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Submitted via regulations.gov

Administrator Andrew R. Wheeler
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460
Attn: Docket No. EPA-HQ-OAR-2017-0757

Re: *Comment on Proposed Policy Amendments 2012 and 2016 New Source Performance Standards for the Oil and Natural Gas Industry,* Docket No. EPA-HQ-OAR-2017-0757 ("Proposed Rule")

Dear Administrator Wheeler:

We submit this letter in response to the Proposed Policy Amendments 2012 and 2016 New Source Performance Standards for the Oil and Natural Gas Industry (the "Proposed Rule").[1] We appreciate the opportunity to comment on this Proposed Rule. Sean B. Hecht is the Co-Executive Director, Emmett Institute on Climate Change and the Environment and Evan Frankel Professor of Policy and Practice, and Harjot Kaur is an Emmett/Frankel Fellow in Environmental Law and Policy, at UCLA School of Law. We comment on our own behalf, in our individual capacities, based on our knowledge and expertise on the Clean Air Act and administrative law principles.

We write in opposition to the Environmental Protection Agency's ("EPA") efforts, in the Proposed Rule, to significantly narrow the reach of the Clean Air Act's ("CAA") ability to regulate key pollutants from stationary sources in the oil and natural gas industry.[2] This Proposed Rule seeks to revoke the changes made in the final rules titled "Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews; Final Rule" (the "2012 Rule")[3] and "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule" (the "2016 Rule").[4] If finalized, this Proposed Rule

[1] *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 84 Fed. Reg. 50,244 (proposed Sept. 24, 2019) (to be codified at 40 C.F.R. pt. 60).
[2] *See generally* Proposed Rule, 84 Fed. Reg. 50,244.
[3] *See generally* Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012) (codified at 40 C.F.R. pts. 60, 63).
[4] *See generally* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (codified at 40 C.F.R. pt. 60).

would remove the transmission and storage segments from the "Crude Oil and Natural Gas Production" source category and would remove methane regulations within the production and processing segments of the "Crude Oil and Natural Gas Production" source category. This Proposed Rule also seeks to rescind regulations on emissions of volatile organic compounds ("VOCs"), including methane, for existing sources, without providing either sound legal or factual support for its decision.[5] In the alternative, the proposal includes a path that would retain the transmission and storage segments of the source category but remove all methane regulations from all segments of the same source category.[6] Finally, this Proposed Rule seeks comment on, but does not directly propose to implement, a major policy change that would require EPA to make a significant contribution finding for every individual pollutant regulated by CAA § 111.[7]

EPA proposes, or suggests, a wide range of policy and procedural changes and new legal interpretations in this Proposed Rule, but the common thread through all the facets of this proposal is the rollback of methane regulations that apply to the oil and natural gas industry. This suggests that EPA's objective in this proposal is to eliminate methane control obligations from businesses within the oil and natural gas industry, despite the importance of limiting methane emissions to minimize their harmful impacts on human health and the climate. EPA's proposed actions are contradictory, and its conflicting rationales—together with evidence highlighted by other commenters—point to the conclusion that those rationales may be pretextual.

As EPA itself has acknowledged in the Proposed Rule and elsewhere, methane has harmful impacts on climate change and human health. Methane is a greenhouse gas with approximately 28-36 times the global warming potential of carbon dioxide.[8] Increased emissions of methane into the atmosphere will worsen climate change, the effects of which will increase average global temperatures and, accordingly, the likelihood of more harmful heat waves, more intense hurricanes, more infectious and waterborne diseases, among others.[9] Methane emissions also contribute to ground-level ozone, which can harm lung tissue for local populations living near the source of the emissions.[10] EPA acknowledged methane's impairment of human health and climate change in the 2016 Rule, and EPA does not directly dispute these impacts in this Proposed Rule. Nevertheless, despite these harms, EPA proposes multiple actions that will eliminate restrictions on methane emissions from the oil and natural gas industry.

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[5] *See* Proposed Rule, 84 Fed. Reg. at 50,271-77.
[6] *See id.* at 50,246, 50,260-61.
[7] *See id.* at 50,261-71.
[8] *See* 2016 Rule, 81 Fed. Reg. at 35,830, 35,837-38.
[9] *See id.* at 35,833-37.
[10] *See Ground-Level Ozone Basics*, U.S. Envtl. Prot. Agency, https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics (last visited Nov. 25, 2019).

