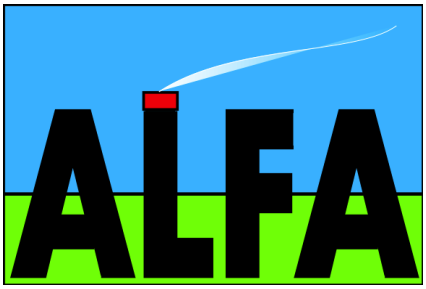

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Docket ID No. EPA–HQ–OAR–2017–0757

Dear EPA,

For the reasons below, EPA's proposed revisions to 40 C.F.R. part 60, subparts OOOO and OOOOa, 84 FR 50244 (Sept. 24, 2019), are arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law.

I. EPA'S PROPOSED USE OF ITS ERROR CORRECTION AUTHORITY IS NOT IN ACCORDANCE WITH LAW AND AN ABUSE OF DISCRETION

EPA variously proposes to find that that EPA's 2016 promulgation of subpart OOOOa was "irrational," "erroneous," or "inappropriate." However, as EPA itself acknowledges, EPA has the direct authority to revise standards of performance and source categories. Why, then, does EPA propose its indirect approach? The only explanation can be that EPA thinks use of direct authority to achieve the same outcome could not stand on the merits. EPA's entire notice must be read with this point in mind.

Agencies do have some inherent authority to correct errors.[1] However, "an agency may not rely on inherent reconsideration authority when Congress has provided a mechanism capable of rectifying mistaken actions."[2] Otherwise, agencies could "short-circuit or end-run" the statutory scheme.[3] Note that the mechanism Congress provides need not be explicitly labelled as an error-correction authority.[4]

From this, it follows that an agency cannot use error correction as a subterfuge to change policy. The way to change policy is to take action directly under the statute. Using error correction to change policy circumvents the factors that Congress intended for the agency to consider when changing policy, because the query changes from whether the new policy conforms to the statute to whether the previous policy conformed to the statute.[5]

1 *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014).
2 *Id.* (quoting *American Methyl Corp. v. EPA,* 749 F.2d 826 (D.C.Cir. 1984)).
3 *Id.* at 87.
4 *See id.* (holding FDA's reclassification authority served as an adequate mechanism instead of revocation of substantial equivalence determination).
5 It also creates the potential for "policy whipsaw": a subsequent administration could use the same error correction authority to restore the original action, still avoiding considering the factors Congress intended. Congress cannot have intended public health and welfare and industry investments to be treated so.

Another problem arises when an agency uses error correction to determine that a previous action was arbitrary and capricious or not in accordance with law, as EPA proposes to do here.[6] Essentially, the agency is substituting itself for a reviewing court. Under the Administrative Procedure Act, and in this case section 307 of the Clean Air Act ("Act"), the authority to make such determinations is reserved for the courts.[7] An agency cannot arrogate that authority to itself.[8] Such use of error correction also creates difficult issues for the courts on review. Should the standard of review be whether the agency was arbitrary and capricious in determining that the agency's past action was arbitrary and capricious? Should the courts defer to the present action or to the prior action?

These problems do not exist when an agency exercises direct authority to reach the same outcome it could using a claimed error correction authority. The court will defer to the present action in the normal way. The only role the prior action plays is that the agency must give reasons for its change in views; the court may (if they are at issue) examine those reasons but is not called on to judge whether the prior action was arbitrary and capricious or contrary to law.

Finally, inherent authority to correct errors is necessarily discretionary.[9] This discretionary nature imposes another limitation: an agency must not only explain why the previous action was erroneous, the agency must also explain why it is choosing to exercise its discretion. An explanation such as "errors as a general matter are bad" or "of course the agency wants to correct all errors" does not suffice, as it does not explain why the agency at its discretion is correcting this particular error.[10]

From this, a "harmless error" limitation can be inferred. When using error correction authority, an agency must consider whether, had the prior action been taken in the way the agency now thinks is correct, the outcome would be the same. If so, then the agency would abuse its discretion by using error correction authority. If the error were harmless, there can be no good reason to correct it.[11]

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6 Even worse, EPA sometimes proposes to find the 2016 action was "inappropriate," a standardless standard of review if there ever was one.

7 5 U.S.C. § 706; 42 U.S.C. § 7607(d)(9).

8 *Cf. Natural Resources Defense Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (holding that section 304(a) creates a private right of action and therefore "the Judiciary, not any executive agency, determines the scope … of judicial power vested" by section 304(a)) (opinion by Kavanaugh, J.); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (criticizing *Chevron* on the grounds that, in part, it permits "executive bureaucracies to swallow huge amounts of *core judicial* and legislative *power*") (Gorsuch, J., concurring) (emphasis added).

9 If EPA chooses instead to locate its error correction authority in section 301(a)(a), then that authority is also discretionary ("is authorized") and requires a finding that the action is "necessary." *See* 42 U.S.C. 7601(a)(1).

10 It should be noted that there are any number of errors in EPA rules under the Act. *See, e.g.* 40 C.F.R. § 51.230(c) (erroneous reference to section 305 instead of section 303); *id.* § 51.190 (erroneous reference to subpart C in part 58). Some are even acknowledged by EPA. *E.g.* Memorandum, "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)," from Stephen D. Page to Regional Air Directors, 22 n.33 (Sept. 2013) (noting error in 40 C.F.R. § 51.190). EPA is not under a mandatory duty to fix them all.

11 EPA may object that this would not allow EPA to fix (for example) minor, typographical errors. That would be wrong. Those errors could be corrected using the normal statutory mechanisms, not inherent authority.

As demonstrated below, EPA's proposal abounds with improper use of error correction authority.

II. EPA'S RATIONALE FOR DEREGULATING THE TRANSMISSION AND STORAGE SEGMENT, IV.A, IS AN IMPROPER USE OF ERROR CORRECTION AUTHORITY

EPA proposes "to conclude that the 2016 expansion of the source category to include sources in the transmission and storage segment did, in fact, exceed the reasonable boundaries of its authority to revise source categories."[12] EPA then gives what it views as reasons for this conclusion.

This is a prime example of EPA's improper use of error correction authority. Given all of EPA's reasons in EPA's proposal for why the transmission and storage segments should be in a separate source category, why does EPA not simply propose to use its authority under section 301(a) to revise the categories, instead of going through the motions of finding that the previous decision to include those segments in the existing source category was "erroneous"?

The question nearly answers itself: EPA in its proposal is attempting to avoid assessing the factors Congress explicitly or implicitly directed EPA to consider when directly revising a source category. EPA frankly admits as much in section IV.C: "In the future, the EPA may evaluate these emissions more closely and determine whether the transmission and storage segment should be listed as a source category under CAA section 111(b)(1)(A)."[13]

In other words, EPA is attempting to avoid assessing whether the transmission and storage segment by itself significantly contributes to air pollution that may reasonably be anticipated to endanger public health and welfare.[14] According to EPA's own theory, EPA previously erred by not making such a finding. But EPA makes no attempt here to find that the contribution of the transmission and storage segment is insignificant. This is an improper use of error correction authority as an attempt to avoid applying the factors Congress intended when listing (or de-listing) a source category.

