Comment on Environmental Protection Agency Proposed Rule – Rescission of the Greenhouse Gas Findings for Fossil Fuel-Fired Power Plants and Repeal of Regulations for Power Plant Greenhouse Gas Emissions Under Clean Air Act Section 111

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Comment submitted by:
Institute for Energy Research
1155 15th St NW Suite 525
Washington, DC 20005

Kenneth Stein, Vice President for Policy
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Assertions of regulatory power over greenhouse gases (GHGs) are enormous claims of regulatory authority. GHGs are byproducts of all human activity. Human respiration itself emits GHGs. Claiming regulatory power over GHG emissions is a claim of regulatory power over all human activity. This sort of massive claim of authority is precisely the sort of major question that the Supreme Court in *West Virginia v. EPA* held can only be undertaken with a clear grant from Congress. Congress has made no such clear statement. In light of this, the Institute for Energy Research strongly supports the EPA's proposal to rescind its regulations of GHGs from power plants. This action will return EPA to more clearly appropriate regulatory bounds. Should Congress in fact desire EPA to regulate GHGs in ways not already authorized, then it is incumbent on Congress to pass legislation to clearly give the authority to do so as well as establish the purpose and aims of such regulation.

Congress did not authorize GHGs to be covered by the Clean Air Act

"I think the Supreme Court came up with a very much erroneous decision on whether the Clean Air Act covers greenhouse gases. Like many of the members of this committee, I was present when we wrote that legislation and we thought it was clear enough that it did not."[1]
- Rep. John Dingell, former Chairman House Energy and Commerce Committee

[1] Remarks from January 2014, https://www.youtube.com/watch?v=7TaWJ1N1m5E

A look at the legislative history of GHG legislation shows clearly that Congress did not intend for the Clean Air Act (CAA) generally to cover GHG emissions. The CAA focused on the impacts of toxic compounds emitted into the air and the problem of visible pollution in the skies. Congress has repeatedly debated regulatory programs and actions on GHGs over the course of decades. This subsequent action indicates clearly that Congress did not and does not intent the CAA to cover GHGs.

To name just two examples, extensive debate occurred in 2010 on proposed cap and trade regulations for GHGs, but Congress declined to pass such legislation. Extensive consideration of GHG regulations and limits were part of the buildup to passage of the Inflation Reduction Act in 2022, but Congress again declined to pass regulations on GHGs beyond some provisions regarding methane emissions. Even those methane-related provisions have subsequently been repealed or weakened by Congress. Many more legislative proposals and amendments regarding GHGs have been proposed and debated, and yet regulation of most GHGs never passed Congress.

Congress has however passed some legislation authorizing regulation of specific GHGs. In addition to methane provisions mentioned above, Congress granted regulatory authority over hydrofluorocarbons (HFCs) in December 2020,[2] and the Senate later ratified the Kigali Amendment to the Montreal Protocol, an agreement to phase out HFCs entirely. This history of legislative action makes clear that Congress has not clearly granted authority to regulate GHGs, with the exception of HFCs. Indeed, the fact that Congress has chosen to regulate some GHGs, while debating and choosing not to regulate other GHGs, should be taken as clear evidence that Congress has not authorized the regulation of most GHGs by EPA. This lack of action should be understood as deliberate inaction, Congress has chosen to leave most GHGs beyond federal regulation.

The record of action (and inaction) by Congress is very clear. Congress has elected to regulate some GHGs, and Congress has debated and elected not to regulate other GHGs. EPA's proposed rescission of its attempted GHG regulations on power plants comports with this clear congressional intent. These power plant GHG regulations were administrative overreach even at the time they occurred, and subsequent actions by Congress have only reinforced that the actions were beyond congressional intent.

