis for determining whether EPA has authority to adopt controls for a source category. EPA must judge whether the air pollution is reasonably anticipated to endanger public health or welfare. EPA also must judge whether a source category contributes significantly to this air pollution. These judgements are to be based on science, not policy and not issues concerning the emissions controls that can only be adopted if an affirmative determination is made. The endangerment and contribution judgments are separate and distinct

[33] Fn. 116, 90 FR at 25767.

from each other and from the judgments involved in setting controls if an affirmative determination is made.

EPA is not contesting or revising the endangerment determination. Instead, EPA is revisiting and re-judging the separate issue of significant contribution. However, EPA improperly conflates the two in its proposal.

EPA claims it is a "particularly demanding analytical task by evaluating the significance of contribution to global, well-mixed air pollution that results from a combination of pollutants from a large and diverse array of sources that in turn, creates elevated global concentrations that, in turn, the Agency determined play a causal role in environmental phenomena that, in turn, the Agency determined adversely affect the public health and welfare." This results in an "attenuated chain of causation" involving "multiple intervening actors, uncertainties, and extrapolations necessary to draw a connection between emissions by a source category and dangerous air pollution in the form of adverse effects in the U.S. from anthropogenic climate change."[34]

EPA is mixing up the issue of contribution by the source category with the separate issue of endangerment from the air pollution. The third or fourth order consequences and the uncertainties and extrapolations referred to concern the air pollution and whether it endangers public health or welfare. That is not at issue in this rulemaking, and it is not relevant to the separate issue of contribution to the air pollution from EGUs.[35]

EPA seems to claim there needs to be a link showing that emissions from EGUs endanger public health or welfare. EPA places importance on "the attenuated nature of the causal chain between the volume of GHG emissions from the EGU source category and potential danger to public health and welfare arising from anthropogenic climate change."[36] The issue before EPA is not whether there is a direct enough causal chain between EGU emissions and danger to public health and welfare. The relevant causal link is between the air pollution and the endangerment of public health or welfare. EGU emissions only come into play in the significant contribution determination, which does not include a criterion of causing danger.

A simple example makes this clear. Assume three sources each emit one third of the total emissions that make up the air pollution. The resulting concentration of the air pollution is high enough that it makes the air pollution dangerous, but the concentrations contributed by each source would not by itself be dangerous. The air pollution is dangerous, and contributing one third of the emissions is clearly a significant contribution to the air pollution. There is no requirement that a source's emissions be dangerous by itself.

EPA also places importance on the fact that there are multiple, diverse, and independent domestic and global sources of emissions. This is irrelevant to the contribution determination. Cf. State of Massachusetts, 549 U.S. at 525-26 ("Nor is it dispositive that developing countries such as China and India are poised to

[34] 90 FR at 25767. Also see at 25767 ("a third or fourth order adverse consequence involving multiple independent domestic and global actors.")

[35] In addition, EPA fails to account for the increasing certainty in the science concerning the dangers presented by GHG air pollution levels. For example, the IPCC's 2023 Sixth Assessment Report (found at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) finds clear causal linkages from emissions to damages and warns that limiting global warming to 1.5°C and 2°C involves rapid, deep and in most cases immediate greenhouse gas emission reductions from all sources and sectors, particularly from CO2 from fossil fuel combustion.

[36] 90 FR at 25767.

increase greenhouse gas emissions" since "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.") The question is not how many different sources emit the pollutants that end up making up the air pollution. EPA seems to argue that this multiplicity of actors makes the causal link between GHG emissions and danger from climate change less direct, and therefore less significant. This is irrelevant for the reasons discussed above.

It also fails to recognize that a million metric tons (MMT) of GHGs emitted by EGUs acts the same way as a MMT of GHGs emitted by another source, whether domestic or global. The EGUs' tons end up well mixed in the atmosphere along with all of the tons emitted by other sources.[37] The endangerment comes from the aggregate concentration of GHGs in the atmosphere, the air pollution. The issue in this rulemaking is not whether the air pollution endangers; that is a given. The issue here is whether the emissions from EGUs make a significant contribution to the total amount of GHGs in the atmosphere comprising the air pollution. The number and location of all of the other sources of GHGs is irrelevant to making a judgment about the degree of contribution from EGUs.

Finally, EPA again improperly ties its judgment on contribution to the effects that control measures would have in terms of reducing the danger from the air pollution. EPA states that "emissions of an air pollutant by a source category cannot be said to contribute significantly to a third or fourth order adverse consequence involving multiple independent domestic and global actors unless the contribution is sufficiently significant that regulation would have a discernable impact on the potential danger."[38] As discussed above, the impact of future control measures, including their effectiveness in addressing the air pollution, is not a factor that is legally relevant in determining the threshold issues of significant contribution and endangerment. The many and varied issues concerning appropriate control measures arise after EPA makes an affirmative determination on contribution and endangerment. Both the Supreme Court and the D.C. Circuit have made clear issues concerning the kinds and impacts of future control measures are not relevant in making the threshold scientific judgments on contribution and endangerment.

(c) Common, ordinary meaning of "significant/significance," "contribution."

EPA claims that the "ordinary meaning" of the term significant contribution supports its proposed interpretation of that phrase. The ordinary meaning of these terms, read in context as they must be, do just the opposite.

The term contribution means "to have a share in bringing about (a result); be partly responsible for."

> The ordinary meanings of the words "contribute" and "factor" suggest that the phrase "contributing factor" is broad indeed. See Webster's New World College Dictionary 317 (4th ed. 1999) (*defining "contribute," in the relevant sense, to mean)*; id., at 508 (defining "factor" as "any of the circumstances, conditions, etc. that bring about a result"). Showing that an employer acted with retaliatory animus is one way of proving that the protected activity was a contributing factor in the adverse employment action, but it is not the only way. (emphasis supplied) *Murray v. UBS Securities, LLC*, 144 S. Ct. 445, 455 (S. Ct. February 8, 2024).

[37] This comparison assumes the same pollutant is involved, e.g. an MMT of CO2 from one source compared to an MMT of CO2 from another source, or an MMT of CH4 compared to another MMT of CH4.
[38] 90 FR at 25767.

EPA points to one possible meaning of the term significant:

> the term "significant[ ]" is defined as "having or likely to have influence or effect: important." [fn 101] "Important" is similarly defined, in turn, as "marked by or indicative of significant worth or consequence : valuable in content or relationship."[fn 102]. 90 FR at 25765.

The dictionary definition EPA relies on provides an example of this meaning – "a significant piece of legislation."

This is just one of that dictionary's primary meanings of significant. There is a parallel meaning – "of a noticeably or measurably large amount." Two examples are provided for this parallel meaning – "a significant number of layoffs" and "producing significant profits."

These are two different meanings and usages, and this difference is reflected in several other dictionary definitions.

1. https://dictionary.cambridge.org/dictionary/english/significant
important or noticeable:

> Examples: There has been a significant increase in the number of women students in recent years.
> The talks between the USA and the USSR were very significant for the relationship between the two countries.
> There was no significant change of blood pressure.

2. https://www.britannica.com/dictionary/significant
(1) large enough to be noticed or have an effect

> Examples: A significant number of customers complained about the service.
> He won a significant amount of money.
> There is a significant difference in prices between the two stores.

(2) very important

> Examples: a significant event in the history of our nation
> Fish is a significant part of their diet.
> It is significant that she never mentioned him.

3. https://www.oxfordlearnersdictionaries.com/definition/english/significant
large or important enough to have an effect or to be noticed

> Examples: There are no significant differences between the two groups of students.

4. https://www.collinsdictionary.com/us/english-language-learning/significant
(1) adjective
A significant amount or effect is large enough to be important or affect a situation to a noticeable degree.

> Examples: A small, but significant number of 11-year-olds are illiterate.
> The number of Senators now supporting him had increased significantly.

(2) adjective
A significant fact, event, or thing is one that is important or shows something.

> Examples: I think it was significant that he never knew his own father.

