ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, et al., Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 21-1035 (and consolidated cases)

RESPONDENT EPA'S UNOPPOSED MOTION
FOR VOLUNTARY VACATUR AND REMAND

Respondent the United States Environmental Protection Agency ("EPA") hereby respectfully moves for remand with vacatur of its action entitled "Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories." 86 Fed. Reg. 2542 (Jan. 13, 2021) ("Significant Contribution Rule"). As discussed below and in the attached declaration, EPA acknowledges that it failed to provide any public notice or opportunity for comment on the central elements of the Significant Contribution Rule, rendering it unlawful.

See 42 U.S.C. § 7607(d). Vacatur is warranted because the procedural defect here is clear, and, as discussed below and in the attached declaration, EPA does not presently intend to cure the defect through additional rulemaking. Vacatur would also forestall needless judicial proceedings and would have no disruptive consequences. Accordingly, EPA's request for vacatur should be granted.

Counsel for State and Municipal Petitioners states that they consent to the relief requested in light of EPA's clear failure to follow the notice and comment requirements in 42 U.S.C. § 7607(d) after determining that those requirements applied. Counsel for Public Health and Environmental Petitioners likewise states that they consent to the relief requested.

BACKGROUND

Clean Air Act Section 7607(d) establishes rulemaking procedures that govern EPA action under certain substantive sections of the Act. *See* 42 U.S.C. § 7607(d). This provision states that, among other things, EPA must provide a "notice of proposed rulemaking" that is published in the Federal Register and that must "specify the period available for public comment" on that proposal. *Id.* § 7607(d)(3). The rulemaking proposal must also include a "statement of [its] basis and purpose" describing the "factual data on which the proposed rule is based," the methodologies used to obtain and analyze the data, and "the major legal interpretations and policy considerations underlying the proposed rule." *Id.* § 7607(d)(3)(A)-(C). A final rule cannot be promulgated unless EPA has "allow[ed] any person to submit written

comments, data, or documentary information," *id.* § 7607(d)(5), and EPA must respond to significant public comments in its final rule, *id.* § 7607(d)(6)(B). These requirements apply to a set of EPA actions listed under § 7607(d)(A)-(U), including EPA rules promulgating or revising any standard of performance under Section 7411 of the Clean Air Act, *id.* § 7607(d)(1)(C), as well as "such other actions as the Administrator may determine." *Id.* § 7607(d)(1)(V).

Section 7411 of the Act requires EPA to list categories of stationary sources that the EPA Administrator finds in his or her judgment "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7411(b)(1)(A). This determination is typically understood to have two prongs: the "significant contribution" finding (concluding that the source category's emissions contribute significantly to air pollution), and the "endangerment" finding (concluding that such air pollution is dangerous). Once a category is listed under Section 7411(b)(1)(A), EPA must issue "standards of performance" for new sources in the source category under 7411(b)(1)(B). Those standards dictate a level of emission reduction based on the "best system of emission reduction" available to those facilities. *See id.* § 7411(b)(1)(B) & (a)(1).

In 2015, EPA promulgated for the first time a set of new source performance standards for greenhouse gas emissions from new, modified, and reconstructed coal- and gas-fired power plants. 80 Fed. Reg. 64,510 (Oct. 23, 2015). In that rule, EPA took the position that it had authority to issue such standards without making a new

significant contribution finding specifically for greenhouse gas emissions from the regulated sources because those sources comprised a source category that was already listed under Section 7411(b)(1)(A) as causing or contributing significantly to dangerous pollution. EPA explained that once it lists a source category, it may proceed to issue standards of performance for any individual pollutant under Section 7411(b)(1)(B), without being required to make an additional significant contribution finding for emissions of that pollutant. *See id.* at 64,529-30.

Even so, the 2015 rule also stated, in the alternative, that if Section 7411 were read to require that the Agency make a "pollutant-specific" significant contribution finding when issuing standards for a given pollutant under 7411(b)(1)(B) – in that case, a finding that power plants' emissions of greenhouse gas emissions *in particular* cause or contribute significantly to dangerous air pollution – then the "information and conclusions described [in the 2015 rule] should be considered to constitute the requisite [pollutant-specific finding]." *Id.* at 64,530. The Agency justified that finding on grounds that, among other things, greenhouse gas emissions from fossil-fuel-fired power plants "emit almost one-third of all U.S. [greenhouse gases] and comprise by far the largest stationary source category of [greenhouse gases] emissions." *Id.*

