ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2017

No. 15-1381 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH DAKOTA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Agency Actions of the United States Environmental Protection Agency 80 Fed. Reg. 64,510 (Oct. 23, 2015) and 81 Fed. Reg. 27,442 (May 6, 2016)

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GLOSSARY OF TERMS

BSER	Best System of Emission Reduction
CAA	Clean Air Act
CCS	Carbon Capture and Storage
CO_2	Carbon Dioxide
EPA	United States Environmental Protection Agency
EPAct	Energy Policy Act of 2005
JA	Joint Appendix
NSPS	New Source Performance Standards
Rule	U.S. Environmental Protection Agency, Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,510 (Oct. 23, 2015)

SUMMARY OF ARGUMENT

EPA persists in misreading this Court's precedents to apply an erroneous legal standard under Section 111(b) of the Clean Air Act ("CAA") to impose onerous and untested new source performance standards ("NSPS") on new fossil fuel-fired steam generating units (the "Rule").

State Petitioners have demonstrated that EPA must show that its selected best system of emission reduction ("BSER") is commercially available for it to be "adequately demonstrated." State Br. 13-16. In response, EPA relies on inapposite case law applying different statutory standards to claim that all it need show is that individual components of the BSER are separately operational. EPA Br. 42. Perhaps aware that this approach is legally unsupportable, EPA devotes much of its brief to asserting instead that its BSER *is* commercially available, based primarily on the Boundary Dam facility in Canada. *Id.* at 20-26.

Boundary Dam cannot sustain the weight that EPA assigns to it. Among other shortcomings, Boundary Dam does not utilize the BSER in the Rule, as it does not sequester CO_2 in deep saline formations. Non-State Reply 3-4. Moreover, Boundary Dam is subsidized by the Canadian government and ultimately owned by the provincial government of Saskatchewan. *Id.* at 5 n.1. A publicly-owned entity like

Boundary Dam, which is insulated to a significant extent from ordinary market forces, cannot be cited as evidence that the BSER is *commercially* available.

EPA's claim that it adequately considered the costs of its new Rule also fails. Remarkably, EPA suggests that it is not required to weigh the costs and benefits of its Rule *at all*, contrary to the Supreme Court's reasoning in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), this Court's case law, and principles of reasoned rulemaking. EPA's reluctance to own up to its responsibilities is understandable as it ultimately concludes that the Rule will not result in any discernable benefits. EPA Br. 75-81. This admission, however, is fatal to any claim that the Rule is "necessary" under the CAA. 42 U.S.C. § 7601(a)(1).

EPA similarly continues to attempt to sidestep its responsibility to make significant contribution and endangerment findings under the CAA, as it relies on irrelevant findings regulating other pollutants from other source categories to support the present rulemaking.

These failures to justify the need for the Rule and to demonstrate that the BSER can be implemented expose the Rule for what it is—a pretext for the administration to put coal companies out of business and dictate the nation's energy mix at the federal level. This Court should reject EPA's attempt to abuse its authority under the CAA and vacate the Rule.

ARGUMENT

I. EPA Misstates The Governing Legal Standard For Determining Whether A BSER Is Adequately Demonstrated.

State Petitioners have previously shown that the text, structure, and legislative history of the CAA, and this Court's case law interpreting it, support the conclusion that a BSER must be commercially available to be "adequately demonstrated." State Br. 13-16. In response, EPA argues that Section 111 does not require it to demonstrate a commercially available, "fully-integrated" system, but instead allows it to make inferences from the operation of its separate component parts. EPA Br. 41-42. That is incorrect.

A. EPA Cannot Avoid Demonstrating Full, Commercial-Scale Operation Of Its BSER.

EPA's various attempts to avoid having to show that its BSER is commercially available are unavailing. In *Portland Cement Ass'n v. Ruckelshaus*, for example, this Court reviewed the legislative history of the CAA and noted that both the House and Senate Reports required that technology be "available" for installation in new plants to be deemed "adequately demonstrated." 486 F.2d 375, 391 (D.C. Cir. 1973). It is only when this Court discussed the *separate* statutory requirement that EPA's emission standards be "achievable" that it said that EPA could have considered "extrapolations from [the test] data," among other things. *Id.* at 402. The Court did not excuse EPA

from making the predicate finding that its BSER be adequately demonstrated, that is, reflect "existing technology." *Id.* at 391-92.