Congress additionally created a specific regulatory mechanism for regulating stationary sources in response to international air pollution concerns in Section 115. The purported impacts from GHGs on global climate are very obviously an international issue. Should EPA desire to regulate in response to global climate concerns, Section 115 is the avenue created by Congress for such action. Creating new authority in Section 111 was administrative adventurism even at the time

[2] American Innovation and Manufacturing (AIM) Act of 2020 was enacted as section 103 in Division S, Innovation for the Environment, of the Consolidated Appropriations Act, 2021 (H.R. 133 (116th): Consolidated Appropriations Act, 2021 [Including Coronavirus Stimulus & Relief])

it was attempted, and the subsequent decision in West Virginia v. EPA only confirms the criticism of that original overreach.

EPA did not make a separate endangerment finding for power plant emissions

Even if EPA believed that Congress had authorized regulation of GHGs in Section 111, the agency did not follow the proper procedure for establishing endangerment which would trigger regulation. Instead of a separate endangerment finding for power plant emissions, EPA relied on the prior endangerment finding for tailpipe GHG emissions. But the endangerment requirements in those two sections are not identical. Section 111(b) states that emissions must cause or contribute "significantly" to air pollution that might endanger human health or welfare, a stricter standard than the Section 202 endangerment language.

Failing to follow the specific statutory language of 111 means that the power plant GHG emissions regulations were void at the outset. EPA's action in this proposed rule mere acknowledges that fact. Additionally, even the endangerment finding for tailpipe emissions which EPA inappropriately relied upon for the purposes of its 111 rulemaking has since been rescinded.

EPA never established independent endangerment grounds for GHG regulation of power plants. The imputed grounds taken from motor vehicles is no longer in effect. Thus there is no present procedural support for maintaining EPA regulation of GHGs from power plants. The appropriate response to this situation is withdrawal of all power plant GHGs regulations.

The flawed Massachusetts v. EPA decision should not inform his rulemaking

The Supreme Court's 2007 decision in *Massachusetts v. EPA* was a flawed reading of statute. As expressed in the quote from Rep. Dingell above, the majority decision went well beyond the intent of Congress in giving EPA the option of regulating GHGs under the CAA. The CAA was not designed to regulate GHGs, and subsequent efforts to regulate GHGs have made this obvious as regulatory efforts have been repeatedly struck down in the courts (e.g. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), *West Virginia v. EPA* 597 U.S. 697 (2022)).

Additionally, the expansive logic of *Massachusetts v. EPA*, assuming the broadest possible definitions of air pollutant and harm, has subsequently been contradicted by the holding of *West Virginia v. EPA*, which held that "major questions" (such the authority to regulate a byproduct of all human activity) must derive from a clear grant of authority from Congress. While *Massachusetts v. EPA* purported to consider major question implications, it only considered it in a perfunctory manner. In addition, in 2007 the major questions doctrine was a vaguer analysis concept, easily dismissed by the goal-oriented majority. *West Virginia v. EPA* elevated major questions to controlling precedent. Thus, the limited and inadequate consideration of major questions in *Massachusetts v EPA* is of great importance in the current

proposed rule. If *Massachusetts v. EPA* were heard today, it would certainly be considered a major questions case and thus would turn on the existence of a clear grant from Congress (or lack thereof, as discussed above). This proposed action is more in keeping with legal developments since 2007, especially *West Virginia v. EPA*.

Attempting to shoehorn GHGs into Section 111 by positing that they "contribute" to harm also requires leaps of logic. All the posited harms from GHGs are indirect, on the theory that eventually accumulations lead to warmer temperatures which then cause some climate effects and those climate effects then impact humans. But possible indirect future impacts are far too tenuous to be considered as "harming human health" under the CAA definition. Indeed, according to the IPCC consensus, other than increased temperatures, no climate impacts from GHG accumulation have actually been observed to date.[3] So EPA's theory of regulating is effectively pre-crime, regulating GHGs in the belief that at some point in the future they will harm human health and welfare. Thus, EPA's proposed rule represents a far more reasonable reading of the statute. Instead of tying itself in knots attempting to cram GHGs into a pollutant definition, the more logical reading is that GHGs were not meant to be classified as "pollutants" under the CAA.

[3] Climate Change Information for Regional Impact and for Risk Assessment. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Table 12.12, p. 1856, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Chapter12.pdf