I. EPA fails to provide an adequate, coherent legal or factual basis for the Proposed Rule

The requirement that agencies provide adequate reasons to justify their rules is one of the core principles of administrative law. Agencies may not make determinations based simply on policy preferences untethered to reasoned decision-making; rather, an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[11]

Here, the Proposed Rule would change dramatically EPA's position on key legal and policy issues and would contradict facts established in prior rulemaking records. Where an agency makes such a change, it must demonstrate "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."[12] In cases where there is something more at stake than mere policy change, the agency must also provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[13] So, for example, where "serious reliance interests" are predicated on a consistent agency position, the "lack of reasoned explication for a regulation that is inconsistent with [an agency's] longstanding earlier position results in a rule that cannot carry the force of law."[14]

In short, this Proposed Rule presents contradictory and conclusory reasoning for EPA's shift in policy to deregulate methane emissions from the oil and gas industries. The agency fails to provide a reasoned explanation for its dramatic change in stance. Its reasoning for deregulating methane emissions—that VOC emissions controls adequately address methane emissions, and indeed are redundant with methane-specific emissions controls—directly conflicts with its simultaneous proposal to rescind VOC regulations from existing sources. Further, EPA provides inadequate information or analysis to support its alternative proposal to retain the transmission and storage segments of the source category, the costs of removing the VOC regulations, and environmental justice impacts. Finally, this Proposed Rule includes an insufficient and inappropriate discussion of a much larger potential rollback in New Source Performance Standards ("NSPS") that could affect a wide range of pollutants in the future, based on a novel and unsupported legal theory, even as it proposes a standard that rejects decades of regulatory policy. This pattern of incoherent policy rationale strongly suggests that the EPA's motive may be simply to deregulate methane emissions and other air pollutant emissions, rather than to implement a consistent policy that protects the public health and welfare in compliance with the CAA. While other commenters have provided a comprehensive critique of the Proposed Rule, we will focus here on just a few examples of the ways EPA's proposal cannot be

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[11] *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted); *see also Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.").
[12] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis removed).
[13] *Id.* at 516.
[14] *Encino Motorcars*, 136 S. Ct. at 2126-27 (internal quotation marks and citations omitted).

justified, illustrating the lack of sound legal underpinning, rational basis, or coherent policy rationale for the rule.

II. EPA's own proposal undercuts its core stated rationale

In this Proposed Rule, EPA argues that methane emissions NSPS are unnecessary, because—the agency asserts—VOC emissions controls, which already are in effect, are redundant with methane emissions controls. At the same time, EPA seeks to eliminate regulatory authority to control VOC emissions from existing stationary sources under CAA § 111(d), through an unprecedented reinterpretation of its legal authority. EPA's reasoning is evidently self-contradictory. By proposing to rescind methane emissions regulations while simultaneously abandoning its core policy justification for rescinding those regulations, EPA reveals its lack of either a coherent policy rationale or legal basis for the rule.

First, EPA proposes that deregulating methane emissions from the production and processing segments of the industry is justified because methane emissions controls are redundant with VOC emissions controls.[15] EPA argues that the capture and control devices used to capture methane are the same as those used to collect methane, and these devices are not selective in collecting emissions.[16] Thus, EPA suggests, removing NSPS for methane in production and processing segments will not affect methane emission control.[17] EPA argues that it could have rescinded either VOCs or methane regulations here, but decided to rescind methane regulations because rescinding VOC regulations would have been more disruptive.[18]

At the same time, the Proposed Rule would purport to exclude VOC emissions from existing-source emissions limitations under CAA § 111(d). EPA asserts that any NSPS promulgated for VOC emissions for new sources in the Crude Oil and Natural Gas Production source category under CAA § 111(b) will not trigger application of those NSPS for existing sources under CAA § 111(d).[19] CAA § 111(d) regulates certain existing sources using the NSPS, when those air pollutants are not already covered by CAA §§ 108(a) and 112.[20] In contrast to prior legal interpretations, EPA here takes the novel position that VOCs are already regulated by CAA § 108(a), even though VOCs are not listed pollutants under that section, because they are precursors to § 108(a) listed pollutants (ozone and PM2.5).[21]