EPA also misreads *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), for the proposition that EPA can rely on smaller-scale operations to justify adopting a BSER for use in full-scale plants. EPA Br. 41. To the contrary, in *Costle*, the rulemaking record on baghouse technology contained evidence, among other things, of "limited data from one full scale commercial sized operation." 657 F.2d at 380. Although the record also contained evidence from eight small-scale facilities deemed "representative" of full-scale performance, the Court accepted this evidence in part because of the "large numbers of utilities that are, in fact, moving to baghouse control systems," and in part because the technology presented no problems of scale. *Id.* at 381-82.

In short, this Court has only permitted EPA to rely on evidence other than full-scale use of the specific technology when there is no functional difference between the two types of evidence. *Lignite Energy Council v. EPA*, 198 F.3d 930, 934 (D.C. Cir. 1999) (no material difference between utility boilers and industrial boilers); *Costle*, 657 F.2d at 382. And even then, that evidence has typically been corroborated by at least limited evidence of full-scale operation. *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 440 (D.C. Cir. 1973) ("wet scrubber" technology was adequately demonstrated based

on "tests of … full scale-control systems," among other things); *Costle*, 657 F.2d at 381.

As set forth below and in Non-State Petitioners' Brief, there is no such record in this case. Non-State Br. 21-26.

B. EPA Cannot Infer Demonstration Of A System From Operation Of Component Parts.

EPA next claims that it need not demonstrate its BSER as a functioning, integrated whole, but instead can merely "infer" demonstration of the system "based on operation of component parts which have not, as yet, been fully integrated." EPA Br. 42.[1] That too is incorrect.

The CAA on its face requires that the "best *system* of emission reduction" be "adequately demonstrated." 42 U.S.C. § 7411(a)(1) (emphasis added). As State Petitioners have shown and EPA has conceded in other contexts, a "system" comprises a "set of things or parts forming a complex whole." State Br. 18-19. The out-of-circuit cases that EPA cites in its brief do not support EPA's component-by-component approach.

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[1] Contrary to what it suggested in the Rule's preamble, EPA now concedes in its brief that it needs to do more than merely show that "the selected system [is] 'technically feasible.'" EPA Br. 47.

In *Sur Contra La Contaminacion v. EPA*, the Court noted by way of background that EPA had approved a combination of "three proven control technologies" proposed by a company as the best available control technology supporting issuance of a permit under the CAA. 202 F.3d 443, 447 (1st Cir. 2000). But best available control technology is a more lenient statutory standard than BSER, *see* Non-State Br. 10-11, and does not contain a requirement that the system be "adequately demonstrated." *Compare* 42 U.S.C. § 7475(a)(4) *with* 42 U.S.C. § 7479(3).

The Ninth Circuit's decision in *Native Village of Point Hope v. Salazar*, 680 F.3d 1123 (9th Cir. 2012), provides even less support for EPA's position. That case involved the Department of Interior's approval of a company's plan for exploration oil drilling in the Arctic under the Outer Continental Shelf Lands Act. *Id.* at 1127. The proposed plan was approved under applicable regulations as a "new or unusual technology," which is technology that has "not been used previously or extensively in" the region. *Id.* at 1131-32. This standard, in other words, is the *precise opposite* of the "adequately demonstrated" standard required under the CAA.

C. EPA Cannot Rely On EPAct-Funded Facilities To Corroborate Its Adequate Demonstration Analysis.

EPA effectively abandons its reliance on facilities that receive federal funding under the Energy Policy Act of 2005 ("EPAct") to establish adequate demonstration, stating that those facilities were merely "corroborative of, but inessential to, that

determination." EPA Br. 52. This Court should decline to consider such evidence based on that concession alone.

But EPAct would in any event prohibit EPA from considering such evidence where it would determine the conclusion (as the "but-for" cause) that technology is adequately demonstrated.