Your work has shown a significant improvement.
a significant increase/decrease/reduction/loss
a significant amount/number/part/portion

There are two primary meanings of "significant," and they differ in usage and general meaning. One is an indication of importance - that is the indication EPA relies on. This meaning is used to refer to the importance of a fact, event, or thing. The examples provided include:

- a significant piece of legislation (from the dictionary definition EPA relies upon)
- The talks between the USA and the USSR were very significant for the relationship between the two countries.
- a significant event in the history of our nation
- Fish is a significant part of their diet.
- It is significant that she never mentioned him.
- I think it was significant that he never knew his own father.
- Your work has shown a significant improvement.
- a significant increase/decrease/reduction/loss
- a significant amount/number/part/portion

The other primary meaning of significant is large enough to be noticed or have an effect. The examples provided include:

- a significant number of layoffs
- producing significant profits
- There has been a significant increase in the number of women students in recent years.
- A significant number of customers complained about the service.
- He won a significant amount of money.
- There is a significant difference in prices between the two stores.
- A small, but significant number of 11-year-olds are illiterate.
- The number of Senators now supporting him had increased significantly.

While there is some limited overlap between the meanings, their difference in usage is clear. The indication of importance often is typically used when referring to a single event or fact – "a significant piece of legislation," meaning an important piece of legislation, the example used in the dictionary EPA relies upon. The indication of large enough to be noticed or have an effect is typically used when referring to things or events in multiple numbers, with the size or number of things being large enough to be considered significant.

The statutory context here – volume or magnitude of emissions of air pollutants in relation to the concentration in the air of the pollutants – clearly speaks to the meaning large enough to be noticed or have an effect. That makes much more sense in this context. Congress is not addressing the importance of a piece of legislation or the importance of a historical event; it is addressing the amount of emissions and their relationship to levels of air pollution.

EPA's proposal ignores this ordinary meaning of "significant contribution." Instead, EPA focuses on importance and value, cherry-picking a definition to promote its policy goal and ignoring the statutory

context for the word significant. The D. C. Circuit recently rejected this improper approach to statutory construction.

> "Pursuant to the text, as amended, the Act prohibits the FDA from approving another application "for the same drug for the same disease or condition" as an orphan-designated and approved drug during the earlier drug's seven-year exclusivity period. 21 U.S.C. § 360cc(a). Jazz argues that "same" here means "the one previously referred to; aforesaid." See Same, Collins English Dictionary 1750 (12th ed. 2014).
>
> For support, *Jazz relies on the Eleventh Circuit's interpretation of "same" in this context to mean "being the one under discussion or already referred to."* Catalyst Pharms., Inc. v. Becerra, 14 F.4th 1299, 1307–08 (11th Cir. 2021) (citing Same, Merriam-Webster's Collegiate Dictionary Online). *But the Eleventh Circuit brushes past Merriam-Webster's first sense of the adjective "same," which defines it as "resembling in every relevant respect," and instead adopts the second definition of the term without explanation.* Id. (citing Same, Merriam-Webster's Collegiate Dictionary Online). Merriam-Webster's first sense also fits with Black's contemporary definition. Same, Black's Law Dictionary 1541 (10th ed. 2014) ("Identical or equal; resembling in every relevant respect."). As a matter of ordinary meaning, a drug that is clinically superior to another drug does not resemble that drug in every relevant respect. Indeed, narcolepsy patients would most likely find it "relevant" that they no longer must wake up at night for a second dose of medication. […]
>
> It is also *a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.*" Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 320, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (quotation omitted)....
> *Beyond the context of the other subsections in section 360cc, Jazz's statutory interpretation fits poorly with the statutory scheme as amended in 2017*." *Jazz Pharms., Inc. v. Kennedy*, No. 24-5262, 2025 WL 1775121, at *5 and *16 (D.C. Cir. June 27, 2025) (emphasis added).

As noted above, contribution means "to have a share in bringing about (a result); be partly responsible for." Contribution of emissions from a source category to air pollution then means the share its emissions provide in bringing about the air pollution, the degree to which the source category is partly responsible for the air pollution. Significant contribution would be a subset of this, a contribution of emissions that is large enough to be noticed or have an effect on the air pollution.

Instead, EPA focuses on its improper definition for "significant" and argues that:

> Whether a source category's contribution to air pollution should be considered "important" or "valuable" entails consideration of the influence, effect, or usefulness of finding such contribution. If regulating emissions of a particular pollutant from a source category would have little effect on dangerous air pollution, that source category's contribution to the air pollution is not significant. By the same token, if regulating emissions would not be useful, taking into account, inter alia, the impacts on, and the Administration's policies concerning, the source category, that source category's contribution to the air pollution is not significant. 90 FR at 25765.

EPA claims a category's contribution of emissions to the air pollution is not significant if future reductions in emissions from controls are not significant in terms of addressing the dangers of the air pollution. This

relies upon a meaning of significant that is not applicable in this statutory context. And it makes no sense, a simple example shows why.

Consider a case where current air pollution levels are harmful and present clear risks to the public health or welfare. Take a source category that contributes 90% or more of the total emissions that result in this level of harmful air pollution. Assume EPA projects that future adoption of emission controls would only reduce the level of the air pollution by a small amount, say 1% or even lower. Under EPA's proposal, the source category would not significantly contribute to the current air pollution. That fails logic and fails any meaningful common or ordinary usage of the term significant as used in section 111.[39]

It's easy to see the source of EPA's error. EPA is using the term significant as if it modifies EPA's remedial power. Its logic is that contribution to the air pollution cannot be significant if the remedy EPA may adopt does not discernably or noticeably or sufficiently solve the air pollution problem. That is not how Congress structured section 111 and the many other similar federal provisions described below.[40]

2. Context of Section 111.

The wide variety of CAA provisions addressing federal and State emission controls supports EPN's interpretation.

(a) Federal controls.
Section 111 is just one of many provisions where Congress followed a two-step process, with the first step a threshold identifying whether EPA has authority to adopt federal controls on emissions, and a second step where Congress specifies what kind of controls EPA can adopt.

This pattern throughout the CAA clearly indicates that the two steps involved are separate and apart and involve consideration of different factors. Factors relating to endangerment and factors relating to standard setting are not relevant for determining contribution or significance of contribution.

CAA Section	**First step – threshold, identifying whether EPA has authority to adopt federal controls on emissions.**	**Second step - if threshold step met, identifying whether EPA must or may adopt federal controls.**	**Second step – specifying what kind of federal emissions controls EPA can adopt.**

[39] cf. 597 U.S. at 524 ("[EPA's] argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. … They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."). See also id. at 525-26.

[40] As discussed above and in Section II.2.(b), Congress knew how to direct EPA to consider the impact of control measures when it makes a significant contribution finding. See CAA Section 169B (EPA can remove a State or portion of a State from a visibility transport region if the control of emissions will not significantly contribute to protection or enhancement of visibility in Class I areas), Section 176A (EPA may remove a State or portion of a State from the interstate transport commission where EPA determines control of emissions in the State will not significantly contribute to attainment of the NAAQS in downwind areas). Congress did not do this in Section 111. In addition, EPA's reliance on lack of usefulness in advancing other administration policies is unlawful, as discussed elsewhere.

Section 108	EPA lists criteria pollutants. Include on list if EPA judges cause/contribute to air pollution that endangers. 108(a)(1)(a)	If pollutant listed, EPA shall adopt NAAQS.	NAAQS must meet requirements of 109(a), (b).
Section 112	Congress lists pollutants. EPA can add to list based on adverse health effects from exposure. 112(b)(1), (2). Area sources. 112(k)(3)(B) EPA shall identify not less than 30 hazardous air pollutants which present the greatest threat to public health.	EPA shall adopt controls.	Standard setting specified. 112(d), (f).
	Accidental releases – EPA list substances which are known to cause or contribute or may reasonably be anticipated to cause death, etc., or harm environment. 112(r)(3).		Standard setting specified. 112(r)(1), (5), (7).
Section 122	EPA determine whether radioactive and other emissions will cause/contribute to endangerment.	If affirmative determination, list under sections 108 or 112 if cause /contribute air pollution reasonably anticipated to increase mortality. List under 111 if emitting significant amounts.	Standard setting specified in sections 109, 111, or 112.
Section 202	EPA determine whether emissions cause/contribute to endangerment. 202(a)(1)	EPA shall adopt standards.	Congress specifies what kind of standards to adopt. In some cases, Congress specified level of standards. 202(a)(1), (a)(2), (a)(3), (b), (d), (f) –(k), (m).d
	EPA conducts study of need for and feasibility of means of control of air toxics emissions from motor vehicles. 202(l)(1).	EPA shall adopt standards.	Standards specified. 202(l)(2).
Section 211	EPA determines if emissions cause/contribute to endangerment. 211(c)(1)(A)	EPA may adopt controls, prohibitions.	Controls/prohibitions specified in 211(c). Congress specified various controls in (g) – (o).