By EPA's own logic, eliminating VOC emissions controls will also correspondingly increase methane emissions from the same sources. Therefore, while EPA claims methane NSPS are unnecessary because VOC NSPS will address methane emissions, the agency's proposal would roll

[15] *See* Proposed Rule, 84 Fed. Reg. at 50,259-60.
[16] *See id.* at 50,259.
[17] *See id.*
[18] *See id.* at 50,260.
[19] *See id.* at 50,271-73.
[20] *See id.* at 50,272; *see also* 42 U.S.C. § 7411(d)(1)(A).
[21] *See* Proposed Rule, 84 Fed. Reg. at 50,272.

back similar VOC regulation from existing sources—leading, without question, to increased methane emissions from those sources. EPA cannot justify deregulating methane emissions in good faith based on the possibility that methane emission controls are redundant with those of VOC controls.

III. EPA did not adequately analyze the impacts of eliminating standards for existing sources under Section 111(d) of the Clean Air Act

As described above, EPA's proposal would eliminate VOC emissions standards under CAA § 111(d) for this source category. EPA concludes that "the lack of regulation of existing sources under CAA section 111(d) will have limited environment impact."[22] But the agency does not justify this conclusion with evidence. EPA relies on speculation, including conjecture that existing sources will be required to adhere to regulations for new sources once they are modified, which will occur over time. This conjecture, along with other statements in the Proposed Rule, lacks evidentiary support.

EPA argues that removing VOC regulations from existing sources will have limited impact the industry because of market incentives to mitigate leakage, voluntary programs that companies have joined to decrease emissions, and state regulatory programs.[23] It argues that NSPS for VOCs will still apply to new and modified sources, and that given the expansive definition of "modification" as provided in the 2016 Rule, many existing sources that undergo qualified modification l be regulated for VOC emissions.[24] EPA also asserts that existing sources will modify, shut down, and become obsolete over time, indicating that the lack of regulation over existing sources will have limited environmental impact.[25]

But EPA provides no quantitative assessment of either the additional methane pollution from the proposal, the foregone benefits relative to the 2016 Rule, or any other aspect of the new proposal's lack of regulation of existing sources. The agency provides no data or modeling to support any assumptions about the rate of turnover, for example. Instead, it acknowledges that it lacks any concrete information on turnover trends and timeline.[26] The forgone benefits of regulating VOCs (and, accordingly, methane) from existing sources could be substantial, placing a burden on states to address emissions—or to leave the emissions unaddressed. EPA's failure to provide any concrete evidence suggests that the proposal lacks any rational basis, even as the agency bears the legal burden to justify its decision.

IV. The proposal does not acknowledge environmental justice benefits of regulating methane

The proposal's treatment of environmental justice impacts is inadequate. EPA contends that "this proposed action is unlikely to have disproportionately high and adverse human health or

[22] Proposed Rule, 84 Fed. Reg. at 50,273.
[23] *See id.* at 50,273-77.
[24] *Id.* at 50,273.
[25] *Id.*
[26] *See id.*

environmental effects on minority populations, low-income populations, and/or indigenous peoples."[27] At the same time, EPA concedes that the proposal would increase the emissions of VOCs, methane, and hazardous air pollutants, and that disadvantaged communities will experience forgone benefits as a result.[28]

In its section analyzing Executive Order 12898, the 2016 Rule stated that its methane regulations would only have a positive impact on disadvantaged communities, and indeed on all affected communities.[29] Revoking a rule with positive health impacts will result in equal and opposite negative effects on those same communities. The Proposed Rule should have addressed this directly, but EPA failed to do so. Nor does the Proposed Rule acknowledge the 2016 Rule's analysis of GHG emissions' disproportionate impact on disadvantaged and tribal communities, particularly in Alaska.[30] The analysis in the 2016 Rule described the disproportionate effects of climate change on these communities' livelihoods.