As State Petitioners have explained, EPAct's requirement that a system cannot be deemed adequately demonstrated "solely by reason of the use of such technology" is best read in context as requiring EPA to show that it would have made the same decision absent its consideration of the covered facilities. State Br. 22. Indeed, Courts within this circuit have rejected the narrow meaning of the phrase "solely by reason of" that EPA advances, where context shows that Congress intended to adopt a "but-for" causation standard.[2] *See, e.g.*, *Gard v. Dep't of Educ.*, 752 F. Supp. 2d 30, 35-36 (D.D.C. 2010), *aff'd*, No. 11-5020, 752 F. Supp. 2d 30 (D.C. Cir. 2010); *Drasek v.*

[2] State Petitioners inadvertently failed to acknowledge that the parenthetical they cited in *Severino v. North Fort Myers Fire Control District*, 935 F.2d 1179 (11th Cir. 1991), came from Judge Kravitch's dissenting opinion. Judge Kravitch's opinion, however, cited to multiple other authorities that reached the same conclusion. *See id.* at 1183-84 (Kravitch, J., dissenting) (collecting authorities).

Burwell, 121 F. Supp. 3d 143, 154 (D.D.C. 2015); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).[3]

Indeed, when reading the term "solely" in EPAct "'in ... context and with a view to their place in the overall statutory scheme,'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)), it becomes clear that EPA must make its determination "but-for" EPAct facilities. "Where the plain language of the statute would lead to blatantly absurd consequences that Congress could not *possibly* have intended, … [this Court] need not apply the language in such a fashion." *Avco Corp. v. Dep't of Justice*, 884 F.2d 621, 624 (D.C. Cir. 1989) (internal quotations and alterations omitted). In this case, any other interpretation would render the restrictions imposed by EPAct toothless, allowing EPA to circumvent EPAct by pointing to any small article of additional evidence to support its analysis—a scenario EPA does not dispute in its brief. EPA Br. 51-56.

Neither *Milner v. Department of Navy*, 562 U.S. 562 (2011), nor *Nebraska v. EPA*, 2014 WL 4983678 (D. Neb. Oct. 6, 2014), helps EPA's position. *Milner* discusses a

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[3] EPA takes the Court's statement in *Ponce v. Billington* that "'sole' and but-for cause are very different," out of its limited context—whether a jury instruction that was read to lay jurors (as opposed to people with knowledge of legal terms of art) could be confusing. *See* EPA Br. 54-55 (quoting *Ponce*, 679 F.3d 840, 845-46 (D.C. Cir. 2012)). The Court did not purport to challenge the analysis in *Price Waterhouse* of causation as a matter of statutory interpretation.

FOIA statute that involves materially different language than that contained in EPAct and did not set forth a causation standard. 562 U.S. at 564-65. And in *Nebraska*, the court merely noted that EPA had solicited comments on the meaning of the word "solely" in connection with its proposed rulemaking and had not yet taken final agency action. 2014 WL 4983678 at *4.

Nor is EPA entitled to any deference for its interpretation of EPAct. As EPA concedes (at 55), it does not administer EPAct, and therefore, under this Court's case law, its interpretations are not entitled to deference. *See, e.g.*, *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1368 (D.C. Cir. 1999). Moreover, there is no reason to believe that Congress intended to delegate interpretive authority to any agency, let alone EPA, to interpret the word "solely" in EPAct. Absent clear evidence of Congressional delegation, no deference is appropriate. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 246-47 (2006).

II. EPA's Record Evidence Is Insufficient Under The Correct Legal Standard.

Applying the correct legal standard, EPA cannot show that its BSER is adequately demonstrated.

EPA claims that Boundary Dam alone is sufficient to support its selected system because it "plainly *is* applying 'the components of [the selected] best system together,'" EPA Br. 40 (quoting Non-State Br. 22. But the record and *amicus curiae*

brief of SaskPower (Boundary Dam's owner) belie EPA's claim that Boundary Dam supports EPA's BSER. *See also* Non-State Reply 4-9.

First, Boundary Dam does not utilize the BSER in the Rule, which specifically calls for sequestration of CO_2 in deep saline formations. 80 Fed. Reg. 64,510, 64,579 (Oct. 23, 2015), JA___ ("determination that the BSER is adequately demonstrated . . . relies on [geologic sequestration] in deep saline formations"). Boundary Dam sells the vast majority of its captured CO_2 for enhanced oil recovery and merely uses sequestration as a backstop measure. *See* Non-State Reply 4-5. The BSER, however, requires sequestration of *all* captured CO_2 in deep saline formations. 80 Fed. Reg. at 64,579, JA___. EPA cannot rely on Boundary Dam's sequestration of a tiny percentage of its captured CO_2 to demonstrate that new sources will be able to store the entirety of their captured CO_2. *See* Non-State Br. 4-5. Furthermore, Boundary Dam makes money off the sale of enhanced oil recovery, whereas it costs money to sequester CO_2 in deep saline formations. Therefore, the Boundary Dam economic model is not probative of whether it would be commercially viable (the test for adequate demonstration) for plants without revenue from oil recovery to sequester CO_2 in deep saline formations. *See id.*