On April 4, 2017, EPA announced that it was reviewing the 2015 standards, 82 Fed. Reg. 16,329, and the judicial petitions for review of those standards were placed in abeyance. *See North Dakota v. EPA*, D.C. Cir. No. 15-1381, ECF No. 1688176. EPA issued a proposed rule to amend the 2015 standards for new, modified, and

reconstructed coal-fired power plants on December 20, 2018. 83 Fed. Reg. 65,424. The proposal explained that EPA was considering amending those existing emissions standards based on a different assessment of the "best system of emission reduction." *Id.*

EPA also proposed to retain its 2015 interpretation that no additional, pollutant-specific significant contribution finding was necessary to set emission standards under Section 7411(b)(1)(B). *Id.* at 65,432 n.25. EPA noted, however, that it would "consider comments" on "whether the EPA must make a new [significant contribution] finding each time the Agency regulates an additional pollutant by an already-listed source category." *Id.* EPA did *not* propose to interpret Section 7411 as requiring the Agency to identify any threshold or criteria for determining when a source category "causes, or contributes significantly," to dangerous air pollution. Indeed, EPA did not even mention this legal interpretation. EPA also did not propose or mention any threshold or criteria – quantitative or qualitative – that it might apply to this or other pollutant-specific significant contribution findings under such an interpretation. *See generally* 83 Fed. Reg. 65,424.

Then, on January 13, 2021, EPA issued the final Rule at issue here, the Significant Contribution Rule. In the Rule, EPA explained that it was not yet taking action to finalize any of the substantive amendments it had proposed to the 2015 standards for coal-fired power plants. 86 Fed. Reg. at 2544. Instead, the Rule addressed the Section 7411 significant contribution finding for greenhouse gas

emissions from fossil-fuel-fired power plants. First, the Rule promulgated a numerical threshold and associated criteria for determining which source categories' greenhouse gas emissions "contribute significantly" to endangerment. *Id.* at 2551-56. Specifically, the Rule stated that source categories whose emissions of greenhouse gases are 3 percent or less of U.S. greenhouse gas emissions are deemed to contribute *in*significantly to dangerous air pollution and so their greenhouse gas emissions cannot be regulated under Section 7411. *Id.* at 2552-53. For source categories emitting more than 3 percent of domestic emissions, their emissions could still be deemed insignificant – and so exempt from regulation – upon assessment of "secondary" criteria like the size of the source category's emissions as compared to global emissions from that same source category. *Id.* at 2554-55. None of this had been discussed in the proposed rule.

Second, the Rule applied that new threshold and used it to affirm EPA's previous conclusion (in the alternative) that power plants' emissions of greenhouse gases alone "cause, or contribute significantly," to dangerous air pollution – applying a "pollutant-specific" reading of Section 7411 that EPA had recently adopted in a separate Section 7411 rule for oil and gas sources. *Id.* at 2555-57. EPA explained that greenhouse gas emissions from this source category "cause, or contribute significantly," to dangerous air pollution, and thus are subject to new source performance standards under Section 7411, because fossil-fuel-fired power plants constitute 27 percent of domestic greenhouse gas emissions – well over the 3-percent

threshold. *Id.* at 2556. But the Rule announced that the new criteria barred EPA from establishing new source performance standards for all other source categories that emit greenhouse gases (like oil and gas production facilities, petroleum refineries, and boilers) because their emissions are 3 percent or less of total U.S. greenhouse gas emissions. *Id.* at 2552.

EPA also determined that the Rule was subject to the procedural requirements of Section 7607(d) of the Clean Air Act, as it fell within the scope of Section 7607(d)(1)(V). *Id.* at 2544.

Two petitions for review have been filed. The Court has not yet set a schedule for merits briefing.

ARGUMENT

In appropriate circumstances, this Court has discretion to vacate agency actions prior to full briefing on the merits, and the Court's exercise of this authority is warranted here. Vacatur of the Significant Contribution Rule is appropriate because the Rule is subject to the procedural requirements of Clean Air Act Section 7607(d), but EPA acknowledges that the "significant contribution" criteria promulgated in the Rule were never proposed or otherwise subject to public notice and comment in any respect, as required by Section 7607(d)(3), 42 U.S.C. § 7607(d)(3). This acknowledged failure renders the Rule plainly unlawful. Because, as explained below, EPA does not presently wish to remedy this clear procedural defect, an order vacating the Rule is appropriate and in the interests of justice.