Section 213	EPA determines if emissions of new nonroad are significant contributors to ozone or CO levels in more than one nonattainment area. If yes, EPA adopt standards for classes/categories which cause/contribute to such air pollution. 213(a)(1), (2).	EPA shall adopt standards. 213(a)(3).	Standards specified 213(a)(3), (4). Standards required for locomotives, 213(a)(5).
	EPA determine if any other emissions from new nonroad significantly contribute to endangerment. If yes, EPA determine if classes/categories cause/contribute to such air pollution. 213(a)(4)	EPA may adopt standards. 213(a)(4)	Standards specified. 213(a)(4).
Section 231	EPA determines if emissions cause/contribute to air pollution which endangers. 231(a)(2)(A).	EPA shall adopt standards.	Standards specified. 231(a)(2)(A),(B); (b)
Section 303	EPA determine if pollution sources present imminent, substantial endangerment. 303.	EPA may sue to enjoin persons.	EPA may sue to enjoin any person who cause/contribute to the pollution to stop emissions that cause/contribute.
Section 602	Congress lists substances. EPA shall add to list if find cause/contribute significantly to harmful effects on the stratosphere. 602(a),(b).		Congress specifies phase out of substances. 604, 605.
Section 615	EPA judges whether a substance, practice, etc. may reasonably be anticipated to affect the stratosphere and such effect may reasonably be anticipated to endanger public health or welfare.	EPA shall regulate.	EPA shall promptly regulate such substance, practice, etc.

Congress consistently set up a two-step structure in determining whether and how EPA was authorized to adopt federal controls for emissions. The first step involves identifying whether EPA has authority to adopt controls. In many cases this involves a determination whether emissions from certain sources cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. In some cases Congress specified that significant contribution was an element of the threshold test. In some cases, Congress itself made the threshold authority determination, e.g. section 112's list of HAPs and section 602's list of substances.

Congress also specified whether EPA must or may adopt controls, and specified what kind of controls EPA could adopt. Typically, Congress specified factors that EPA had to consider in setting standards. In some cases, Congress went into some detail in specifying the kind of control, in other cases Congress provided EPA great discretion in determining the kind of control to adopt.

The consistency of Congress' use of this structure throughout the Act makes it clear that Congress was acting intentionally. Congress intended that the first threshold question was determining when EPA had authority to adopt controls, and the second step was specifying what kind of controls EPA could adopt. These steps address different questions, and different factors are relevant to answering each of those questions. In section 111, EPA's role is to determine whether emissions from certain sources contribute significantly to certain air pollution. This determination is separate from and does not involve whether the air pollution endangers and does not involve what kind or the impact of emissions controls EPA may adopt in the future if EPA makes an affirmative threshold determination.

(b) State controls, SIPs.

Congress did not follow this consistent structure when it addressed a different question – when and how should EPA require States to address emissions controls in their SIPs?

(i) State SIPs are largely designed to achieve attainment and maintenance of the NAAQS set by EPA. The NAAQS are the result of the two-step process Congress set for EPA in sections 108 and 109. Most of Congress' direction to states concerns what elements a state SIP must contain to address emissions of the NAAQS pollutants, when a state has to achieve attainment of the NAAQS, and what happens if it does not.

(ii) In section 110, Congress addressed when a state SIP had to contain measures to address emissions from the State that affected the air quality of downwind states. Congress specified that a state SIP had to contain provisions that prohibit sources from emitting amounts of emissions which contribute significantly to nonattainment in downwind states. This is called the Good Neighbor provision.[41]

Congress chose to structure the contribution finding in section 110's Good Neighbor provision differently than how Congress chose to structure the contribution finding in section 111. In section 110, the contribution finding performs two functions – it identifies the threshold question of whether the state has to include provisions to control emissions, and it identifies the amount of emissions that must be controlled. As noted earlier, Congress did not choose to combine these two steps for section 111, contrary to EPA's proposal.

(iii) In Part C, Congress addressed visibility impairment. EPA determines areas where visibility is an important value. States with listed areas must adopt SIP provisions that make reasonable progress to address visibility impairment. In addition, states that may reasonably be anticipated to cause or contribute to visibility impairment in listed areas have to adopt such SIP provisions.[42]

[41] Section 110(a)(2)(D)(i)(I).
[42] Section 169A(a)(2), (ii).

EPA also establishes a visibility transport region and adds a state or portion of a state to the region if there is significant contribution to visibility impairment in a Class I area. EPA can remove a state or portion of a state if the control of emissions will not significantly contribute to protection or enhancement of visibility in Class I areas under section 169B. In this case, unlike section 111, EPA looks at the results of standard setting — for purposes of removal, the degree of contribution is based on the level of emissions remaining after controls are adopted — before determining whether standards will be required.

(iv) Congress adopted the same approach to an interstate transport commission concerning NAAQS pollutants. Section 176A establishes an interstate transport commission where EPA determines interstate transport of pollutants that contribute significantly to NAAQS violations in other states. States or portions of states are added to the commission based on a determination of significant contribution to NAAQS violations, and states or portions of states are removed where EPA determines control of emissions in the state will not significantly contribute to attainment of the NAAQS in downwind areas.[43] As with visibility impairment, Congress specified when EPA's determination of contribution would take into account the level of emissions after controls were adopted. This is different from the approach Congress employed for section 111 and the federal controls noted above.

For both visibility impairment and interstate transport of NAAQS pollutants, it is important to note that the decision to initially include a state or portion of the state is based on contribution prior to controls, as in the federal controls noted above. It is only when Congress addressed removal of a state or portion of the state that it authorized EPA to consider the level of emissions after controls are adopted in making the contribution finding.

(c) Overall.

It is clear Congress knew how to authorize EPA to consider the impacts of future emissions controls when it made a contribution finding. It did not take this approach in section 111 and did not take it in the many similar provisions for federal controls noted above.

The different Congressional approach for provisions addressing states and for provisions addressing federal controls, combined with the consistency of the two-step approach employed for the provisions on federal controls, make it clear that under section 111 the characteristics that make a source category's contribution significant are separate and distinct from the characteristics that make air pollution dangerous, separate and distinct from the characteristics and impacts of the standard setting that occurs only if an affirmative threshold determination is made, and separate and distinct from other policy considerations of the administration.

B. Past EPA practice.

For many decades EPA determined contribution under a variety of provisions addressing EPA's authority to adopt emissions controls. Throughout, EPA's core focus has been evaluating the inventory of emissions from the relevant sources, and in many cases comparing this inventory to inventories of other relevant sources and groups of sources. Several examples are included in this table.

[43] Section 176A(a).