This also suggests that EPA knows in fact that by any reasonable standard, the transportation and storage segment does significantly contribute to such air pollution. In other words, if there was an error in the 2016 action, it was harmless. Therefore, EPA's proposed rescission is also an abuse of discretion.

Finally, EPA's proposed removal of the transmission and storage segment is a change in policy disguised as an error correction. EPA first proposes an interpretation: to be included in a revised source category an industry segment must be "sufficiently related."[15] While perhaps that is a reasonable interpretation, it is also a quintessential policy choice. And even if that interpretation is compelled, applying a standard such as "sufficiently related" is also a quintessential policy choice. In fact, EPA itself acknowledges similarity in equipment used

12 84 FR at 50256.
13 84 FR at 50259.
14 As revising the source category also revises standards of performance, EPA is attempting to avoid the factors to be considered there as well. *See infra*, section III.A.
15 84 FR at 50256.

across the segments, which by itself constitutes "substantial evidence" for placing the segments in the same category.[16] But EPA thinks the 2016 action was "unreasonable," arrogating to itself the function of a reviewing court.

Thus, EPA's proposed error correction for the transmission and storage sector suffers from all the defects of improper use of error correction authority:

- Congress provided a mechanism to revise source categories directly, but EPA refuses to use it to avoid determining that the contribution from the transmission and storage segments is insignificant;
- EPA has not shown—and very likely cannot show—that had EPA in 2016 used EPA's new, proposed approach, the outcome would be any different because the contribution was insignificant;
- EPA is creating policy in the guise of an error correction; and
- EPA is arrogating to itself the function of a reviewing court.

EPA's proposed rescission of the standards of performance for and listing of the transmission and storage segment is therefore not in accordance with law and an abuse of discretion.

III. EPA'S PRIMARY PROPOSAL TO DEREGULATE METHANE, IV.D, FAILS ON MULTIPLE GROUNDS

In section IV.D, EPA proposes:

> to find that, in the specific circumstances presented here, the EPA lacked a rational basis to establish standards of performance for methane emissions from the production and processing segments because those requirements are entirely redundant with the existing NSPS for VOC, establish no additional health protections, and are, thus, unnecessary.[17]

EPA cites the 1977 proposal for lime kiln new source performance standards ("NSPS"), which, EPA claims, is an example of redundancy.

EPA's proposal fails for multiple reasons: EPA improperly uses error correction authority; EPA misreads the lime kiln NSPS proposal; EPA ignores the relevant statutory definitions; and EPA ignores structural aspects of the issue.

A. EPA Again Improperly Uses Its Error Correction Authority

Why does EPA attempt to find that the EPA lacked a rational basis in its 2016 promulgation of subpart OOOOa? If the reason given by EPA, redundancy, is valid, then why not simply revise the standards of performance to remove methane regulation directly based on that reason?

16 84 FR at 50258. No doubt other commenters will provide additional reasons for including the transmission and storage segment in the source category, reinforcing the argument made here.

17 84 FR at 50259. By "establish," EPA presumably means to disregard potential health (and welfare) benefits from an emission guideline under section 111(d) for existing sources, because the duty to promulgate such a guideline does not by itself "establish" health and welfare protections. If EPA meant to rely on the information in section VII.B, then EPA needed to invite comment on it.

Again, the question answers itself. EPA is trying to avoid assessing the factors that Congress intended EPA to consider when revising standards of performance. Section 111(b)(1)(B) provides in relevant part:

> When implementation and enforcement of any requirement of [the Act] indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, *when revising standards promulgated under this section*, consider the emission limitations and percent reductions achieved in practice.[18]

Thus, when revising a standard of performance, EPA must consider whether the standard reflecting BSER should be revised to be more stringent. EPA entirely fails to discuss this provision.[19] EPA may attempt in response to claim that "rescission" is not "revision," but the plain language of EPA's proposed regulatory text refutes that. It states "EPA proposes to amend 40 CFR part 60 as follows," and then repeatedly uses the terms "revise" and "revising."[20]

Even if "rescission" is understood to be different than "revision," the Act provides a separate mechanism to rescind a standard of performance: EPA can determine that BSER for methane consists of no controls, due to costs, amount of methane reduced, or other factors Congress intended EPA to consider.[21] EPA's improper use of error correction tries to "end-run" that mechanism, likely because EPA knows that it cannot meet the standard required for such a determination. Thus, EPA is attempting to impose a policy it likely knows cannot be supported under the Act through the guise of error correction. This is improper.

B. The Lime Kiln NSPS Example Cuts Against EPA

EPA states:

> For example, in its 1977 proposed NSPS for Lime Manufacturing Plants, the EPA proposed (and later promulgated) NSPS for particulate matter (PM) from lime plants, but not SO2, and explained that the particulate controls would have the effect of adequately controlling SO2. 42 FR 22506, 22507 (May 3, 1977). See National Lime Assoc. v. EPA, 627 F.2d 416, 426 n.27 (D.C. Cir. 1980) (quoting statements in the EPA's proposal). In effect, the EPA recognized that SO2 requirements would be redundant to PM requirements, and, for that reason, declined to impose SO2 requirements.[22]

This example is not quite on point: unlike regulation of methane here, regulation of SO2 in the lime kiln NSPS would not have created a duty for the Administrator to issue emission guidelines under section 111(d), as SO2 is a criteria pollutant. This was equally true on May 3, 1977, when the lime kiln NSPS was proposed, under the 1970 version of section 111(d) then in

18 42 U.S.C. § 7411(b)(1)(B) (emphasis added).
19 This also is a procedural flaw. If EPA finalizes its proposed action without providing an interpretation of section 111(b)(1)(B) for the public to comment on, then that flaw is of central relevance to the final rule.
20 84 FR at 50283-86.
21 "Redundancy" is not a factor Congress intended EPA to consider. *See infra*, section III.C.
22 84 FR at 50259.

effect,[23] as it is now. Had SO2 been eligible for regulation under section 111(d), then EPA's failure to discuss that aspect would mean the Agency "entirely failed to consider an important aspect of the problem."[24]

Furthermore, EPA's description of the lime kiln NSPS proposal is lacking. In that proposal, EPA first noted that SO2 emissions from lime kilns react with lime dust; thus particulate matter controls are effective in reducing SO2 emissions.[25] EPA analyzed two controls for SO2 emissions from fossil fuel combustion in kilns: venturi scrubbers and baghouses.[26] The cost of operating a venturi scrubber was "more than twice" that of a baghouse, with a relatively small marginal benefit: 95% control efficiency versus 85-90% for a baghouse.[27] Furthermore, the collateral environmental and energy impacts of operating a venturi scrubber weighed against selecting that control in light of the relatively small emissions benefit.[28]

Thus, EPA's lime kiln proposal must be understood to have selected a baghouse as BSER for SO2 emissions from lime kilns. What EPA declined to do was to set a separate emission standard for SO2, which is in accordance with the definition of "standard of performance."[29] This underscores an important point: EPA here is eliding the distinction between the control analysis for BSER and setting the emission standard. EPA's proposal would rescind the emission standards for methane without finding any "error" or that it was "inappropriate," to use EPA's terms, in the 2016 determination that the controls constituted BSER for methane.[30] Thus, the lime kiln NSPS proposal cuts against EPA's position here.