V. EPA's "alternative proposal" lacks any reasoning or support, and relies on a legal argument incompatible with the basis for the primary proposal

EPA provides no reasoning to underpin its "alternative proposal" in Section V—a proposal that implicitly relies on a legal interpretation manifestly at odds with EPA's legal analysis elsewhere in the Proposed Rule. Section V of the Proposed Rule proposes, as an alternative to the primary proposal, to eliminate methane NSPS from all segments of the industry, while maintaining the source category unchanged.[31] EPA bases its short alternative proposal on the same policy rationale as its primary proposal, reiterating its view that removing methane from regulation under Section 111 is appropriate because of redundancy with VOC regulations.[32] But the alternative proposal relies on a legal argument incompatible with the legal basis for the primary proposal. EPA's decision to put out for comment inconsistent legal analyses, without any significant analysis or explanation, provides further evidence of EPA's wholly results-oriented approach to this rulemaking, and demonstrates the arbitrariness of the agency's proposal.

In Section IV of the proposal, EPA argues that adding the transmission and storage segments of the oil and natural gas industry into the "Oil and Natural Gas Production" source category inappropriately widened its reach, and that those segments therefore should be removed from this source category.[33] EPA added these segments to the source category in the 2012 Rule and the 2016 Rule. While EPA had incorporated the transmission and storage segments into the source category in the 2012 Rule, it provided further reasoning for that addition in the 2016 Rule. In this Proposed Rule, EPA explains its view that the expansion "exceed[ed] the reasonable boundaries of its authority to

[27] Proposed Rule, 84 Fed. Reg. at 50,283 (citing Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994)).
[28] *See id.* (citing Chapter 1 of the regulatory impact analysis supporting the Proposed Rule).
[29] *See* 2016 Rule, 81 Fed. Reg. at 35,827.
[30] *See id.* at 35,836.
[31] *See* Proposed Rule, 84 Fed. Reg. at 50,260-61.
[32] *See id.* at 50,261.
[33] *See id.* at 50,254-60.

revise source categories."[34] It argues that expanding an existing source category would circumvent the requirement for creating wholly new source categories, which requires a "judgment" from the EPA Administrator that the emissions from the "category of sources . . . cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" ("significant contribution" and "public health endangerment" findings).[35] EPA asserts that it failed to do this properly in the 2016 Rule because EPA made these findings for the source category inclusive of the production and processing segments with transmission and storage. EPA asserts that it should have instead made these findings for the transmission and storage segments separately from the production and processing segments.[36]

But in Section V, EPA raises an alternative proposal that would retain the prior legal interpretation—a proposal that, if implemented, would be manifestly at odds with the legal analysis elsewhere in the Proposed Rule. Instead, this alternative proposal would continue to implement a prior legal interpretation that the Proposed Rule argues "exceed[ed] the reasonable boundaries of its authority to revise source categories."[37] EPA's legal analysis does not leave any doubt of its position that the 2016 Rule inappropriately incorporated the transmission and storage segments into its prior NSPS. Despite this, EPA suggests retaining them anyway, while removing methane emissions regulations. EPA does not even try either to reconcile its alternative proposal with the legal analysis elsewhere in its proposal, nor does it provide an alternative legal analysis. EPA's zeal to provide a proposal with the result of deregulating methane emissions is strong enough to motivate the agency to provide even a transparently contradictory set of alternatives that all achieve this result.

VI. EPA fails to provide a legally adequate basis for its proposal

EPA's internally contradictory legal, factual, and policy analysis, and its failure to put forward a concrete proposal based on stable and transparent factual data, methodology, and legal and policy considerations, will render any decision it makes inadequate. Section 307(d) of the Clean Air Act requires EPA to provide, in every proposed rule, a statement of basis and purpose stating:

> (A) the factual data on which the proposed rule is based;
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> (B) the methodology used in obtaining the data and in analyzing the data; and
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> (C) the major legal interpretations and policy considerations underlying the proposed rule.[38]

Moreover, under this same section of the CAA, all supporting evidence must be in the rulemaking docket.[39] And finally, any final rule must—under both the Administrative Procedure Act and CAA

[34] *Id.* at 50,256.
[35] *Id.*; *see also* 42 U.S.C. § 7411(b)(1)(A).
[36] *See* Proposed Rule, 84 Fed. Reg. at 50,257.
[37] *Id.* at 50,256.
[38] 42 U.S.C. § 7607(d)(3).
[39] *See id.* ("All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.").