Second, the system utilized at Boundary Dam is not commercially available, because Boundary Dam is a first-of-a-kind demonstration project that is owned by the

provincial government of Saskatchewan and heavily subsidized by the Canadian government. *See* Non-State Reply 5 n.1. Boundary Dam's existence as a government-owned project, and the significant flexibility public ownership affords, cannot be used to show that a private facility, which relies on private investors, would also be able to survive commercially.

Third, Boundary Dam, as a 110 megawatt system, is far smaller than the average existing steam unit, which averages 385 megawatts, and even further below the typical size of a new steam unit, which would most likely be 500 megawatts or more. Non-State Reply 6. And *fourth*, Boundary Dam has encountered extensive operational difficulties that have greatly limited the performance and reliability of the control system. *Id.* at 7.

None of the other facilities that EPA cites support its claim that the BSER is adequately demonstrated. EPA fails to explain how Dakota Gasification supports its determination, noting only that it is "fully-integrated." EPA Br. 42. As State Petitioners explained, Dakota Gasification, as a pre-combustion process that manufactures natural gas and does not generate power, cannot be representative of the operations of a full-scale commercial system at an electric generating unit. *See* State Br. 26-27 n.7; Comments of the Utility Air Regulatory Group, EPA-HQ-OAR-2013-0495, at 5 (May 9, 2014), JA___. And EPA does not even attempt to explain how the

additional small-scale facilities on which it relies might be scaled up, stating only that the record is "replete" with evidence supporting it. EPA Br. 26. To the contrary, EPA's "evidence" relies on a number of unsupportable assumptions about base-line emissions. *See* Non-State Reply 12.

In its brief, EPA also repeatedly attempts to defend the conclusion that its BSER is adequately demonstrated by pointing to alternative compliance options, such as enhanced oil recovery, alternative storage methods, and natural gas co-firing. EPA Br. 30. But while it is true that regulated entities may comply with EPA's emission standards by alternate means, that does not relieve EPA of the statutory requirement that it adequately demonstrate its BSER. *See* 42 U.S.C. § 7411(a); Non-State Reply 14.

Alternatively, EPA suggests that if deep saline storage is not available at the desired site, the new unit could simply relocate to another State that has sequestration capabilities and then ship its generation through the electric grid to other States who can use it. EPA Br. 33. But this response demonstrates that the Rule is not a "national" performance standard because it impermissibly disadvantages some States. Non-State Br. 27; Non-State Reply 15; *Costle*, 657 F.2d at 325. EPA argues that it is not responsible for accounting for "a few isolated operations," EPA Br. 35-36, but eleven States—more than one-fifth the nation—with no proven sequestration

measures far surpasses a few isolated operations, 80 Fed. Reg. at 64,576, JA___; Non-State Br. 27.

III. The Presumption Against Regulation Of Areas Of Traditional State Concern Resolves Any Ambiguity In Favor Of State Petitioners.

EPA offers no response to State Petitioners' argument that any doubt as to the meaning of "adequately demonstrated" in the CAA or "solely" in EPAct should be resolved in favor of State Petitioners' reading, which protects the States' traditional interest in energy policy from federal encroachment. State Br. 23-25 (citing *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (internal quotations omitted)). While State Respondent-Intervenors argue against application of this canon on the basis that the facts of *Bond* are distinguishable (at 20-22), that case is but one example of a general principle that the Supreme Court has applied in a variety of contexts. *See, e.g.*, *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002) (cited in State Br. 24, collecting authorities). And none of the cases cited by the State Respondent-Intervenors involved the same intrusion on the States presented here, where new sources are mandated to adopt technology that does not exist in integrated fashion anywhere in the world. Thus, this Court must apply this clear-statement rule even where, as here, EPA seeks deference for a contrary interpretation. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001).

IV. EPA Failed To Engage In Reasoned Consideration Of Costs And Benefits.

State Petitioners demonstrated that EPA also failed to comply with its statutory obligation to "tak[e] into account the cost of achieving [the emission] reduction" that results from its regulation. 42 U.S.C. § 7411(a)(1). State Br. 29-37. In response, EPA asserts that it "did not—nor was required to—rely on monetary benefit-cost analysis as the basis for its determination" to issue the Rule. EPA Br. 65. To the contrary, EPA is required to engage in a meaningful evaluation of costs and benefits, including monetized analysis where possible. *See* State Br. 29-32.