C. EPA Ignores the Definitions of "Standard of Performance" and "Air Pollutant"

Indeed, Congress explicitly contemplated the potential outcome in both the lime kiln NSPS and the oil and gas NSPS that EPA now claims is irrational. Section 111(a)(1) defines "standard of performance" 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.[31]

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23 1 LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 TOGETHER WITH A SECTION-BY-SECTION INDEX ("1970 LEGISLATIVE HISTORY") 20 (Environmental Policy Division, Congressional Research Service Jan. 1974) (Clean Air Act as amended).

24 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.* ("*State Farm*"), 463 U.S. 29, 43 (1983).

25 *Id.*

26 42 FR 22506, 22507 (May 3, 1977).

27 *Id.* EPA also questioned whether this difference would have much effect on ambient SO2 concentrations. *Id.*

28 *Id.*

29 *See infra*, section III.C.

30 If EPA decides to attempt to determine that the VOC controls are not BSER for methane, or again (improperly) attempts to determine that EPA erred in 2016 by determining the VOC controls are BSER for methane, then EPA must issue a supplemental proposal giving reasons. If EPA does not and finalizes this proposal, that procedural flaw will be of central relevance to the rules.

31 42 U.S.C. § 7411(a)(1) (emphasis added).

Thus, the definition of "standard of performance" explicitly allows for a single standard for multiple air pollutants, regardless of redundancy. EPA cannot write the singular "a standard" and plural "air pollutants" out of the Act by assuming, as it does in the proposal, that a single standard for multiple air pollutants is *per se* irrational. Instead, EPA has a duty to give meaning to statutory language.[32]

Furthermore, section 302(g) defines "air pollutant" as:

> any air pollution agent or *combination of such agents*, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.[33]

Thus, an emission standard for a single "air pollutant" can control emissions for multiple air pollution agents, regardless of redundancy.

EPA may object that "combination" is intended to refer to chemical or photochemical reactions, such as when nitrogen oxides ("NOx") and volatile organic compounds ("VOCs") combine to form ozone. That is belied by the plain language of the definition, which includes combinations of (for example) physical agents that would not have a chemical or photochemical reaction.

Thus, if EPA had wanted to define an air pollutant for the oil and gas NSPS as the "combination" of VOC and methane, the Act would allow for this, regardless of redundancy.[34] EPA may protest that EPA did not do so in the oil and gas NSPS, but that's irrelevant: the point is redundancy is expressly allowed by the Act, both with respect to a "standard of performance" and an "air pollutant." Thus, EPA has flexibility to both promulgate a single emission standard for multiple pollutants and to define an air pollutant as composed of multiple air pollution agents. In other words, Congress gave EPA discretion to slice-and-dice air pollution into air pollutants in any way that is in reasonable accordance with the structure and purpose of the Act.

D. EPA Ignores Structural Aspects of the Issue

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32 *E.g. North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (granting petition on failure of Clean Air Interstate Rule to give meaning to the phrase "interfere with maintenance" in section 110(a)(2)(D)(i)).

33 42 U.S.C. § 7602(g) (emphasis added).

34 This was EPA's approach in the municipal solid waste landfill NSPS, 61 FR 9905 (Mar. 12, 1996), which EPA nowhere mentions in its proposal. There, EPA defined the air pollutant as "gas generated by the decomposition of organic waste deposited in an [municipal solid waste] landfill or derived from the evolution of organic compounds in the waste." *Id.* at 9920. The "emissions of concern [were] non-methane organic compounds … and methane." *Id.* at 9905. In turn, non-methane organic compounds from landfills included VOCs, HAPs, and "odorous compounds." *Id.* Necessarily the emission standards would be "redundant" with respect to these air pollution agents.

According to EPA itself, section 111(d) "is properly understood as a 'gap-filling' measure to address pollutants that are not addressed under either the NAAQS/SIP provisions in CAA sections 108–110 or the HAP provisions in CAA section 112."[35] EPA's theory that "redundancy" is *per se* irrational creates an anomalous gap in this gap-filling provision. As with the lime kiln NSPS and the oil and gas NSPS, it could turn out by happenstance that BSER for two air pollutants is the same and therefore one standard of performance serves for both. In the simpler example, the case of the lime kiln NSPS, a bag house turned out to be BSER for both particulate matter and SO2, due to the unique circumstance that SO2 reacts with lime particles from the kiln.[36] In the oil and gas NSPS, EPA determined that the suite of measures for VOC were also BSER for methane (or more precisely, GHGs, of which methane are a component).

Thus, in the happenstance that BSER for a criteria pollutant and a designated pollutant emitted by a particular source category were the same, EPA could not fill the gap for existing sources of the designated pollutant. However, in the happenstance that BSER for the pollutants for a particular source category were different, EPA could fill the gap. Congress cannot have intended a gap-filling provision such as 111(d) to depend on such happenstance for its success. Therefore, "redundancy" cannot be a factor Congress intended EPA to consider when promulgating standards of performance for a criteria pollutant and a designated pollutant in a source category, and EPA's proposal is therefore arbitrary and capricious.[37]

Other structural consequences flow from the choice to regulate multiple air pollutants from a particular source category, even if a single emission standard is used. First, regulating an air pollutant that has not previously been regulated makes it "subject to regulation" within the meaning of the definition of "best available control technology" ("BACT") in the prevention of significant deterioration ("PSD") program.[38] Furthermore, promulgating a standard of performance creates a "floor" for BACT.[39]

It should be noted that EPA's decision to define the air pollutant in the 2016 NSPS as "GHGs" is a good example of careful use of EPA's discretion. Had EPA chosen "methane" as the air pollutant, then another pollutant would be "subject to regulation" under the PSD program.

These structural considerations, such as the interplay of section 111(b) with PSD and with section 111(d), show that EPA's "redundancy" rationale is simplistic in the extreme.

IV. EPA'S "POLLUTANT-SPECIFIC SIGNIFICANT CONTRIBUTION" ARGUMENTS, SECTION VI.A, ARE WITHOUT MERIT

Section VI.A proposes to apply a judicial doctrine that allows an agency to avoid the plain meaning of the statute. At the outset of this discussion, EPA does not state precisely what

35 84 FR at 50272.
36 *See supra*, section III.B.
37 *State Farm*, 463 U.S. at 43.
38 *See* 42 U.S.C. § 7479(3).
39 *Id.* ("In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section [111] or [112] of [the Act]."_

EPA thinks the meaning should be, but that is revealed at the end of the section, when EPA states that this interpretation would not necessarily result in duplicative findings for the source category and for the air pollutant.[40] Thus, EPA proposes in this section an interpretation that would require EPA to follow a two-step process: first a source category-wide significance finding and second an air pollutant-specific significance finding.