As this Court recently explained, "vacatur is the normal remedy for a procedural violation, although we may remand to the agency without vacatur based on the seriousness of the order's deficiencies and the likely disruptive consequences of vacatur." *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020) ("*NRDC*") (internal quotation marks and citation omitted). Where an agency has not provided any opportunity for public notice and comment at all, the seriousness of the deficiency is patent and vacatur is typically appropriate. "[T]he entire premise of notice-and-comment requirements is that an agency's decisionmaking may be affected by concerns aired by interested parties through those procedures." *Id.* Accordingly, "the court typically vacates rules when an agency 'entirely fail[s]' to provide notice and comment." *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013) (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991)) (vacating an EPA final rule where the proposed rule failed to provide notice of the adopted amendments); *NRDC*, 955 F.3d at 85 ("[F]ailure to provide the required notice and to invite public comment . . . is a fundamental flaw that normally requires vacatur of the rule." (quoting *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) ("[A]n agency that bypassed required notice and comment rulemaking obviously could not ordinarily keep in place a regulation while it completed that fundamental procedural prerequisite.").

EPA's acknowledged failure to provide any public notice or comment on the Significant Contribution Rule is this type of serious deficiency. The Clean Air Act requires EPA to publish a proposed rule whenever EPA sets standards of performance under Section 7411 or promulgates "such other actions as the Administrator may determine." 42 U.S.C. § 7607(d)(3), (d)(1)(C), (d)(1)(V). That proposal must describe "the factual data on which the proposed rule is based; the methodology used in obtaining the data and in analyzing the data; and the major legal interpretations and policy considerations underlying the proposed rule." *Id.* § 7607(d)(3)(A)-(C). And EPA must accept and respond to public comments on the proposed data, methodologies, and interpretations. *Id.* § 7607(d)(5), (d)(6)(B).

Here, EPA acknowledges that it issued this final Rule without observing any of these requirements, despite the Administrator's determination that this Rule was subject to the requirements in Section 7607(d). Decl. of Acting Assistant Administrator Joseph Goffman ¶¶ 9-13 ("Goffman Decl."); 86 Fed. Reg. at 2544. Nothing in the proposed rule discusses or even hints at the binding legal interpretation provided in the final Rule. Moreover, EPA acknowledges that it also failed to undertake significant analyses relevant to the underlying legal and factual questions. Goffman Decl. ¶¶ 17-19. The Agency's acknowledged failure to weigh relevant data and potential objections to proposed significance criteria in any respect before finalizing them is precisely the sort of error that casts serious, insurmountable "doubt" on "whether the agency chose correctly" when reaching the conclusions

advanced in this Rule. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (noting that the "seriousness" of a rule's "deficiencies" reflects "the extent of doubt whether the agency chose correctly").

Vacatur is also warranted because the Agency does not wish to cure the procedural defect at this juncture. Goffman Decl. ¶ 15. Instead, as explained in the declaration – and consistent with Executive Order 13990 directing EPA to review and, if appropriate, revise or rescind the Significant Contribution Rule at issue here – EPA wishes to undertake a wholesale reexamination of the legal interpretations advanced in this Rule. Goffman Decl. ¶ 16; *see* Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

Even if EPA were to conclude that pollutant-specific significance criteria were appropriate, the Agency still would not intend to proceed with re-proposal of the existing Significant Contribution Rule. Goffman Decl. ¶ 17. Important substantive analyses were not performed before the Rule was promulgated, and would need to be conducted in the event EPA were to seek to re-promulgate these or other significance criteria. *Id.* This would include new analyses weighing the level of stationary source greenhouse gas emissions EPA should address to appropriately mitigate the public health and welfare impacts of greenhouse gas emissions, and, depending on those analyses, work to develop comprehensive estimates of the greenhouse gas emissions of other source categories listed under Section 7411. Goffman Decl. ¶¶ 18-19; *cf. Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 347 (D.C. Cir. 1989) ("The proper

course in a case with an inadequate record is to vacate the agency's decision and to remand the matter to the agency for further proceedings."). Given the depth and breadth of the review to be conducted, and the substantial possibility that the review may change the Agency's approach to the questions presented in the Rule, EPA does not plan to simply re-propose the existing Significant Contribution Rule. Goffman Decl. ¶¶ 15-17. Where a serious procedural defect will not be cured by remand without vacatur, remand with vacatur is appropriate. *See NRDC*, 955 F.3d at 85 ("In general, vacatur is the normal remedy for a procedural violation, although we may remand to the agency without vacatur based on the seriousness of the order's deficiencies and the likely disruptive consequences of vacatur." (internal quotation marks and citation omitted)).