As EPA admits, it "may not adopt a standard of performance if its cost would be 'exorbitant,' … 'excessive,' or 'unreasonable.'" EPA Br. 65. These words connote a balancing test; indeed, EPA has recognized the need to "balance" competing considerations in other cases that EPA relies on in its brief. *See, e.g.*, *NRDC v. EPA*, 749 F.3d 1055, 1060 (D.C. Cir. 2014). The Supreme Court, in turn, has explained how such balancing should occur: EPA should weigh, in monetary terms, the "economic costs" of a rule against the rule's purported "health or environmental benefits." *Michigan*, 135 S. Ct. at 2707.

To be sure, as EPA notes (at 76), the Court did not mandate a particular methodology that EPA must use in all cases when weighing costs against benefits. But the Court did not hold that EPA could simply decline to conduct *any* cost-benefit

analysis; it merely rejected as arbitrary EPA's contention that costs were "irrelevant" to its decision. *Michigan*, 135 S. Ct. at 1206-07. Here, too, EPA has declined to offer a principled methodology by which to balance benefits against costs.

The principal cases EPA cites from this Court involved rules that Congress mandated EPA issue on an expedited timetable immediately after the CAA was enacted in 1970. This Court specifically noted those time constraints and other practical considerations as reasons not to impose a monetized cost-benefit requirement on the agency. *See, e.g.*, *Portland Cement*, 486 F.2d at 386; *Essex*, 486 F.2d at 437. EPA has made no such showing that it would be impractical to engage in cost-benefit analysis here.

While EPA incorrectly protests that it is not *required* to conduct cost-benefit analysis, it nevertheless purported to consider costs and benefits in the preamble to its Rule. But this analysis too falls short. Evaluating current market trends, EPA concluded that it was unlikely that new coal-fired plants would be built in the near future, and therefore, it was unlikely that the Rule would impose any costs or yield any environmental benefits. 80 Fed. Reg. at 64,563, JA___. This conclusion, however, amounts to a concession that the Rule is not "necessary" under the CAA, 42 U.S.C. § 7601(a)(1), and should be vacated for that reason alone.

At best, EPA speculates that companies "may" build new units to diversify their energy portfolios. EPA Br. 79 (quoting the Rule, 80 Fed. Reg. at 64,642, JA___). And, in that event, EPA claims in its regulatory impact analysis that benefits would outweigh costs on a plant level. *See* EPA Br. 66 n.29. But EPA provides no empirical support for its conjecture that new plants might be built (in fact, it concludes the opposite), nor any analysis of whether any new plants could have an appreciable impact on the environment. EPA cannot regulate based on such "crystal ball" assessments. *Portland Cement*, 486 F.2d at 391. Moreover, EPA disclaims in its brief any reliance on its plant-level analysis in the regulatory impact analysis. *See* EPA Br. 77.

Nor can EPA rely, finally, on its calculation of the "incremental costs" of a new plant constructed with CCS relative to the "base case" of a new plant constructed without CCS. EPA Br. 77-78. EPA must do more than merely tally the incremental costs of a Rule and hand regulated entities the bill. Instead, EPA must consider whether the purported benefits of the Rule *outweigh* the incremental costs. *Michigan*, 135 S. Ct. at 2711. By EPA's own admission, it did not rely on any such analysis here.

V. EPA Failed To Make The Required Significant Contribution And Endangerment Findings.

EPA engages in various sleights of hand to attempt to avoid its statutory mandate to show that (1) the air pollutant it seeks to regulate "may reasonably be anticipated to endanger public health or welfare," and (2) the source category

"contributes significantly" to that endangerment. 42 U.S.C. § 7411(b)(1)(A). None of these efforts is persuasive.