CAA Section, Air Pollutant, and Emissions Control		Date Enacted
Section 202(a)		
GHGs	74 FR 66496, 66506, 66507-508, 66515-516, 66537-540, 66541-545)	December 15, 2009
Section 231(a)		
GHGs	81 FR 54422, 54424, 54426-427, 54434-438, 54459-4, 5446-474	August 15, 2016
CO, HC, NOx	38 FR 19088, 19089	July 17, 1973
Pb	88 FR 72372, 72378-385, 72393-393, 72397-402	October 20, 2023
Section 213(a)(2),(3),(4)		
Large CI land based >37Kw (CO, NOx, VOC, PM, smoke)	59 FR 31306 Significant contribution finding. 59 FR at 31307-310. Large CI – contribution finding, (a)(3), (a)(4). 59 FR at 31309.	June 17, 1994
Small CI land based <37Kw (CO, NOx, VOC, PM, smoke)	63 FR 56968 Contribution finding 63 FR at 56968-969	October 23, 1998
Large SI, Recreational (Regional haze, visibility HC, NOx, CO, PM)	67 FR 68242, 68242-249	November 8, 2002
Nonroad Diesel (regional haze, visibility)	69 FR 38958, 38963	June 29, 2004
Section 211(c)(1)		
Highway Diesel S (PM)	66 FR 5002, 5006-07, 5008; RIA Appendix A pp. A1-A3.	January 18, 2001
Nonroad Diesel S (PM)	69 FR 38958, 38962, 38963 ; RIA pp2-1 – 2-3, Chpt. 5 Appendix 5A pp 5-99 – 5-101.	June 24, 2004
Highway Gasoline S (PM)	65 FR 6698, 6703; RIA Appendix D, pp D-2 – D-3.	February 10, 2000
RFG (NOx)	59 FR 7716, 7745, 7750-752	February 16, 1994

Section 111(b)		
Initial list	36 FR 5931	March 31, 1971
Additional list	38 FR 15406	June 11, 1973
Primary Aluminum plants	39 FR 37668, 37730	October 23, 1974
Petroleum refinery Sulfur recovery plants	41 FR 43866	October 4, 1976
MSW Landfill	56 FR 24468, 24473-474	May 30, 1991

C. Best interpretation of significant contribution as used in Section 111.

All of the above analysis strongly shows that the best interpretation of Section 111(b)'s term "significantly contributes" is as follows:

> Contribution of emissions from a source category to air pollution means the share of emissions that the category provides or is responsible for in bringing about the air pollution. Significant contribution is a subset of this –- a contribution that is large enough to be noticed or have an effect on the air pollution.

The requirement that EPA exercise its judgment refers to judgment on issues that are relevant to contribution. The text and structure set by Congress call for EPA to judge contribution to air pollution at a point when EPA has no authority to adopt future emissions controls. That authority follows from the determination EPA makes; it does not exist at the point Congress requires a determination on contribution. The potential for future emissions reductions if EPA makes an affirmative determination on contribution is not relevant to the prior threshold issue of contribution. Likewise, the effects of future controls on other policies of the administrations are not relevant to EPA's judgment on contribution.

As shown in EPA's many past determinations on contribution, the primary metric to evaluate contribution involves magnitude of emissions, and the relationship this magnitude has to the level of air pollution that endangers. In many cases this becomes a relative comparison of magnitude of emissions from the source category to the magnitude of emissions from other parts of the total inventory of emissions. To make an apple to apple comparison, this relative comparison typically considers the magnitude of the source category's emissions and compares it to the magnitude of various other inventories, such as the total emissions that produce the air pollution, and the total emissions from various subsets of sources that are part of the total inventory. In specific cases there may be additional metrics that can be useful, but this kind of comparison of magnitudes is a core and primary factor in evaluating the relationship between a source category's emissions and the levels of air pollution of concern.

D. EPA's proposed interpretation is unlawful.

EPA's proposed interpretation of significant contribution is based on two different kinds of considerations.[44] Each of them is unlawful.

1. One kind of consideration that EPA relies upon concerns factors that are relevant to determining appropriate control measures under section 111(a) once an affirmative contribution/endangerment finding is made under section 111(b). This includes the projected impacts of such control measures and their impact on the endangerment, as well as consideration of how the control measures would affect the administration's overall policy on energy production.

Under this umbrella, EPA considers the effectiveness of emissions reduction controls, the cost effectiveness and reasonableness of those controls, and the impacts on the industry. EPA also considers the impact that emissions reductions under the projected controls would have on reducing the endangerment from the air pollution. Finally, EPA takes into consideration the impact of the controls on the President's overall policy on energy generation.

After evaluating these factors EPA concludes that there are serious flaws in the current standards and that it is unlikely that EPA could develop a BSER that would result in "any meaningful, cost reasonable GHG emission reductions," and therefore "the contribution of this source category to GHG air pollution is not significant."[45] EPA determines that "only extraordinary emissions reductions on a global scale would have any impact on the potential endangerment of public health and welfare in this context," and therefore "GHG emissions from the EGU source category do not contribute significantly to dangerous air pollution."[46] EPA also relies upon a claim that even if all GHG emissions from EGUs were eliminated, "the risks to public health and welfare attributed to anthropogenic climate change would not be meaningfully different."[47]

EPA proposes that controls on EGUs would interfere with "this Administration's national policy that energy production is essential to the public welfare" (referring to the statutory definition of "welfare" in CAA Section 302(h)) and "[t]his entails continued and increasing reliance on fossil fuels to meet increasing demand for electricity generation."[48] This "Administration's priority is to promote the public health and welfare through energy dominance and independence secured by using fossil fuels to generate power."[49] The other kind of consideration involves factors characteristic of the global nature of GHG emissions sources and GHG air pollution. EPA relies upon principles of proximate cause from the area of tort law to find that there is a higher threshold for contribution because there are multiple intervening actors and various uncertainties and extrapolations needed to draw a causal link between EGU emissions and the adverse domestic effects of climate change. The "attenuated causal chain" requires a "greater volume and percentage of contribution than a more direct causal relationship to account for the degree of uncertainty and extrapolations involved."[50]

---

[44] 90 FR at 25755, 765-768.
[45] 90 FR at 25766.
[46] Id.
[47] 90 FR at 25768.
[48] 90 FR at 25766.
[49] 90 FR at 25755.
[50] 90 FR at 25767.

This also considers claims that EGU emissions are a "small and decreasing part of global emissions"[51] because of a "large and growing share of GHG emissions from international sources."[52]
EPA bases its authority to take these various factors into consideration on the use of the term "judgment," the alleged ordinary meaning of the undefined term "significant," and EPA's prior interpretation of the CAA's Good Neighbor provision, involving obligations on states to address interstate transport of pollutants.

2. The various factors EPA considers in the first area are legally irrelevant and are unlawful for EPA to consider in determining significant contribution under section 111(b).[53] Section 111, like many other provisions in the Act, addresses federal authority to establish emission controls on source categories using a two-step approach. The first is a threshold step. EPA is to determine whether air pollution is reasonably anticipated to endanger public health or welfare and determine whether a source category contributes significantly to this air pollution. If and only if EPA makes an affirmative determination, EPA has authority to and must adopt emissions controls on the source category. Congress specifies the nature of appropriate emission controls in section 111(a), defining "standard of performance," BSER. Under this two-step approach, contribution and endangerment are determined first and are separate and distinct from the subsequent determination of the appropriate emission controls. This is the approach taken by Congress in section 111, and it is mirrored by many other provisions throughout the Act addressing when EPA has authority to adopt emissions controls on sources. Under this approach, the factors that determine BSER and the impacts from BSER are irrelevant to the factors that determine contribution or endangerment.

As discussed above, both the Supreme Court and the D.C. Circuit have been clear that the factors EPA considers in the first area are irrelevant to the scientific judgment that must be made concerning significant contribution. EPA may not consider the standard setting factors of cost, cost effectiveness, or cost reasonableness in determining significant contribution. EPA may not consider the degree of mitigation of the air pollution's harms that an appropriate emissions control might achieve. EPA may not consider other policies of the administration, such as an overall policy to promote use of fossil fuels to generate electricity. The agency's invocation of national energy policy to increase fossil fuel utilization, and its reliance on "welfare" to justify this consideration, is clearly improper. EPA is considering a factor legally irrelevant to the threshold contribution determination. EPA's authority to interpret significant contribution under section 111 is limited to factors legally relevant to air pollution. EPA has no authority to interpret this provision as a backdoor way to adopt and implement a national energy policy that promotes use of fossil fuels to generate electricity.[54] EPA's effort to justify its invocation of national energy policy by considerations of public welfare is of no avail. That definition is relevant to the endangerment determination, which is not at issue in this rulemaking. In addition, that general definition does not authorize EPA to incorporate any one of a myriad number of national, societal impacts of potential future control measures as a factor EPA can lawfully consider in determining significance of contribution, a threshold step that precedes EPA having authority to adopt control measures.[55]

[51] 90 FR at 25755.
[52] 90 FR at 25768.
[53] The discussion here incorporates all of the prior analysis of EPA's proposed interpretation.
[54] *West Virginia v. EPA*, 597 U.S. 697, 728-731(June 30, 2022).
[55] See id., *West Virginia v. EPA*.