§ 307(d)—be a "logical outgrowth" of the proposal.[40] Here, by contrast, and as discussed above, EPA provides contradictory legal bases for the Proposed Rule, and EPA also casts much of the proposal as a call for more information and analysis from the public on alternatives potentially at odds with some of the most basic legal underpinnings of the proposal.

While the failure to provide an adequate discussion of facts, methodology, legal interpretations, and policy considerations pervades the Proposed Rule, EPA's failure is most apparent in its analysis in Section VI of the proposal. In this section, the agency solicits comment on a proposal to revise a key legal interpretation. The Clean Air Act, in section 111(b)(1)(A), requires EPA to make two findings prior to listing a new source category: (1) that certain air pollution may reasonably be anticipated to endanger public health or welfare, and (2) that the source category's emissions of air pollutants cause or contribute significantly to that air pollution.[41] The second requirement is also known as a "significant contribution finding," or an "SCF." Once an SCF has been issued for a source category, EPA interprets Section 111 to require only a "rational basis" for promulgating NSPS for a pollutant emitted by sources in that category.[42] EPA has used this rational basis requirement previously, including in a Section 111 rulemaking covering GHG emissions from electricity generating units and in the 2016 Rule.[43]

In this section of the Proposed Rule, EPA discusses and solicits comment on whether EPA should instead issue SCFs on a pollutant-by-pollutant basis, and if so, how that would affect the 2016 Rule.[44] Under the proposed interpretation on which EPA is soliciting comment, EPA would need to issue a SCF for each pollutant it seeks to regulate "from a previously unlisted source category" as it is emitted by that source category.[45] EPA solicits comment on whether this new interpretation would compel or authorize EPA to repeal the 2016 Rule.[46] Note that in this section, EPA is not directly reasoning that it needs to make a pollutant-specific SCF finding for methane, only that it is requesting comment on whether it should.[47]

EPA may not lawfully base a final rule on this section of the proposal. The proper way for EPA to vet publicly these types of arguments and multiple alternative interpretations, if at all, is through an advanced notice of proposed rulemaking. Including these queries and hypotheticals in the proposed rule does not allow for proper notice prior to finalization. EPA has provided the public with little basis for understanding the agency's legal or factual rationale if it finalizes a rule based on comments it may receive, violating CAA § 307(d). In soliciting comment for much of this Proposed Rule, particularly in

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[40] *Portland Cement Ass'n v. E.P.A.*, 665 F.3d 177, 189 (D.C. Cir. 2011) (quoting *Small Refiner Lead Phase-Down Task Force v. E.P.A.*, 705 F.2d 506, 543 (D.C. Cir. 1983)).
[41] *See* Proposed Rule, 84 Fed. Reg. 50,261; 42 U.S.C. § 7411(b)(1)(A).
[42] *See id.* at 50,262.
[43] *See id.* (citing 2016 Rule, 81 Fed. Reg. at 35,841; Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,529-31 (Oct. 23, 2015) (codified at 40 C.F.R. pts. 60, 70-71, 98)).
[44] *See id.* at 50,261-71.
[45] See *id.* at 50,266.
[46] *See id.* at 50,261-62.
[47] *See id.* at 50,261.

this section, EPA evades its responsibility to provide reasoning in its proposals. Instead of articulating in its proposal the major legal interpretations and policy considerations on which it will rely, the agency passes that task to commenters. Accordingly, the public will not have adequate notice of the agency's reasoning for promulgating the final rule.

VII. Conclusion

EPA's proposed rule is a solution in search of a problem—if one can call deregulation of a serious pollutant like methane a solution. The agency strains, through incomplete and internally contradictory analysis, to justify some action—any action—that would result in rescinding the 2016 Rule. The proposal is flawed both legally and as a matter of policy. For these reasons, we urge the agency not to finalize this Proposed Rule; we support EPA retaining all methane emissions NSPS within the source category as promulgated in the 2016 Rule.

Sincerely,

Sean B. Hecht

Harjot Kaur