Vacatur is further warranted because it would have no "disruptive consequences." *See id.*; *Allied-Signal*, 988 F.2d at 150-51; *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020) ("A strong showing of one [vacatur] factor may obviate the need to find a similar showing of the other." (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002)). The Significant Contribution Rule "re-affirmed" that fossil-fuel-fired power plants are appropriately regulated under Section 7411 and did not alter the standards themselves. Consequently, vacatur of the Significant Contribution Rule – including the new significant contribution finding made therein – would have no effect on existing regulation of the source category. Goffman Decl. ¶ 20. And the

significance criteria have not yet been applied to any other source category's greenhouse gases emissions, so no other performance standards would be affected by their retraction. Goffman Decl. ¶ 21.

Moreover, none of the other disruptive consequences that traditionally counsel in favor of remand without vacatur are present here. Specifically, no deleterious effects on public health and the environment would result from vacatur, and there are few (if any) reliance interests on this Rule given its recent promulgation. *See, e.g.*, *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (declining to vacate a rule issued without proper notice-and-comment procedures because it "may affect the EPA's ability to respond adequately to serious safety hazards"); *see also Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) ("[A]lthough remand without vacatur remains an exceptional remedy, we have held that it is appropriate when vacatur would disrupt settled transactions."). Here, the longstanding regulatory regime will remain in place even after vacatur of this Rule. The standards to reduce the source category's emissions of harmful greenhouse gases will be unaffected by vacatur. Indeed, in the Agency's view, remanding the Rule *without* vacatur would have the most disruptive and deleterious consequences for public health and the environment, as it would leave in place a statutory interpretation constraining any further regulation of greenhouse gas emissions under Section 7411, even though that interpretation was promulgated without proper observance of law. Goffman Decl. ¶ 22. Likewise, those parties that might support the legal interpretation or criteria put

forward in the Significant Contribution Rule lack any reliance interests on the Rule because it has been in effect less than a week. 86 Fed. Reg. at 2542.

Nor will remand with vacatur have any disruptive consequences for the Court or the parties to this litigation. This matter is still at a nascent stage. The Court has not yet set deadlines for merits briefing or argument. And Petitioners consent to vacatur.

Because the procedural error here is patent and serious, and because vacatur will have no disruptive consequences, the Significant Contribution Rule should be vacated and remanded to EPA.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court: (1) grant this motion and issue an order vacating and remanding the Rule entitled, "Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories," 86 Fed. Reg. 2542 (Jan. 13, 2021); and (2) dismiss as moot the above-captioned consolidated petitions for review, Nos. 21-1035, 21-1036, and 21-1063.

Respectfully submitted,

JEAN E. WILLIAMS
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DATED: March 17, 2021

/s/ Chloe H. Kolman

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion for Voluntary Vacatur and Remand complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 3,008 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Voluntary Vacatur and Remand have been served through the Court's CM/ECF system on all registered counsel this 17th day of March, 2021.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, et al., Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 21-1035 (and consolidated cases)

DECLARATION OF JOSEPH GOFFMAN

1. I, JOSEPH GOFFMAN, pursuant to 28 U.S.C. § 1746, declare, under penalty of perjury, that the following statements are true and correct based upon my personal knowledge or upon information provided to me by persons under my supervision.

2. I am Principal Deputy Assistant Administrator and Acting Assistant Administrator for the United States Environmental Protection Agency ("EPA" or the "Agency") Office of Air and Radiation ("OAR"), which is located at 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

3. OAR is the EPA headquarters-based unit with primary responsibility for administration of the Clean Air Act ("CAA"). As the Principal Deputy Assistant

Administrator and Acting Assistant Administrator for OAR, I serve as the principal advisor to the Administrator of EPA on matters pertaining to air and radiation programs, and I am responsible for managing these programs. These duties include overseeing program policy development and evaluation; development of emissions standards; program policy guidance and overview; and technical support and evaluation of regional air and radiation program activities.

4. This declaration is filed in support of EPA's motion for voluntary vacatur and remand, in *State of California v. U.S. EPA*, No. 21-1035 (D.C. Cir.). My Office develops all regulations, policy, and guidance associated with Clean Air Act ("CAA") Section 7411, 42 U.S.C. § 7411. As part of my duties as Principal Deputy Assistant and Acting Assistant Administrator of OAR, I oversee the development and implementation of these Section 7411 regulations, policy, and guidance. In this capacity, I have been responsible for overseeing the implementation of the rule at issue in the above-captioned litigation, the "Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories—Final Rule," 86 Fed. Reg. 2542 (Jan. 13, 2021) ("Significant Contribution Rule").