The courts are clear that EPA's "judgment" is constrained to only consider the factors that are legally relevant when determining contribution. It is not permission to consider a wide range of factors and allegedly desirable policy considerations.[56]

In addition, the undefined term "significant" does not support EPA's proposal. EPA relies upon a meaning of significant ("important") that is not relevant in this context. As discussed above, the ordinary meaning of significant that is appropriate in this context is "large enough to be noticed or have an effect."[57] EPA ignores this meaning and instead relies on a meaning that does not apply in this context.

As discussed above, the Act's Good Neighbor SIP provision does not support EPA's proposed interpretation, it undermines it. The Good Neighbor provision is distinctly different from the significant contribution finding in section 111. The contribution finding in the Good Neighbor provision performs two functions – it identifies whether the state has to include provisions in its SIP to control emissions, and it identifies the exact amount of emissions that must be controlled.[58] This is distinctly different from section 111. The SIP provision combines two questions (duty to adopt controls and amount of reductions required by the controls), while these two questions are kept separate in section 111 (authority to adopt controls, based on contribution/endangerment determination; and achievement of emissions controls through the separate standard setting provision, BSER). The Good Neighbor provision and other SIP provisions concerning transport make it clear that Congress knew how to authorize EPA to consider factors related to emissions control when making a significant contribution finding. Congress did not do so in section 111(b).

3. In the second area of consideration, EPA improperly relies upon principles of "proximate cause," taken from the common law of tort. These tort principles have no relevance in interpreting section 111(b)'s significant contribution determination. As discussed above, these principles address suits by private parties seeking to recover monetary damages for injuries allegedly caused by another party's conduct. The case law cited by EPA addresses this situation, where the alleged injury is caused by conduct that is prohibited by statute. These situations have nothing to do with a federal statute addressing the scope of an administrative agency's authority to adopt emission controls to address air pollution problems. It is improper for EPA to rely on these tort principles as a basis for determining contribution at all, much less deciding there is a heightened threshold for making such a determination.

As discussed above, EPA's reliance on the alleged attenuated causal link between EGU emissions and harm from global climate change mixes up issues relevant to determining endangerment and issues relevant to determining contribution. The attenuated causal linkage is largely a consideration already taken into account in making the endangerment finding, a finding EPA does not contest, and which has only become scientifically more certain over time. Likewise, the consideration of the existence of multiple and diverse domestic and foreign sources of GHG emissions is irrelevant, especially given the nature of the air pollution as a well-mixed aggregate of gases, where what matters is the amount of emissions of the specific pollutant, not the identity or characteristics of the source. Finally, as discussed above the courts have been clear that the global nature of the air pollution and its sources does not authorize EPA to base its decision on a claim

[56] EPA's reliance on *Michigan v. EPA*, 576 U.S. 743, 753 (see 90 FR 25765, fn.104) is apposite. That case concerns a very different statutory provision in section 112(n)(1)(A), calling for EPA to determine whether "regulation is necessary and appropriate" with respect to emissions of HAPs from electric utility steam generating units.

[57] As discussed below, the emissions from EGUs are far and away large enough to be noticed and have an effect.

[58] States must "prohibit[]… amounts [of any air pollutant] which will contribute significantly to [nonattainment or maintenance of attainment in a downwind State]" Section 110(a)(2)(D). See the discussion of this provision above.

that the relative contribution of EGUs is "just too small" when compared to total global emissions. EPA must look at the size of the category's emissions in a context where there are many countries and sources; various comparisons are highly relevant, such as comparisons between the source category and the U.S. total, and comparisons to other countries. It is improper to narrowly focus on a comparison between the source category and the global total. The courts are also clear that the projected future increase in emissions from some other countries and the inability of controls on the source category by itself to make a large impact on the global air pollution problem is not a valid reason to make a negative determination on contribution.
For all of these reasons, including the more detailed discussion above, EPA's proposed interpretation and application of its interpretation is unlawful.

4. Based on its proposed negative determination on significant contribution, EPA proposes to "repeal all greenhouse gas standards for the power sector, specifically the 2015 NSPS and the CPS."[59] Even assuming the validity of EPA's proposed negative determination, it does not authorize EPA to cancel the pre-existing and lawful GHG standards for these sources. A valid negative determination on significant contribution might mean EPA would no longer have authority to adopt new or additional GHG standards for this source category. But the pre-existing GHG standards for this source category were lawfully adopted under a valid finding of significant contribution. The D.C. Circuit upheld the lawfulness of EPA's prior significant contribution finding, and EPA's proposed negative determination on contribution does not change or undermine the validity of EPA's prior affirmative determination. EPA's proposed negative determination on significant contribution has no legal effect on EPA's prior standard setting for this category and is not a lawful basis for EPA to cancel the existing GHG standards.

E. Under the best interpretation of significant contribution, EGU's clearly meet the significant contribution criterion.

In its 2015 rulemaking, EPA determined that GHG emissions from EGUs contributed significantly to the endangerment from GHG air pollution. EPA found that emissions from EGUs amounted to about one-third of all U.S. emissions. EGUs were far and away the largest stationary source of GHG emissions — emissions from EGUs were about three times the level of the next 10 categories of stationary sources combined. A single new coal fired power plant could emit millions of tons of GHGs. Emissions from EGUs far exceeded in magnitude the emissions from motor vehicles. EPA specified the very large level of emissions from these sources in Tables 3 and 4.[60]

The D.C. Circuit found this evidence more than enough to justify a significant contribution finding.

> The *EPA … chose to regulate carbon dioxide emissions from electricity-generating plants specifically because greenhouse gas pollution endangers public health and welfare and contributes significantly to air pollution. See id. at 64,530–64,531*. The EPA found in particular that increased atmospheric levels of greenhouse gases, including carbon dioxide, could lead to, among other things, more frequent extreme weather events and wildfires; threats to mental and physical health, especially for children and the elderly; reduced access to food and safe water; and mass migrations and displacements as a result of rising sea levels. *Id.* at 64,517–64,520. […]

[59] 90 FR at 25768.
[60] 80 FR at 64522-523, 530-531.

> *Given that the United States, at the time of the endangerment finding, was the second-largest emitter of greenhouse gases in the world*, see 2009 Endangerment Finding, 74 Fed. Reg. at 66,538, *it was not arbitrary or capricious for the EPA to conclude that the source of close to one-third of those emissions is a significant contributor to air pollution by any measure.* The global nature of the air pollution problem means that *"[a] country or a source may be a large contributor, in comparison to other countries or sources, even though its percentage contribution may appear relatively small" in the context of total emissions worldwide.* Id. Looking just at the Coal Petitioners' calculations, *power plants contributed a hefty 4.5 percent to global greenhouse gas emissions in 2013.* See Coal Pet'rs Br. 18. More to the point, *a holding that greenhouse gas emissions by fossil-fuel-fired power plants are not significant would make it nigh impossible for any source of greenhouse gas pollution to cross that statutory threshold.*17 For those reasons, we hold that the New Source Rule's endangerment finding provided a sufficient basis for the EPA's promulgation of the ACE Rule." (emphasis added) *Am. Lung Ass'n v. Env't Prot. Agency*, 985 F.3d 914, 977 (D.C. Cir. 2021), rev'd on other grounds and remanded sub nom. *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022).

The current situation is very similar to the situation before EPA in 2015.