EPA admits that it would need to make a significant contribution finding if it chose to list a new source category. EPA Br. 23. But contrary to EPA's suggestion (at 119-20), it did not merely combine two old source categories into a new one for administrative convenience. To the contrary, EPA has grouped certain sources from two old categories listed in the 1970s into a new amalgam without making the appropriate findings that the new category as a whole significantly contributes to air pollution. *See* Non-State Br. 32-35. The brand new Subpart TTTTT category is both narrower and broader than a combination of the Subpart D and Subpart KKKK categories that EPA listed in the 1970s. *Compare* 40 C.F.R. § 60.40; 40 C.F.R. § 60.4305; *with* 40 C.F.R. § 60.5509 (numerous additional exclusions); 40 C.F.R. § 60.5580 (broader definitions); *cf.* U.S. EPA, "Basis for Denial of Petitions to Reconsider the CAA Section 111(b) Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Utility Generating Units," April 2016, at 25-26 (admitting that some "turbines will become subject to the rule's requirements as a result of the change"). Because the new source category contains a different array of individual sources than the two earlier

categories, EPA cannot rely on its prior significant contribution and endangerment findings.

Even if EPA had not listed a new source category in the Rule, it would still need to show that the selected source category significantly contributed to the specific air pollutant being regulated here—CO_2. EPA admits that "the endangerment finding considers whether the source category contributes to 'air pollution … which may … endanger'" human health. EPA Br. 110. But EPA claims that it may rely on its prior findings from the 1970s relating to other types of "air pollution"—including particulate matter, sulfur dioxide, and nitrogen oxides[4]—to set performance standards relating to a *completely different* type of "air pollution" namely CO_2. *See* 80 Fed. Reg. at 64,527 & nn.86-87. That is not a sensible reading of the statute.

An analysis of the text in the CAA shows that EPA must first prove that the source category significantly contributes to "air pollution" deemed dangerous to human health, and then must set NSPS for the same "air pollutants." 42 U.S.C. § 7411(b)(1), (3). And similar language in other statutory provisions in the CAA confirms this conclusion. *See* EPA Br. 112 (collecting authorities). While EPA claims

[4] Addition to the List of Categories of Stationary Sources, 42 Fed. Reg. 53,657 (Oct. 3, 1977); Standards of Performance for New Stationary Sources, 36 Fed. Reg. 24,876, 24,878-79 (Dec. 23, 1971); List of Categories of Stationary Sources, 36 Fed. Reg. 5,931 (Mar. 23, 1971).

that these provisions "share a common textual structure" that Section 111(b) lacks, *id.*, that claim collapses under scrutiny. The language cited by EPA merely combines the significant contribution and new source requirements into a single sentence, but retains the same references to "air pollutants" and "air pollution" that appear in Section 111(b). *See, e.g.*, 42 U.S.C. § 7571(a)(2)(A). EPA does not explain why it should enjoy broader authority to regulate all new sources than it enjoys under other, similarly-worded sections of the CAA.

Ultimately, EPA acknowledges that its authority is limited and proposes that it supply a "rational basis" for regulating new pollutants from previously-listed source categories. EPA Br. 115. EPA is correct that all rulemaking must be rational. *See id.* (citing *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1106 (D.C. Cir. 1979)). But that is merely a baseline—it does not absolve EPA from complying with specific statutory mandates contained in its organic statutes. *See, e.g.*, *Duquesne Light Co. v. EPA*, 791 F.2d 959, 960 (D.C. Cir. 1986). Here, the relevant provision establishes requirements for "significant contribution" and "endangerment" findings—two threshold showings that EPA must meet to lawfully promulgate NSPS.

Finally, EPA errs in concluding that it has, in any event, satisfied the requisite statutory findings. As support for that conclusion, EPA cites a 2009 endangerment finding relating to *different* source categories (motor vehicles) and *different* air

pollution—namely, an "aggregate group of six long-lived and directly-emitted greenhouse gases," of which only one is CO_2. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,536-37 (Dec. 15, 2009), JA___-___. The preamble to the Rule in this case likewise focuses primarily on the purported environmental effect of this "mix" of greenhouse gases. *See* 80 Fed. Reg. at 64,517-24, JA___-___; Non-State Br. 67-68. Because the preamble does not adequately address whether the new source category substantially contributes to CO_2 emissions, the Rule must be vacated, even if EPA would reach the same conclusion had it actually engaged in the required analysis.

CONCLUSION

For the foregoing reasons, the Rule should be vacated.

Dated: January 23, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing State Petitioners' Reply Brief contains 4,494 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: January 23, 2017 /s/ Elbert Lin

Elbert Lin

CERTIFICATE OF SERVICE

I hereby certify that, on this 23th day of January 2017, a copy of the foregoing State Petitioners' Opening Brief was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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