EPA provides five arguments for this interpretation:

- To not require an air pollutant-specific significance finding is "potentially anomalous";
- EPA's "rational basis" approach is "largely undefined";
- That other endangerment findings are structured differently is "anomalous";
- The legislative history of the 1970 Act supports EPA's alternative interpretation; and
- The legislative history of the 1977 Act supports EPA's alternative interpretation.

All are without merit. In addition, EPA fails to discuss the exceptionally high standard that is required to avoid the plain meaning of a statute, a standard that EPA's arguments do not come within a country mile of meeting.

A. EPA Fails to Discuss the Meaning of "Air Pollutant," "Air Pollution," and "Air Pollution Agent"

Before addressing EPA's arguments, it's necessary to discuss in detail the meaning of these terms. The term "air pollution" is not defined in the Act. The term "air pollutant" is defined as:

> any *air pollution agent* or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.[41]

In turn, the term "air pollution agent" is not defined.

The common meaning of the terms suggests interpretations. "In technical and commercial coinages, -ant is a suffix of nouns denoting impersonal physical *agents* (propellant, lubricant, deodorant)."[42] Thus, the phrase "air pollutant" is well chosen as a collective term for air pollution agents, just as a "deodorant" may be composed of a single or multiple deodorizing agents. In turn, an agent is "an active cause, an efficient cause."[43] Thus, an "air pollution agent" is an active cause of "air pollution." Finally, "air pollution" is the passive end result of the active "air pollution agents,"[44] such agents being collectively denoted as an "air pollutant."

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40 84 FR at 50266.
41 Section 302(g), 42 U.S.C. § 7602(g) (emphasis added).
42 RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 86 (2d. ed. unabridged, 1987). *See also id.* at 1498 (defining "pollutant" as "something that pollutes").
43 *Id.* at 38.
44 *Id.* at 1498 (defining "pollution" as "the state of being polluted").

The use of these terms in the Act is in accordance with these common meanings. For example, section 108(a)(1) directs EPA to publish:

> a list which includes each *air pollutant—*
>
> (A) emissions of which, in [EPA's] judgment, cause or contribute to **air pollution** which may reasonably be anticipated to endanger public health or welfare;
>
> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources;[45]

Thus "air pollutants" are emitted to the ambient air by mobile and stationary sources[46] and cause or contribute to air pollution. The "cause or contribute" phrase confirms the active role of "air pollutants" (as a combination of "air pollution agents") in bringing about "air pollution." "Air pollution," the end result of the emissions of "air pollutants" by source, is that which EPA must determine can reasonably be anticipated to endanger public health or welfare.

The relevant portion of section 202(a)(1) uses the terms "air pollutant" and "air pollution" in the same way:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any *air pollutant* from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, *air pollution* which may reasonably be anticipated to endanger public health or welfare.[47]

Again, "air pollutants" are emitted and cause or contribute to "air pollution," which in turn may reasonably be anticipated to endanger public health or welfare.

These examples demonstrate that Congress carefully chose and well understood the terms "air pollution," "air pollutant," and "air pollution agent." That alone belies the notion that Congress did not know what it was doing when it used a standard in section 111(b) that differs from the formulation in, for example, sections 108(a)(1) and 202(a)(1). Congress understood the distinction between "air pollution" and "air pollutant."

For example, attention to the detail of these terms refutes the frivolous argument that EPA's "rational basis" approach could result in EPA promulgating a standard of performance a benign or harmless substance.[48] As defined in section 111(a)(1), a "standard of performance" is "a standard for emissions of *air pollutants*."[49] An "air pollutant" consists of "air pollution agents" that result in "air pollution" that endangers public health or welfare. A benign or

45 42 U.S.C. § 7408(a)(1) (emphasis added).
46 One could use the term "polluters" instead of "sources" to preserve perfect harmony, but Congress chose a more neutral term.
47 42 U.S.C. § 7521(a)(1) (emphasis added).
48 84 FR at 50262. Such a result would also not survive "arbitrary and capricious" review. *See infra*, section IV.C.
49 42 U.S.C. § 7411(a)(1) (emphasis added).

harmless substance is thus not an "air pollutant" within the meaning of the Act, and therefore EPA could not set a standard of performance for it.

B. EPA's Alternative Interpretation, Not EPA's Current, Is Anomalous

EPA states:

> [P]otentially anomalous results [] could occur under the EPA's current interpretation that CAA section 111(b)(1)(A) does not require a pollutant-specific SCF. For example, under the EPA's current interpretation, the EPA could list a source category on grounds that it emits numerous air pollutants that, taken together, significantly contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, and proceed to regulate each of those pollutants, without ever finding that each (or any) of those air pollutants by itself causes or contributes significantly to—or, in terms of the text of other provisions, causes or contributes to—air pollution that may reasonably be anticipated to endanger public health or welfare. It is clear that CAA section 111(b) requires the EPA, and CAA section 111(d) requires the states, to regulate on a pollutant-by-pollutant basis—CAA section 111(b)(1)(B) and (d)(1) require the EPA and the states, respectively, to promulgate for the affected sources "standards of performance," which, as noted above, are defined in relevant part as "standard[s] for emissions of air pollutants"—as a result, it seems potentially anomalous not to require that the EPA make a SCF for those pollutants as a prerequisite for promulgating the standards of performance.

First, the reference to "cause or contribute" in other provisions is irrelevant, because EPA is not proposing to adopt that standard for a pollutant-specific finding under section 111. Instead, EPA proposes to adopt a "significant contribution" standard for a pollutant-specific finding.[50]

Second, as discussed above,[51] the definition of "standard of performance" contemplates EPA setting a single emission standard for multiple air pollutants. Thus, EPA's statement that air pollutants must be regulated under section 111 on a pollutant-by-pollutant basis is anything but "clear."[52] The plain language of the Act allows EPA to regulate multiple pollutants at a single go.

Turning to the main point, EPA states that it is "potentially anomalous not to require that the EPA make" a finding for each pollutant as a prerequisite, but does not actually identify any anomaly.[53] It is EPA's proposed interpretation here that creates numerous anomalies. First,

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50 Should EPA decide to switch course, EPA must issue a supplemental proposal.

51 *See supra*, section III.C.

52 "Exaggerators like this word, along with its cousins (obviously, undeniably, undoubtedly, and the like). Often a statement prefaced with one of these words is conclusory, and *sometimes even exceedingly dubious*." Bryan L. Garner, GARNER'S MODERN AMERICAN USAGE 157 (3d. ed., Oxford University Press 2009) (entry for "clearly") (emphasis added).