1. The U.S. is still the second largest emitter in the world.[61]
2. EGUs are still a very large percentage of total US GHG emissions (25%). EGU emissions are the second largest source of emissions in the U.S., just behind transportation at 28%.[62] CO_2 emissions from coal burning power plants alone rank as the second largest source category in the US GHG inventory, after mobile sources.[63]
3. EGUs emit more greenhouse gases than all of the U.S. Industry sector combined.[64]
4. The global power sector is the largest source of GHG emissions, outranking industry, transport, buildings, agriculture, and other global sectors.[65] Global emissions of CO2 from the power sector were 14,650 MMT CO2, with the U.S. power sector emitting 11% of the global power sector's emissions.[66]
5. U.S. EGUs emit more GHGs than all of the countries in the world, with the exception of three countries – China, India, and Russia. Again – only three countries in the world emit more GHGs than U.S. EGUs.[67]

---

[61] U.S. EPA, "Global Greenhouse Gas Overview," https://www.epa.gov/ghgemissions/global-greenhouse-gas-overview, ("Emissions by Country").
[62] Total U.S. emissions for 2022 are 6343.2 MMT CO2 Eq. EGUs are 1577.5, Transportation is 1801.5. Transportation is 28% of total U.S. emissions. "Table ES-5," U.S. EPA, "Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2022," EPA 430-R-24-004, April 2024 (hereafter "U.S. GHG Inventory 2024"), https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks.
[63] "Figure ES-16," U.S. GHG Inventory 2024.
[64] "Figure ES-13," "Table ES-5," U.S. GHG Inventory 2024.
[65] "Figure 5," International Energy Agency, "CO2 Emissions in 2022," https://www.iea.org/reports/co2-emissions-in-2022.
[66] 1577.5 MMT CO2 Eq./14,650 MMT CO2. Table ES-5, U.S. GHG Inventory 2024, p.9, International Energy Agency, "CO2 Emissions in 2022," https://www.iea.org/reports/co2-emissions-in-2022.
[67] https://www.climatewatchdata.org/ghg-emissions?end_year=2022&start_year=1990. Also see "Table 1," European Commission, Joint Research Centre, "GHG emissions of all world countries, 2024", https://data.europa.eu/doi/10.2760/4002897.

Here are some examples[68]:

China	15,160
India	3,897
Russia	2,622
[U.S. EGUs	1,577]
Brazil	1298
Indonesia	1152
Japan	1107
Iran	960
Saudi Arabia	787
Germany	762
Canada	745
Mexico	687
Australia	569
France	416

The global nature of air pollution has not changed. EGUs are still very large contributors in comparison to other countries and other sources. "While the percentage contribution of this sector may appear relatively small in comparison to total emissions worldwide, "[t]he global nature of the air pollution problem means that "[a] country or a source may be a large contributor, in comparison to other countries or sources, even though its percentage contribution may appear relatively small" in the context of total emissions worldwide. […] More to the point, a holding that greenhouse gas emissions by fossil-fuel-fired power plants are not significant would make it nigh impossible for any source of greenhouse gas pollution to cross that statutory threshold."[69] EPA's view that EGUs are "only" 3% of total global emissions is of no import in this global context.

The Supreme Court recognized the same, when it addressed standing issues:

> Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere—according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. 30, Stdg. App. 219. That accounts for more than 6% of worldwide carbon dioxide emissions. Id., at 232 (Oppenheimer Decl. 3); see also MacCracken Decl. 31, at 220. To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world outpaced only by the European Union and China.22 Judged by any standard, U. S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming. *Massachusetts*, 549 U.S. at 524-525.

All of this shows that EGUs are clearly very significant contributors to global concentrations of GHGs.

---

[68] Data for 2022, in Mt CO2eq/yr. "EDGAR GHG emissions," (Edgar_2024_GHG_Booklet_2024, xlsx), https://edgar.jrc.ec.europa.eu/report_2024#emissions_table

[69] *Am. Lung Ass'n v. Env't Prot. Agency*, 985 F.3d at 977. In any case, in the global context, 3% of global emissions is a significant contribution to emissions. Id. at 977 ("power plants contributed a hefty 4.5 percent to global greenhouse gas emissions in 2013").

It is also clear that this situation is not likely to change anytime soon. Demand for electricity and therefore electricity generation will increase in the future, leading to the potential of even greater emissions levels from EGUs absent appropriate regulation and increased use of renewable or non-emitting energy. Levels of GHG emissions are not static over time. Although U.S. emissions from the power sector have declined in recent years due in part to shifts among fuel types (e.g., from coal to natural gas and renewable energy), there are no guarantees that emissions won't rise in the future. The administration and Congress are taking multiple actions currently that are specifically designed to result in increased fossil fuel emissions in the power sector, such as executive actions that add barriers to renewable energy (e.g., canceling permits for new offshore wind projects), its efforts to rescind Greenhouse Gas Reduction Grants, the removal of tax credits for renewable energy in the "Big Beautiful Bill," and the devaluing of energy efficiency (e.g., eliminating the office in EPA that implements the Energy Star program).

Demands for electricity are also increasing due to changes in technology, society, and economic factors, such as increasing electrification of buildings (e.g., appliances and heating), transportation (e.g., growth in electric vehicles), and industry, particularly rapid growth in cloud computing, artificial intelligence applications (e.g., ChatGPT and Claude), data centers, and cryptocurrency mining (e.g., bitcoin and stablecoin). Policy efforts by the administration to expand domestic manufacturing could also prompt increasing US electric power demand.

The growth in demand for power for data centers and digital currency mining is particularly striking. These facilities consume large amounts of power both for running their computing equipment and to keep the equipment cool. Because these facilities need to run 24/7 with no downtime, they have installed backup diesel generators in the event of outages, which could increase emissions from the sector in the future. Regional transmission organizations (which coordinate multi-state wholesale power delivery) have been forecasting increased growth in these sectors, such as 60 percent growth in the Midwest region over the next twenty years.[70] The U.S. Department of Energy (DOE) projected in 2024 that energy use from data centers alone has tripled over the past decade and could grow from 4 percent in 2023 to 7 to 12 percent of total US electricity demand in the next 3 years (i.e., by 2028).[71]

EPA instead focuses on the trend for other countries to increase their use of fossil fuels. EPA states that:

> This relative decline is driven in part by increases in GHG emissions from developing countries that are rapidly electrifying and increasing their energy demands, including through the robust deployment of fossil fuel-fired EGUs—a trend that is likely to persist going forward. … Limiting the use of coal and other fossil fuels in U.S. EGUs does not significantly impact global GHG concentrations when other countries continue to increase their use of fossil fuels. The EPA proposes to find that the large and growing share of GHG emissions from international sources strengthens the conclusion that U.S. fossil fuel-fired electricity generation, including U.S. coal use for electricity generation, does not contribute significantly to globally elevated concentrations of GHGs in the atmosphere. 90 FR at 25768.

[70] Testimony of Jennifer Curran, Senior Vice President, Planning and Operations Midcontinent Independent System Operator, Inc. (MISO) Before the House Committee on Energy and Commerce, Subcommittee on Energy, March 25, 2025 - https://democrats-energycommerce.house.gov/sites/evo-subsites/democrats-energycommerce.house.gov/files/evo-media-document/witness-testimony_curran_eng_grid-operators_03.25.2025.pdf

[71] See the LBNL report from 2024 at https://escholarship.org/uc/item/32d6m0d1.

This ignores consideration of future increases in electricity demand and therefore potential increases in emissions from the U.S. power sector. In addition, the Supreme Court rejected this approach in a related context, involving standing. The Court said:

> For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.
>
> But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 489 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed. Cf. *SEC v. Chenery Corp.*, 332 U. S. 194, 202 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations"). That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law. *Massachusetts*, 549 U.S. at 523-524.

Likewise, the Court stated that:

> Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere. 549 U.S. at 525-26.

Overall, it is clear that GHG emissions from EGUs contribute significantly to air pollution that endangers public health and welfare, under the best reading of the term significant contribution as used in CAA section 111.

F. Conclusion.

The best interpretation of significant contribution in section 111 is that contribution of emissions from a source category means the share of emissions that the category provides or is responsible for in bringing about the air pollution. Significant contribution is a subset of this - a contribution that is large enough to be noticed or have an effect on the air pollution. The facts are clear - emissions from fossil fueled EGUs contribute significantly to GHG air pollution.

EPA's proposed interpretation of significant contribution is unlawful. It is inconsistent with the text and context of the statute and with EPA's past practice over many decades. The Supreme Court and the D. C. Circuit have clearly rejected the approach EPA takes in its proposed interpretation.
Even if its proposed finding of no significant contribution were valid, it does not authorize EPA to cancel the current GHG standards. The current standards were lawfully adopted under a valid finding of significant

contribution. EPA's proposed negative determination is not a valid basis for EPA to cancel the lawful, pre-existing GHG standards.