5. CAA Section 7411 authorizes EPA to regulate air pollutant emissions from any category of stationary sources which, in EPA's judgment, "causes, or

contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). After EPA makes this so-called "endangerment finding" (in actuality, a combination of (1) a finding that the air pollution in question may reasonably be anticipated to endanger public health or welfare, and (2) a separate finding that the emissions in question cause or contribute significantly to that air pollution), EPA must propose and then take final action on performance standards for that source category's emissions. *Id.* § 7411(b)(1)(B).

6. EPA currently regulates greenhouse gas emissions from the source category of fossil fuel-fired electric generating units (power plants) under Section 7411. EPA issued that rule in 2015. *See* 80 Fed. Reg. 64,510 (Oct. 23, 2015) (2015 Rule).

7. EPA promulgated the Significant Contribution Rule challenged in this matter as part of the agency's review of the 2015 Rule. The Significant Contribution Rule established for the first time generally applicable criteria to define when a source category's greenhouse gas emissions "contribute significantly" to dangerous air pollution under Section 7411. In addition, the Rule applied those criteria to greenhouse gas emissions from fossil fuel-fired electric generating units and affirmed that those sources do contribute significantly to dangerous air pollution within the meaning of Section 7411, and so may be regulated (as they already are) under that section of the Clean Air Act.

8. In particular, the Significant Contribution Rule determined that only source categories whose emissions constitute more than 3 percent of U.S. greenhouse gas emissions may be determined to contribute significantly to dangerous air pollution. However, the Rule adopted "secondary" significance criteria that apply to emissions above that threshold, so that even source categories emitting more than 3 percent of U.S. greenhouse gas emissions may be deemed "insignificant" under some circumstances. The Rule affirmed that greenhouse gas emissions from fossil fuel-fired electric generating units should be considered significant because they exceeded the 3-percent threshold and are uniquely large compared to all other source categories – because they constitute nearly one-third of all U.S. greenhouse gas emissions. EPA explained that given the unique magnitude of greenhouse gas emissions from fossil fuel-fired electric generating units, it was not necessary to consider the secondary significance criteria. 86 Fed. Reg. at 2556.

9. EPA promulgated the Significant Contribution Rule without any public notice or opportunity for comment.

10. EPA did issue a proposed rule to amend the 2015 Rule for greenhouse gas emissions from fossil fuel-fired power plants. 83 Fed. Reg. 65,424 (December 20, 2018) ("2018 Proposed Rule"). But the focus of that proposal was proposed changes to the greenhouse gases performance standards that currently apply to coal-fired electric generating units. The Significant Contribution Rule did not finalize any of those proposed changes to the standards.

11. While the 2018 Proposed Rule included a footnote stating that EPA would consider comments on whether it should interpret Section 7411 as requiring EPA to make a new "pollutant-specific" significant contribution finding that the source category's emissions of greenhouse gases – and not its emissions generally – "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," *id.* at 65,432 n.25, neither that footnote nor any other part of the 2018 Proposed Rule proposed or mentioned that EPA was considering adopting or requiring a threshold or criteria for determining when a source category's emissions are significant. Consequently, the 2018 Proposed Rule did not propose or mention any specific threshold or criteria for determining whether a contribution is significant.

12. EPA also did not propose a significant contribution threshold or criteria in any other rulemaking under Section 7411. In a Section 7411 rule finalized in September 2020 concerning the oil and gas industry, EPA did set forth, for the first time, its statutory interpretation of Section 7411 requiring EPA to establish such a threshold or criteria. 85 Fed. Reg. 57018 (Sept. 14, 2020). But that rulemaking did not propose (or adopt) the threshold or criteria themselves.

13. Accordingly, with respect to the Significant Contribution Rule, EPA did not "publish[]" a "notice of proposed rulemaking" and "specify the period available for public comment," 42 U.S.C. § 7607(d)(3); EPA did not include a "statement of [the] basis and purpose" for the Rule, describing the "factual data on which the

proposed rule is based," "the methodology used in obtaining the data and in analyzing the data," and "the major legal interpretations and policy considerations underlying the proposed rule," *id.* § 7607(d)(3)(A)-(C); EPA did not "allow any person to submit written comments, data, or documentary information" related to the Rule, *id.* § 7607(d)(5); and EPA did not "respon[d] to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period" when it promulgated the final Rule, *id.* § 7607(d)(6)(B).