53 Here EPA appears to be using the term "anomaly" to mean "an odd, peculiar, or strange condition." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 85 (2d. ed. 1987). The term "anomaly" could be used to refer to the distinction between section 111(b)'s findings and findings required under other sections of the Act, but that is a topic for later.

EPA does not offer any credible explanation for why Congress would create EPA's proposed two-step process. A two-step process is anomalous, as the other provisions EPA cites only involve a one-step process.

Second, suppose for the sake of illustration that EPA creates, as EPA suggests could be done, a numeric threshold for significant contribution.[54] To be specific, take some air pollution that endangers public health and welfare, and suppose EPA sets a numeric threshold of 100 units to determine whether a contribution to that air pollution is "significant." Suppose the air pollution results from four air pollutants, and take a source category that emits all four and in the aggregate is slightly above the threshold, say 120 units. If the emissions from the source category of each of the four pollutants is 30 units individually, then the source category would be listed, but EPA could not regulate any pollutant, as all would be below the threshold. That, unlike EPA's distinction, is a true anomaly.

EPA may respond that EPA could set nested, smaller thresholds for individual pollutants. That also leads to an anomaly. Suppose again the same air pollution resulting from four air pollutants, and the same 100 unit threshold for the category-wide significance finding. And suppose a 30 unit threshold for the pollutant-specific significance finding. Then take a source category that emits the same four air pollutants in the amounts of 31 units for three air pollutants, and 20 units for the fourth air pollutant. The source category as a whole is above the 100 unit threshold, so its emissions are significant. But due to the 30 unit pollutant-specific threshold, only three of the four pollutants can be regulated. And the sum of the emissions by the source category for those three pollutants is 91 units, below the significance threshold. Thus, under a nested scheme, there could be a source category with significant emissions for which EPA could only regulate an insignificant portion. That is, again, a true anomaly.

EPA may respond that numeric thresholds are not required. True enough, but even in their absence a two-step scheme necessarily creates two potential anomalies: 1) EPA might determine that emissions from a source category significantly contribute but not be able to determine that any individual air pollutant significantly contributes and therefore not be able to regulate at all; and 2) EPA might determine that emissions from a source category significantly contributes, but only be able to regulate an insignificant portion of those emissions.

C. EPA Ignores Basic Administrative Law

Without apparent irony, EPA states that the "rational basis" standard is "largely undefined" and solicits comment on whether Congress could possibly have meant for it to apply to EPA's decision to promulgate an emission standard for an additional air pollutant. Of course, the "arbitrary and capricious" standard—which EPA acknowledges is equivalent to "rational basis"—applies equally to, for example, EPA's proposed action under section 301(a) to revise the source category, so one might equally wonder whether Congress could possibly have meant that section 301(a) should allow EPA to revise the source category.

54 84 FR at 50267-68.

The irony does not stop there: the lime kiln NSPS, which EPA elsewhere cites, was remanded by the D.C. Circuit Court of Appeals under the same "arbitrary and capricious" standard which EPA now claims is "largely undefined" and therefore could not possibly apply to EPA's action to add an air pollutant.[55] As the Court quoted from the legislative history of the 1977 Amendments, Congress intended the arbitrary and capricious standard to have teeth: "With respect to the 'arbitrary and capricious' scope of review retained in these amendments, the conferees intend that the courts continue their thorough, comprehensive review which has characterized judicial proceedings under the Clean Air Act thus far."[56] The remand of the lime kiln NSPS under the arbitrary and capricious standard should allay EPA's supposed concern that a future EPA might run amok under that standard.

Furthermore, the "arbitrary and capricious" standard is not "largely undefined." Although it necessarily must be flexible to address the wide variety of actions and statutes to which it may apply, the standard has been elaborated in several judicial opinions. First, an agency action must be based on the record before the agency at the time it took the action.[57] An action will be found to be arbitrary and capricious if the agency entirely fails to give reasons for its action.[58] "The agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[59] Furthermore:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[60]

Under this standard, for example, an EPA decision to promulgate a standard of performance for a benign or harmless substance would fail.[61] EPA would have to give some reasons for doing so, but any reason EPA might give would necessarily rely on factors that Congress did not intend EPA to consider and ignore the relevant factors (i.e. endangerment to public health or welfare) provided by section 111 itself.

Furthermore, under the "arbitrary and capricious" standard the D.C. Circuit Court of Appeals has identified certain factors that EPA must consider in promulgating emission standards under section 111(b). For example, EPA must consider "the amount of air pollution" reduced when determining the best system of emission reductions ("BSER").[62] This belies EPA's argument that the current standard is "largely undefined," and it defeats another bogeyman mentioned by EPA, that EPA would have the authority under the "rational basis" test to

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55 *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 452 (D.C. Cir. 1980).

56 *Id.* (quoting H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 178 (1977)).

57 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

58 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50 (1983) (finding agency action arbitrary and capricious because agency "submitted no reasons at all.").

59 *Id.* at 42 (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)).

60 *Id.* at 43.

61 As discussed before, *supra*, section IV.A, such a standard would also be "contrary to law," as a benign or harmless substance would not be an "air pollutant" within the meaning of the Act.

62 *Sierra Club v. Costle*, 657 F.2d 298, 326 (D.C. Cir. 1981).

promulgate a standard of performance for a pollutant that a source category emits in small amounts.[63]

D. EPA Misreads the 1970 Legislative History

Like "entering a crowded cocktail party and looking over the heads of the guests for one's friends,"[64] EPA discusses other provisions of the 1970 Act and compares them to the 1970 version of section 111, but does not discuss the history of section 111 itself.[65] The history of section 111 is not a friend to EPA's proposed interpretation.

Section 111 was the result of a substitute amendment during the conference between the House and Senate.[66] The House bill, H.R. 17255, as passed by the House, would have placed new source performance standards in section 112 of the Act.[67] In relevant part, the House bill provided:

> For the purpose of preventing the occurrence of significant new air pollution problems arising from or associated with any class of new stationary sources which, because of the nature or amount of emissions therefrom, may contribute substantially to endangerment of the public health or welfare, the Secretary shall from time to time by regulation, giving appropriate consideration to technological and economic feasibility, establish standards with respect to such emissions.[68]

The Senate bill, S. 4358, as passed by the Senate, would have placed new source performance standards in section 114 of the Act.[69] The Senate bill placed the relevant standard in the definition of "stationary source":

> "stationary sources" means those buildings, structures, facilities, or installations which, regardless of location, emit or may emit any air pollution agent or combination of such agents in amounts which cause or contribute to the endangerment of the public health and welfare[70]

The Senate bill separately required EPA to "publish in the Federal Register a list of categories of stationary sources which shall be subject to standards of performance established under this section."[71]

Thus, in the two bills two different approaches are presented. The Senate bill requires a pollutant-specific finding: the "amounts" of the "air pollution agent or combination of such

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63 84 FR at 50262.
64 *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Judge Harold Leventhal).
65 *See* 84 FR at 50263-64.
66 1 1970 LEGISLATIVE HISTORY 151, 195-197 (reprinting H.R. Rep. No. 91-1783).
67 2 1970 LEGISLATIVE HISTORY 920-24 (reprinting H.R. 17255).
68 2 1970 LEGISLATIVE HISTORY 920.
69 1 1970 LEGISLATIVE HISTORY 553 (reprinting S. 4358). The Senate bill would have placed provisions similar to current section 126 in section 112 of the Act. *Id.*
70 *Id.* at 553-54.
71 *Id.* at 554-55.

agents" must "cause or contribute" to endangerment. Note that the Senate bill uses the core language of the definition of "air pollutant" that was created in the 1970 Act.