IV. EPA's Proposal Contains Rationales Not Supported by Evidence

In addition to being legally flawed, EPA's proposal is arbitrary and capricious because it is based on statements that are unsupported by evidence. This fails the most basic test of administrative law. "Our well-worn arbitrary-and-capricious standard ensures that an administrative agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983)." [72] Specifically, CAA section 307(d)(3) states:

> In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose […] The statement of basis and purpose shall include a summary of—
>
> (A) *the factual data* on which the proposed rule is based;
>
> (B) *the methodology used in obtaining the data and in analyzing the data*. (emphasis added)

This proposal fails to meet that test. Among the many examples of "rationales" without support are:

EPA says that this action is consistent with "this Administration's priority is to promote the public health or welfare through energy dominance and independence secured by using fossil fuels to generate power." However, EPA does not show how increased fossil fuel use will improve either public health or welfare.

1. According to the US Energy Information Administration, the U.S. has been a net energy exporter since 2019 and had record high energy exports in 2023 (last year of available data). So, by any reasonable definition, the U.S. is already energy independent.

2. To the extent that there are any benefits to increased fossil fuel energy production, they come from the value of an increased energy supply. But increasing the U.S. energy supply is inconsistent with this administration's actions to decrease energy production from the renewable energy sector which we detailed earlier in our comments. By its own actions, the administration shows that increasing U.S. energy supply is NOT the actual objective. It is not clear what the administration's actual objective is, but EPA is acting like the actual objective is to increase pollution. This runs contrary to the first listed purpose of the CAA which says, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[73]

3. The proposal says that significant increases in GHG emissions from other countries, particularly China and India, will swamp any reductions in U.S. GHG emissions. Besides being irrelevant (both legally and morally as we cannot excuse the pollution we create by saying they do it too), the facts are that world emissions are peaking. The World Economic Forum reports that world "[e]nergy-related emissions are on the cusp of a prolonged period of decline for the first time since the Industrial Revolution. Peak energy

[72] *FDA v. Wages and White Lion Investments, LLC,* 604 U.S. ___ (2025) (not published yet)
[73] CAA Section 101(b)(1).

emissions is here."[74] Emissions from China are peaking,[75] while India just recently hit the 50% of non-fossil power milestone ahead of its 2030 target.[76] This means that if the administration goes forward with all its plans, U.S. EGUs will have an increasing percentage of world GHG emissions.

The proposal quotes from Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241. "The Executive Order specifically found that "beautiful clean coal resources will be critical to meeting the rise in electricity demand due to the resurgence of domestic manufacturing and the construction of artificial intelligence data processing centers" and to increasing "energy supply," lowering "electricity costs," stabilizing the power grid, creating "high paying jobs," supporting "burgeoning industries," and assisting allies abroad." Again, EPA does not provide any information to back the Executive Order's pronouncements. The administration can say whatever it wants, but rulemakings require a record that supports the decision made. EPA cannot blindly rely on administration policy statements without producing evidence to support the connection between those statements and legitimate CAA objectives. Failure to do so is arbitrary and capricious.

A key part of administrative law is that agencies have to undertake reasoned decision making. EPA cannot use an Executive Order as the basis for a rulemaking without facts to support the positions in the order. Otherwise, the Administrative Procedure Act (APA) and judicial review of regulations would be meaningless if all an agency has to do is point to an Executive Order as justification for every rule they promulgate. It is worth noting that the administration's actions in the energy field are increasing the costs of electricity and not lowering them.[77]

In addition, while the Executive Order talks about promoting "Beautiful Clean Coal," this action appears to be the first of a number of deregulations that will eliminate the requirements that might actually make the use of coal clean. The administrator's list of deregulatory actions shows almost half of them would have the effect of making coal dirtier.[78]

As we pointed out above, EPA claims in its proposal that there it is a "particularly demanding analytical task by evaluating the significance of contribution to global, well-mixed air pollution that results from a combination of pollutants from a large and diverse array of sources that in turn, creates elevated global concentrations that, in turn, the Agency determined play a causal role in environmental phenomena that, in turn, the Agency determined adversely affect the public health and welfare." This results in an "attenuated chain of causation" involving "multiple intervening actors, uncertainties, and extrapolations necessary to draw a connection between emissions by a source category and dangerous air pollution in the form of adverse effects in the U.S. from anthropogenic climate change." Our earlier comments focused on how this statement is irrelevant to this deregulatory action. Not only are these statements legally irrelevant, they are factually unsupported and false. There is a clear scientific link between emissions and damages and the fact

[74] https://www.weforum.org/stories/2024/11/peak-energy-emissions-a-historic-moment-overshadowed-by-the-endurance-of-fossil-fuels/
[75] https://www.carbonbrief.org/analysis-clean-energy-just-put-chinas-co2-emissions-into-reverse-for-first-time/
[76] https://www.reuters.com/business/energy/india-hits-50-non-fossil-power-milestone-ahead-2030-clean-energy-target-2025-07-14/?utm_source=cbnewsletter&utm_medium=email&utm_term=2025-07-15&utm_campaign=Daily+Briefing+India+hits+energy+milestone+EU-China+summit+Catastrophe+bond+sales.
[77] https://www.americanprogress.org/article/the-one-big-beautiful-bill-act-is-crushing-americas-electricity-system/ and https://www.nytimes.com/2025/06/04/climate/electricity-prices-republican-big-beautiful-bill.html
[78] https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history

that the increased emissions increase damages. Multiple administrations, including the first Trump Administration, have come up with estimates of the Social Cost of Carbon (SCC). The SCC is an estimate of the cost, in dollars, of the damage done by each additional ton of carbon emissions. As such it is a determination of the chain of causation from emissions — such as those from EGUs — to damage suffered by Americans and people around the world. It also serves as an estimate of the benefit of any action taken to reduce a ton of carbon emissions. For purposes of this discussion, it actually doesn't matter what that number is as long as it is positive. Any positive number shows that the chain of causation is not too attenuated to connect EGU GHG emissions to damage.

The federal government is not the only organization that has determined a positive SCC. The Canadian government,[79] New York Department of Environmental Conservation,[80] William Nordhaus and his team at Yale,[81] Resources for the Future,[82] have all come up with estimates. In fact, as additional scientific evidence of the damage caused by increased concentrations of GHGs in the atmosphere comes in, these estimates have increased over time.[83] If EPA has actual facts and data as opposed to hand waving it should present that data and allow the public to comment on it.

We note that while the current administration has determined to no longer use a SCC, its determination like this rulemaking has provided no scientific support for its decision. Whether the EPA wants to establish or use a SCC or not, the fact remains that it can, as others have, connect GHG emissions to harm to the American public.

V. Additional comments on Alternative Proposals for Carbon Capture Sequestration

EPN believes EPA's BSER determinations or standards of performance and related requirements for new and reconstructed intermediate load and low load fossil fuel-fired stationary combustion turbines and phase 1 for new and reconstructed base load fossil fuel-fired stationary combustion turbines are flawed. The BSER determination is flawed by not having any requirements that reduce dangerous pollution. EPA says that efficiency standards for coal-fired plants would make the plants more cost effective, increasing their being dispatched and thus increasing GHG emission. Since increased use of gas would reduce emissions, by EPA's own logic there would be positive benefits from requiring efficiency improvements in combustion turbines. At a minimum those should be required.

A. Alternative Proposal–Carbon Capture and Storage

EPA should be considering tax credits when determining the cost of the control. The agency may not permissibly ignore existing laws which affect regulatory costs. Doing so necessarily overestimates or underestimates actual cost impacts, or otherwise overlooks or ignores an important consideration — impermissible under standard principles of administrative law. Thus, among other things, the existing IRS section 45Q tax credit for carbon capture and sequestration needs to be accounted for in EPA's

[79] https://www.canada.ca/en/environment-climate-change/services/climate-change/science-research-data/social-cost-ghg.html
[80] https://dec.ny.gov/regulatory/guidance-and-policy-documents/climate-change-guidance-documents
[81] https://economics.yale.edu/sites/default/files/2024-03/barrage-nordhaus-2024-policies-projections-and-the-social-cost-of-carbon-results-from-the-dice-2023-model.pdf
[82] https://www.rff.org/topics/scc/
[83] https://research.vu.nl/en/publications/social-cost-of-carbon-estimates-have-increased-over-time

consideration of cost. There are a myriad of tax and other laws that impact the economics of any system of regulatory compliance.