14. On January 20, 2021, a week after the Significant Contribution Rule was published in the Federal Register, President Joseph R. Biden Jr. signed Executive Order 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). The Executive Order, along with a list of agency actions accompanying the Executive Order, specifically directs EPA to "review and, as appropriate and consistent with applicable law, take action to address" the Significant Contribution Rule and other rules to the extent they conflict with the Executive Order's stated policies of, among other things, improving public health, protecting the environment, and reducing greenhouse gas emissions. *Id.*; "Fact Sheet: List of Agency Actions for Review," at "U.S. Environmental Protection Agency" § 3. https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

15. In light of Executive Order 13990, EPA does not intend to re-propose and for the first time accept public comments on the Significant Contribution Rule.

Instead, EPA intends to conduct a holistic re-examination of the legal and policy conclusions reached in the Rule.

16. Specifically, EPA will re-examine the recently adopted legal interpretations that underlie this and other EPA rules, including whether Section 7411 requires EPA to make a "pollutant-specific" finding that the source category's emissions of a particular pollutant – rather than its emissions as a whole – cause or contribute significantly to dangerous air pollution, and, if so, whether EPA is required to set significance criteria before regulating a source category's emissions of a particular pollutant.

17. Moreover, even if EPA's review under Executive Order 13990 were to conclude that pollutant-specific significance criteria were appropriate, EPA still would not intend to proceed with re-proposal of the existing Significant Contribution Rule. Important substantive analyses were not performed before the Rule was promulgated, and would need to be conducted in the event EPA were to seek to re-promulgate these or other significance criteria.

18. For example, if EPA were to pursue developing a threshold or criteria, EPA would need to analyze the various options in the context of the purpose of Section 7411. The Significant Contribution Rule justified the 3-percent threshold primarily as providing certainty to industry; while an important outcome, that justification was not grounded in the purpose of Section 7411 in general or of the significant contribution finding in particular, which is to protect public health and

welfare. *See* Section 7411(b)(1)(A) (directing the Administrator to list for regulation a source category if "it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"). The Significant Contribution Rule did not address the public health and welfare impacts of greenhouse gas emissions and, thus, did not point towards what levels of emissions from stationary sources EPA should address to appropriately mitigate those health and welfare impacts. Any future consideration of a significance threshold or criteria would need to reconsider these questions.

19. Depending on the analyses described in paragraph 18, EPA would also need to consider whether the greenhouse gas emissions estimates for the source categories used in the Rule, and the estimates EPA may have for other source categories not mentioned in the Rule, are adequate to support determination of the threshold or criteria for significance. To date, EPA has promulgated Section 7411 rules regulating greenhouse gas emissions from only two source categories, fossil fuel-fired electricity generating units and oil and gas sources, and as a result EPA has fully developed emissions estimates for only those two source categories. The agency's primary sources of information for greenhouse gas emissions are the Inventory of U.S. Greenhouse Gas Emissions and Sinks ("the GHG Emissions Inventory") and the Greenhouse Gas Reporting Program ("GHG Reporting program"). However, the sources of data for these two programs do not correspond directly to the Section 7411 source categories, as the stationary sources reporting under these programs are

not precisely the same as the stationary sources covered by Section 7411's applicability requirements. Accordingly, EPA would need to consider whether it needs to develop more particularized estimates of greenhouse gas emissions for various source categories before proposing a significance threshold or criteria.

20. Vacatur of the Significant Contribution Rule will not negatively impact public health or the environment. Vacatur will not disrupt regulation of greenhouse gases from fossil fuel-fired power plants. Emission limits for those sources were promulgated in 2015 and will remain in place even after vacatur of the Significant Contribution Rule, which affirmed EPA's prior conclusion that these sources are subject to regulation under Section 7411 of the CAA.

21. Vacatur of the Significant Contribution Rule also will not disrupt regulation of any other sources of greenhouse gases because the Rule's significance criteria have not yet been applied to any other source category.

22. Remanding the Significant Contribution Rule without vacatur, however, could negatively impact public health and the environment. While the significance criteria remain in place, EPA likely cannot regulate any stationary sources of greenhouse gases other than fossil fuel-fired electric generating units because all other source categories appear to be below the 3-percent significance threshold the Rule adopted.

March 17, 2021

JOSEPH GOFFMAN