The House bill, on the other hand, requires a source category-wide finding. The dangling "which" after "class of new stationary sources," interrupted by the clause "because of the nature or amount of emissions therefrom" set off by commas, is resolved when the clause ends and "may contribute substantially" starts. In other words, it is the class of new stationary sources that "contribute[s] substantially to endangerment of the public health and welfare."

Thus, the conference committee had in front of it competing proposals, one with the first step and one with the second, with specific language for each. No matter how much EPA might want to think in response that the committee as a compromise adopted both steps, it beggars belief to think that the committee could not have used language from both to create a two-step process. Instead, the strong inference is that the committee rejected the Senate approach.[72] At a minimum, this history shows that the issue was squarely before the committee, making it almost impossible that the substitute amendment forgot to say what it meant.

After ignoring the history of section 111, EPA states: "In the 1970 CAA Amendments, Congress did not explain why it used language in CAA section 111 that suggested a SCF for the source category under CAA section 111 while using pollutant-specific language in the other provisions."[73] This, EPA believes, gives EPA license to tell a "Just So story"[74]:

> [T]he reason appears to be that under CAA section 111, Congress tasked the EPA with determining, among the large numbers of highly diverse stationary sources in the U.S., which ones, grouped into which source categories, should be listed and subject to regulation. It was logical for Congress to constrain the EPA's discretion by requiring that the EPA make a SCF for each source category that it sought to list. While it is true that in drafting CAA section 111(b)(1)(A), Congress did not explicitly require the EPA to make an additional, pollutant-specific SCF, it seems reasonable to think that Congress may have intended pollutant-specific SCF findings but conflated them with the required source-category SCF finding.[75]

This is anything but reasonable. If Congress wanted the additional, pollutant-specific significance finding, what possible reason could Congress have had to require the initial source category-wide significance finding? EPA lamely offers that it would "constrain [] EPA's discretion," but later turns around to admit that essentially the same finding could be used for both steps when initially listing a source category.[76] Thus EPA's discretion is not at all constrained by the additional roadblock EPA wants to erect. It appears that EPA instead wants to construct the roadblock solely for the purpose of claiming that the 2016 promulgation of subpart OOOOa was "inappropriate" or erroneous. Congress cannot have

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72 Note also that the substitute amendment originated from the House. 1 1970 LEGISLATIVE HISTORY 151.

73 84 FR at 50263.

74 *See, e.g.* Stephen Jay Gould, "Sociobiology: the art of storytelling," NEW SCIENTIST 530 (Nov. 16, 1978) (borrowing the term "Just So story" from Rudyard Kipling to describe sociobiological explanations that "may be plausible, but are less than rigorously supported by solid evidence").

75 84 FR at 50263.

76 84 FR at 50266.

intended to create such a pointless roadblock, no matter how much EPA and polluters wish it were "just so."

Finally, in addition to "looking over" the history of section 111 itself to find EPA's "friends," EPA draws a dubious conclusion from the provisions that EPA does choose as its "friends": "Certainly,[77] interpreting CAA section 111(b)(1)(A) to require such a pollutant-specific finding would make it consistent with those other CAA provisions."

There is nothing at all certain about EPA's conclusion. First, none of the other provisions require a "significant" contribution. Second, EPA's proposed interpretation would create a two-step process for findings, first for the source category and second for the air pollutant. None of the other provisions EPA cites work in that manner; all require merely one step.

EPA in response might try to switch to a theory that Congress meant in section 111 to create the same one-step process used in other sections. If so, EPA would bear an even heavier burden: with its current theory EPA must try to explain why Congress forgot to mention the second step, but with the switched theory EPA would also have to explain why Congress did create the first step. And EPA would have to explain why Congress would've required EPA to maintain a list of source categories: with only a pollutant-specific finding required the list is useless.[78]

E. EPA Misreads the 1977 Legislative History

Again looking for "friends in a crowd," EPA leans heavily on statements in the 1977 legislative history that the amendments were intended to "provide the same standard of proof for regulation of any air pollutant."[79] EPA ignores salient features of the legislative history and misreads the relevant legislative reports.

Start with what the "Clean Air Act Amendments of 1977," Public Law 95-95, 91 Stat. 685, actually did. Section 401, "Basis of Administrative Standards," contains the relevant provisions.

- Section 108(a)(1) was amended in relevant part:
  - From: "air pollutant, which in [the Administrator's] judgment has an adverse effect on health and welfare"[80]
  - To: "air pollutants, emissions of which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[81]

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77 *See supra*, n. 52.

78 In addition, EPA must re-propose if it changes course so radically. If EPA fails to do so, then that procedural flaw is of central relevance to the final rule.

79 *E.g.* 84 FR at 50265 (quoting H.R. Rep. No. 94–1175, at 33).

80 1 1970 LEGISLATIVE HISTORY 12 (Clean Air Act as amended).

81 3 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, A CONTINUATION OF THE CLEAN AIR ACT AMENDMENTS OF 1970, TOGETHER WITH A SECTION-BY-SECTION INDEX ("1977 LEGISLATIVE HISTORY") 296-297 (Environmental Policy Division, Congressional Research Service, Aug. 1978) (reprinting P.L. 95-95, 91 Stat. 685).

- Section 111(b)(1)(A) was amended in relevant part:
  - From: "[The Administrator] shall include a category of sources in such list if [the Administrator] determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare."[82]
  - To: "[The Administrator] shall include category of sources in such list if in [the Administrator's] judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[83]

- Section 112(a)(1) was amended in relevant part:
  - From: "The term 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible, illness."[84]
  - To: "The term 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."[85]

- Section 202(a)(1) was amended in relevant part:
  - From: "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment causes or contributes to, or is likely to cause or to contribute to, air pollution which endangers the public health or welfare."[86]
  - To: "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[87]

- Section 202(e) was "amended by striking out 'which cause or contribute to, or are likely to cause or contribute to, air pollution which endangers' and substituting 'which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger.'"[88]

- Section 211(c)(1)(A) was amended in relevant part:
  - From: "if any emission products of such fuel or fuel additive will endanger the public health or welfare"[89]

82 1 1970 LEGISLATIVE HISTORY 19 (Clean Air Act as amended).
83 3 1977 LEGISLATIVE HISTORY 297; 91 Stat. 791.
84 1 1970 LEGISLATIVE HISTORY 20 (Clean Air Act as amended).
85 3 1977 LEGISLATIVE HISTORY 297; 91 Stat. 791.
86 1 1970 LEGISLATIVE HISTORY 33 (Clean Air Act as amended).
87 3 1977 LEGISLATIVE HISTORY 297; 91 Stat. 791.
88 *Id.*
89 1 1970 LEGISLATIVE HISTORY 46 (Clean Air Act as amended).