EPA should not repeal the 90% CCS-based requirements of the emission guidelines pertaining to long-term coal-fired steam generating units. The argument to repeal this guideline is deeply flawed because EPA has ignored the potential for CO_2 removal rates below 90% and concluded that the only viable options are 90% or 0% removal. Even if one improperly disregards EPA's pre-existing robust record showing that 90% removal is not only feasible but has been achieved at commercial scale, EPA's proposal clearly shows that some non-zero level of CO_2 removal has been demonstrated, but concludes that because EPA now estimates (improperly) that 90% removal is not possible, the only remaining option is to require 0% removal. This contradicts the information in the proposal as well as sound engineering analysis. EPA needs to show why levels currently achieved cannot be achieved in the future.

EPN disagrees with EPA's proposed conclusion that 90% CCS is not an adequately demonstrated system of emission reduction. As noted above, removal percentages other than 90% are demonstrated – as are 90% removals. It is not reasonable to conclude that any other removal percentage greater than zero is not adequately demonstrated even if one concludes mistakenly that 90% removal has not been adequately demonstrated. The proposal similarly concludes that, because it is "unlikely that infrastructure necessary for CCS can be deployed by the January 1, 2032, compliance date," use of CCS is therefore not achievable at all. This all-or-nothing position ignores the potential for later compliance dates or partial EGU category compliance. As the proposal states, the U.S. has broad availability of the geologic formations that may potentially be suitable for CO2 sequestration, many of which have been or are being evaluated for use as long-term CO2 storage.[84] These evaluations include permitting and transport pipeline requirements. Substantial expertise exists within industry to support these efforts.

The performance expectation of the CO_2 capture system at Boundary Dam Unit 3 of 90% removal is unrealistic. The proposal's insistence that the only viable options are 90% removal or 0% removal is again contradicted by the information presented in the proposal itself. The proposal notes that the Boundary Dam CCS system was able to achieve as much as 63% CO_2 removal over the course of a year, yet concludes that the inability to demonstrate 90% removal means the only appropriate option is 0% removal. The proposal further implies requirements for operational standards that are unrealistic, noting that the CCS system's availability was less than 100%. Any major engineered system will necessarily have less than 100% availability.

EPN believes EPA should solicit comments on existing CCS technologies and consider all projects with varying levels of CO_2 removal. Limiting the question to whether 90% removal is adequately demonstrated shows that EPA is not interested in any level of CO_2 removal other than 90% or 0%, a false choice. To adequately evaluate alternative options, EPA must request information about existing CCS projects and technologies that have demonstrated CO_2 removals less than 90% and use that information to meaningfully analyze the viability of other CO_2 removal levels.

---

[84] See National Energy Technology Laboratory, "Carbon Capture and Storage Database," https://netl.doe.gov/carbon-management/carbon-storage/worldwide-ccs-database). See also the recent assessment from the Department of Energy's Office of Clean Energy Demonstration: "North America has abundant subsurface storage resources for CO2 ranging anywhere from 2400 billion to 21,000 billion metric tons of potential storage resources." https://www.energy.gov/sites/default/files/2024-04/OCED_Portfolio_Insights_CC_part_i_FINAL.pdf (at p. 14)

EPN thinks the proposed conclusion that the cost of 90% CCS for long-term coal-fired steam generating units is reasonable, and the IRC section 45Q tax credit should be taken into account when calculating the costs of CCS in the context of a BSER analysis. EPA's conclusion is flawed for not giving full credit to the 45Q tax credit. In addition, there are billions of dollars in benefits, so even if the costs are between $1-3 billion more than estimated by EPA in 2024, the 2024 rule would still show net benefits.

EPN believes EPA's projected costs of CCS for existing coal-fired steam generating units, including on the interplay of design capture efficiency, actual capture efficiency, and cost effectiveness are inaccurate. The proposal's conclusions regarding cost effectiveness are based on inappropriate assumptions regarding capital and operating costs and lack meaningful analysis. The proposal appears to assume that capital and operating costs for the CCS system will be constant regardless of the system's level of operation and therefore assumes that costs per ton of CO_2 removed will increase as capture efficiency decreases due to operational considerations or a system's inability to achieve a 90% design removal. This assumption does not account for lower capital and operating costs for lower design and operational removal.

EPN strongly disagrees with EPA's determination that because CCS infrastructure may not be deployed by the January 1, 2032, compliance date, the degree of emission limitation is not achievable for long-term coal-fired steam generating units. The proposal concludes that, because it is "unlikely that infrastructure necessary for CCS can be deployed by the January 1, 2032, compliance date," use of CCS is therefore not achievable at all. This all-or-nothing position ignores the potential for later compliance dates or partial EGU category compliance. As the proposal states, the U.S. has broad availability of the geologic formations that may potentially be suitable for CO_2 sequestration, many of which have been or are being evaluated for use as long-term CO_2 storage.[85] These evaluations include permitting and transport pipeline requirements. Substantial expertise exists within industry to support these efforts.

EPN Recommends Consideration of Alternatives to 90% CO_2 Capture CCS

EPA proposes eliminating the requirement for 90% CO_2 capture using CCS, arguing that that level of capture has not been adequately demonstrated and associated costs are not reasonable, but provides no consideration of substitute alternatives to control CO_2. In fact, EPA's proposal states that "*Whether CCS with other, lower rates of capture could be the BSER is outside the scope of this repeal action.*"[86]

EPA cannot curtail public comment addressing reasonable alternatives to what it proposes. It is a standard principle of administrative law that agencies must address such reasoned alternatives.[87]

EPN believes such options should be within the scope of this action, and, therefore, recommends that before finalization of this subject rule, that EPA investigate and consider information on lower capture rates for CCS in determining BSER, and that a supplementary NPRM be developed for public comment. Based on information in the proposal, there is reason to believe that some lower rates may have been adequately demonstrated and may have reasonable associated cost. Consideration could be given to a multi-step BSER process, starting with a lower percentage now with the expectation of moving to higher ones in later years.

---

[85] See National Energy Technology Laboratory, "Carbon Capture and Storage Database," https://netl.doe.gov/carbon-management/carbon-storage/worldwide-ccs-database

[86] 90 FR at 25773.

[87] See *Spirit Airlines, Inc. v. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (citing *Chamber of Com. v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005) ("Where a party raises facially reasonable alternatives, the agency must either consider those alternatives or give some reason for declining to do so.")

B. Alternative Proposal–Natural Gas- and Oil-Fired Steam EGUs

EPN does not support any of EPA's arguments for repealing the requirements of the emission guidelines pertaining to natural gas- and oil-fired steam generating units. EPA is proposing to eliminate CO_2 removal requirements entirely based upon administrative costs. The proposal recognizes that the BSERs or presumptive standards in the CPS are "not unreasonable or inappropriate," meaning that EPA understands the BSERs or presumptive standards in the CPS to be both reasonable and appropriate. The proposal also notes that existing natural gas- and oil-fired units emit CO_2 at nearly three times the rate of other electric generating units, accounting for 3.5% of emissions but only 1.2% of electricity generation. This higher rate of emissions strongly justifies retaining the reasonable and appropriate standards.

The proposal further states that EPA expects generation from existing natural gas- and oil-fired units to decrease below current levels, making the administrative efforts less efficient. However, EPA and other agencies are taking steps to keep existing power generating plants in operation.[88] These actions indicate that the administration sees a need to extend the operating life of EGUs, undercutting their statement that existing natural gas- and oil-fired units will reduce their operations.

C. Alternative Proposal–Phase 2 Standards

EPN's comments on Alternative Proposals for Phase 1 standards also apply to Phase 2 standards.

[88] See Air Plan Partial Approval and Partial Disapproval; Colorado; Regional Haze Plan for the Second Implementation Period, https://www.federalregister.gov/documents/2025/07/16/2025-13342/air-plan-partial-approval-and-partial-disapproval-colorado-regional-haze-plan-for-the-second; Trump Administration's DOE Is Forcing Coal Plants to Stay Open. Michigan Is the First Target. Also see https://www.nrdc.org/bio/derrell-e-slaughter/trump-administrations-doe-forcing-coal-plants-stay-open-michigan-first