- To: "if in the judgment. of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare, or"[90]

- Section 231(a)(2) was amended in relevant part:
  - From: "emissions of any air pollutant from any class or classes of aircraft or aircraft engines which in his judgment cause or contribute to or are likely to cause or contribute to air pollution which endangers the public health or welfare."[91]
  - To: "emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare."[92]

One immediately notes that these amendments did not impose a uniform "standard of proof" at the highest level of generality: hazardous air pollutants continued to have a different standard, "result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness," instead of "endanger public health or welfare." And section 111(b)(1) continued to have a "significant" contribution standard that is not found in the other provisions.

Thus, "standard of proof" as used in the reports cited by EPA cannot mean what EPA would like it to. Instead, it must mean the portions that are common to all the provisions: "which in the judgment of the Administrator," "may reasonably be anticipated," and "cause, or contribute to," (whether significantly or not). It should be noted that the amendments, generally speaking, amended the statutory language to the minimum extent possible, confirming that Congress wanted to keep the source-category wide finding but not impose an air pollutant-specific finding in section 111(b).

To accept EPA's argument, one must accept that Congress consciously revised the relevant portion of section 111(b)(1) from "may contribute significantly to air pollution" to "causes, or significantly contributes to, air pollution" but somehow overlooked the pollutant-specific finding that was being imposed in other sections and neglected to add it to section 111. That is simply not credible.

Returning to the relevant reports, EPA misreads them. For example, EPA quotes as a purpose for the amendments from House Report 94-1175: "To provide the same standard of proof for regulation of any air pollutant, whether that pollutant comes from stationary or mobile sources, or both, and to make the vehicle and fuel industries equally responsible for cleaning up vehicle exhaust emissions."[93]

To start, EPA does not explain why EPA quotes from House Report 94-1175. That report accompanied H.R. 10498, which was debated and passed by the House in 1976.[94] The more relevant report is House Report 95-254,[95] the report accompanying H.R. 6161, the bill that

90 3 1977 LEGISLATIVE HISTORY 297; 91 Stat. 791.
91 1 1970 LEGISLATIVE HISTORY 53 (Clean Air Act as amended).
92 3 1977 LEGISLATIVE HISTORY 297; 91 Stat. 791.
93 84 FR 50265 (quoting H.R. Rep. No. 94–1175, at 33).
94 *See* 3 1977 LEGISLATIVE HISTORY V (table of contents).
95 4 1977 LEGISLATIVE HISTORY 2468 (reprinting H.R. Rep. 95-254).

eventually became law in 1977. However, the two reports seem generally similar in relevant respect.[96]

Read fully, the reports' primary concern is "whether it is appropriate to wait for 'bodies on the street' before a regulatory agency can act to protect the public interest."[97] In other words, "Should the Administrator act to prevent harm before it occurs or should he be authorized to regulate an air pollutant only if he finds actual harm has already occurred?"[98] This is the "standard of proof" to which the report refers, not whether contribution should be assessed by source category or by individual air pollutant.

F. EPA Fails to Meet the "Exceptionally High" Standard Set by the Case Law

In a transparent attempt to shift burdens, EPA asks for comment:

> on whether its current interpretation of the CAA section 111 SCF provision, as set forth in the 2016 NSPS OOOOa rule, correctly determined that this apparent anomaly is, in fact, a deliberate and significant variation on Congress's part, or whether instead Congress "almost surely could not have meant" that.[99]

This mischaracterizes the issue: an agency does not need to make a positive determination that the plain language of a statute means what it says. The presumption is that it means what it says.[100]

Instead, it is EPA here that has to overcome the burden to "show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it," and that burden is "exceptionally high."[101]

With regard to the first prong, "historical fact," the legislative history shows careful Congressional attention to the terms "air pollution," "air pollutant," and "air pollution agent," and shows the 1970 Congress was aware of the distinction between a source category-wide contribution finding and a pollutant-specific contribution finding. It also shows that in the 1977 Amendments Congress sought to regularize the standard of proof only to the extent possible without disturbing the existing statutory provisions. If anything, this shows that it is

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96 *Compare* 4 1977 LEGISLATIVE HISTORY 2510-518 (H.R. Rep. 95-254 at 43-51) *with* 7 1977 LEGISLATIVE HISTORY 6576-584 (H.R. Rep. 94-1175 at 27-35).

97 4 1977 LEGISLATIVE HISTORY 2512-13 (H.R. Rep. 95-254 at 45-46) (quoting Karstadt, "Protecting Public Health from Hazardous Substances: Federal Regulations of Environmental Contaminants," 5 E.L.R. 50165 (1975)).

98 *Id.* at 2515.

99 84 FR at 50263.

100 *New England Public Communications Council, Inc. v. F.C.C.*, 334 F.3d 69, 78 (D.C. Cir. 2003) ("a party seeking to rebut the presumption created by clear language" must show the doctrine applies) (quoting *Nat'l Pub. Radio, Inc. v. FCC,* 254 F.3d 226, 230 (D.C.Cir. 2001)). Even improbability "cannot 'overcome th[e] plain meaning presumption'" applicable at *Chevron*'s first step." *Delaware Department of Natural Resources and Environmental Control v. E.P.A.*, 895 F.3d 90, 99 (2018) (quoting *Va. Dep't of Med. Assistance Servs. v. HHS*, 678 F.3d 918, 923 (D.C. Cir. 2012)).

101 *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140, 146 (2006).

nearly impossible that Congress sloppily erred—twice, once in 1970 and again in 1977—by failing to explicitly require a pollutant-specific contribution finding.

In fact, that the 1970 version of section 111 was created during conference through a substitute amendment cuts against EPA here: in discussing application of the doctrine to the 1990 Amendments, the D.C. Circuit Court of Appeals stated:

> The haste and confusion attendant upon the passage of this massive bill do not license the court to rewrite it; rather, they are all the more reason for us to hew to the statutory text because there is no coherent alternative intention to be gleaned from the historical record.
>
> .....
>
> Essentially, the EPA concludes that the conferees inadvertently left out the word "new" in § 209(e)(2), and the EPA is, in fact, adhering to what was intended. Without a showing that the text is "demonstrably at odds" with Congressional intent, much less that the regulatory scheme is unworkable or absurd, however, the court must take Congress at its word.[102]

So it is here: EPA argues that the 1970 conferees inadvertently left out the pollutant-specific significance finding (and that somehow the 1977 House bill that revised the provision did the same). EPA therefore falls as far from meeting the "exceptionally high" burden for this prong as could possibly be.

With respect to the second prong, EPA has failed to show that "as a matter of logic and statutory structure, [Congress] almost surely could not have meant" what it said. That there is a variation in the scheme for contribution findings is insufficient, given that there is an excellent "explanation for why Congress would have done so."[103] As the plain text of section 111(b)(1)(A) allows EPA to promulgate standards of performance without a contribution finding once a source category is listed, it makes perfect sense that Congress imposed a higher standard—significant contribution, not "simple contribution" as EPA describes it—for listing a source category in the first instance. The forty-nine years that have passed since the 1970 Act have not shown that this scheme is unworkable. In fact, it is EPA's proposal that creates an unworkable scheme.[104]

V. EPA AGAIN PROPOSES AN IMPROPER USE OF ERROR CORRECTION IN SECTION VI.B

In section VI.B, EPA requests comment "on whether, assuming it is required to make a SCF for methane emissions from the Oil and Natural Gas source category as a prerequisite to promulgating an NSPS for methane, the SCF it made in the 2016 NSPS OOOOa rule was an appropriate methane-specific finding."[105] For the reasons explained above, this is another

102 *Engine Mfrs. Ass'n v. U.S. E.P.A.*, 88 F.3d 1075, 1092-93 (1996).

103 *Id.* at 1091. The court there only required a "plausible" explanation; the explanation here far exceeds that standard.

104 *See supra*, section IV.B.

105 84 FR at 50267.

improper use of error correction authority. Assuming *arguendo* that a significant contribution finding is required, EPA certainly has the direct authority to find that methane from the source category is not a significant contributor to air pollution that endangers public health and welfare. As EPA has that direct authority, EPA lacks error correction authority.

As EPA is not proposing to use that direct authority, it may be assumed that EPA cannot show that methane is an insignificant contributor. In other words, if there was an error, it was harmless.

Furthermore, EPA argues that EPA must articulate a "standard" for "significant contribution." This again is an attempt to impose a policy in the guise of an error correction.

Thus, EPA's proposed use of error correction authority in section VI.B is an abuse of discretion and not in accordance with law.

VI. SECTION VI.C OF EPA'S NOTICE IS PROCEDURALLY FLAWED

In section VI.C, EPA asks for comment on criteria for significant contribution findings.[106] EPA states, "EPA does not intend for these comments to inform the finalization of this rule, but rather to inform the EPA's actions in future rules."[107] If true, then EPA is asking for comment in the wrong forum.

This action is governed by section 307(d). Under section 307(d)(7), the record for judicial review includes "all written comments and documentary information on the proposed rule received from any person for inclusion in the docket," and "a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period."[108] The record for judicial review is strictly limited.[109]

Based on EPA's statement, if true, that comments on section VI.C are "not intended to inform finalization of this rule," a comment on section VI.C is not a "comment on the proposed rule" within the meaning of section 307(d). Given that, EPA must at a minimum segregate all comments or portions of comments on section VI.C, and any responses thereto, before finalizing its action. However, there may be comments which, for example, by their nature necessarily touch on section VI.C as well as sections which are relevant to the proposed rule. As a result, EPA's proposal is procedurally flawed. If EPA relies on any comments or responses thereto in promulgating the final rule, then this procedural flaw is of central relevance to the final rule.

106 84 FR at 50267.
107 *Id.*
108 42 U.S.C. §§ 7607(d)(7), (d)(4)(B)(i), (d)(6)(B).
109 *Id.* § 7607(d)(7)(A).

The proper procedure for a request such as EPA makes in section VI.C is an advance notice of proposed rulemaking.[110] By using a separate docket for that procedure, there would be no risk of tainting the record for judicial review in this action.

Furthermore, under section 307(d), the record for judicial review necessarily includes the notice for the proposed rule.[111] EPA's inclusion section VI.C in this notice would result in it being part of the record for review, even though EPA disclaims its relevance to the proposed action. Thus, EPA must re-propose its action without such extraneous requests for comment or with an explanation of the relevance of section VI.C to the proposed action.

VII. SECTION VII OF EPA'S NOTICE IS PROCEDURALLY FLAWED

In section VII.B, EPA provides information on "several reasons why the lack of regulation of existing sources under CAA section 111(d) will have limited environment impact."[112] However, EPA neither explains the relevance to its proposed action nor invites comments on the "reasons." As a result, EPA's notice is procedurally flawed, and the flaw is fatal to the proposal. EPA cannot finalize its proposed action without reissuing a proposal notice that does not contain such flaws.

As mentioned above, under section 307(d), the record for judicial review must include the notice for the proposed rule. EPA's inclusion of this information in this notice would result in it being part of the record for review, even thought EPA does not identify its relevance to the proposed action. Commenters will be left to wonder whether they must comment on it, despite EPA's failure to invite comment, so that it is rebutted in the record for review.

The information is not relevant to the EPA's proposal and alternative proposal in section V, nor to EPA's second alternative proposal in section VI.A, because these proposals invoke error correction authority to find that EPA's 2016 action was in error. If EPA had used its direct authority to rescind the methane standards,[113] then the information in section VII.B would be highly relevant and EPA would necessarily have to invite comment on it.

EPA may attempt to argue that the information is relevant to its alleged proposal in section VII.A to determine that a standard of performance for VOCs does not trigger an obligation for EPA to promulgate emission guidelines under section 111(d) for existing sources. However, the argument in section VII.A is of a purely legal nature; the reasonableness of failure to regulate methane emissions for existing sources is not relevant to section VII.A.

Furthermore, EPA does not invite comment on section VII.A, nor does EPA propose any regulatory language that would bind EPA to its proposed determination. Furthermore, section VII.A belabors at length a legal point that is not in any serious dispute. EPA must

110 S*ee* Office of Federal Register, "A Guide to the Rulemaking Process," at 3 ("An agency that is in the preliminary stages of rulemaking may publish an 'Advance Notice of Proposed Rulemaking' in the *Federal Register* to get more information. The Advance Notice is a formal invitation to *participate in shaping the proposed rule* and starts the notice–and–comment process in motion.") (emphasis added), *available at* https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

111 42 U.S.C. §§ 7607(d)(7)(A), (d)(3).

112 84 FR at 50273.

113 *See supra*, section I.

therefore re-propose its action without section VII, or identify its relevance to its proposed action and invite comment on it.

VIII. CONCLUSION

EPA's extreme use of error correction authority is an abuse of discretion and not in accordance with law, a fatal flaw that infects EPA's entire proposal. EPA's "redundancy" rationale for deregulating methane is contrary to the Act. EPA's alternative attempt to overcome the presumption that clear statutory language means what it says falls far short of the "exceptionally high" standard that is required. And EPA's larding of its proposal notice with extraneous material in section VI.C and VII makes it virtually impossible for commenters to know what to comment on and for EPA to produce a clean record for judicial review. For these reasons, EPA's proposed action cannot be finalized.

Respectfully,

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