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Ms. Amy Hambrick
U.S. Environmental Protection Agency
EPA Docket Center, Docket ID EPA-HQ-OAR-2021-0317
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review (Docket ID NO. EPA-HQ-OAR-2021-0317); 86 FR 63110

Ms. Hambrick:

The U.S. Chamber of Commerce (the "Chamber") appreciates the opportunity to comment on the U.S. Environmental Protection Agency's ("EPA") "Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review," dated November 15, 2021 (the "Proposal").[1] The Chamber supports the smart, balanced regulation, consistent with law, of methane emissions from the oil and gas sector, as an important element of the nation's overall commitment to continue reducing its greenhouse gas ("GHG") emissions. Affordable, domestically produced natural gas has been one of the primary driving forces behind significant reductions in carbon emissions achieved over the past decade, most notably from the power generation sector.

Accordingly, the Chamber offers the following comments to help refine EPA's Proposal to create durable, long-term regulatory certainty for the upstream and midstream segments of the oil and gas sector, while maintaining a proper balance with key economic, legal, and policy considerations. As discussed more fully below, EPA's proposed regulations should work to achieve additional progress in cost-effectively reducing methane, in accordance with law, while accounting for the key policy considerations described below.

In the anticipated supplemental proposal and in any final rule, EPA should also take into account all relevant legal and structural comments raised to ensure that the final rule is appropriately legally defensible, that the regulated community understands its future obligations, and that there are clear roles for the states that are likely to be the primary implementers of the regulations at the source level. The Chamber emphasizes that the supplemental proposal should contain full regulatory text, should be comprehensive, and should be based on robust reasoning and a strong factual record in all respects.

[1] *See* 86 Fed. Reg. 63,110 (Nov. 15, 2021).

The Chamber provides here a summary of its comments on EPA's Proposal:

- EPA's Proposal must consider the importance of maintaining the nation's energy security and continuing the development of our natural resources to maintain comparatively low-energy prices.

- EPA's Proposal must account for and maintain appropriate regulatory consistency across federal and state agencies.

- EPA's Proposal should prioritize performance-based regulations, as this will help drive cost-effective solutions.

- EPA's Proposal must consider and support the availability and growth of good-paying jobs in the oil and gas sector.

- EPA's Proposal must follow the appropriate Clean Air Act ("CAA") process for development of new source performance standards ("NSPS") regulations to provide certainty to the regulated community.

    - EPA should explain the applicability of Quad O, Oa, Ob, and Oc and should do so in a manner consistent with the CAA.

    - EPA should abandon its proposed position that state provisions that go beyond what EPA has determined to be the "Best System of Emission Reduction" ("BSER") can be federally enforced.

    - EPA should amend the applicability date for the NSPS to the publication date of the anticipated supplemental proposal, which will presumably include regulatory text sufficient to trigger applicability.

    - EPA's proposed BSER standard must allow for innovation and not limit compliance to certain technologies.

    - EPA's cost-benefit analysis should be completed only after the Interagency Working Group ("IWG") on the Social Cost of Greenhouse Gases develops durable social cost of GHGs estimates that are established through a robust public stakeholder engagement process.

Setting nationwide methane regulations on a strong legal footing with efficient regulatory mechanisms will facilitate swifter implementation to achieve important emissions reduction goals and will create needed long-term certainty. The Chamber looks forward to commenting on

EPA's supplemental proposal, which is anticipated to provide the key regulatory text that would inform the regulated community of its potential legal obligations.[2]

I. EPA's Proposal Must Consider the Importance of the Nation's Energy Security

In crafting a methane regulation that will be durable and cost-effective, it is critical that EPA maintain and not undercut the energy security that the shale revolution has provided for the nation. In 2019, the U.S. enjoyed its best energy security since 1970.[3] In addition, the U.S. became a net energy exporter in 2019 for the first time since 1952.[4] After achieving a record high risk score in 2011 of 100.9, the total U.S. energy security risk score fell in seven of eight years, achieving a record low of 70.1 in 2019 (a 5.5 percent decrease from 2018.).[5] This record achievement in reduced energy security risk is a direct result of the increased energy production and usage made possible by advanced hydraulic fracturing technology.[6]

Importantly, the increased energy security in the U.S. due to production of oil and gas from shale occurred while the U.S. maintains one of the lowest methane intensity measures in the world associated with its energy production.[7] In addition, largely as a result of natural gas fueling an ever increasing portion of electricity generation, overall CO_2 emissions from fossil fuel combustion decreased by 896.8 million metric tons of CO_2 equivalent (MMT CO_2e) from 2005 levels to 2019, a decrease of approximately 15.6 percent.[8] From 2018 to 2019, emissions decreased by an additional 134.7 MMT CO_2e (2.7 percent).[9]

The decreases in emissions and reduced methane intensity from energy production were achieved while natural gas production rose to a record level in 2019, climbing 10.6 percent to 40.7 trillion cubic feet (tcf).[10] The U.S. led the world in natural gas production in 2019. Increases in Texas (1.3 tcf) and Pennsylvania (0.8 tcf) accounted for most of the increase.[11] Colorado, Louisiana, New Mexico, North Dakota, Ohio, Oklahoma, and West Virginia also contributed

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[2] *Id.* at 63,115 ("As a further step in the rulemaking process and to solicit additional public input, the EPA plans to issue a supplemental proposal and supplemental RIA for the supplemental proposal to provide regulatory text for the proposed NSPS OOOOb and EG OOOOc . . . . the EPA is considering including additional provisions in this supplemental proposal and RIA based on information and comment collected in response to this document.").
[3] *See* Global Energy Institute ("GEI"), U.S. Chamber of Commerce, "Index of U.S. Energy Security Risk – 2020 Edition" Table 1,https://www.globalenergyinstitute.org/sites/default/files/2020-10/024036%20Global%20Energy%20Institute%20US%20Index_Web.pdf.
[4] U.S. Energy Information Administration ("EIA"), "U.S. Energy Facts Explained" https://www.eia.gov/energyexplained/us-energy-facts/imports-and-exports.php.
[5] GEI "Index of U.S. Energy Security Risk – 2020 Edition," p. 4.
[6] *Id.* (The decreasing energy security risks in 2019 were broad-based. Much of the total decline in risk can be attributed to large drops in fuel import-related metrics.)
[7] *See* Daniel Byers, "The Best Solution to Pain at the Pump is Here in America," GEI, U.S. Chamber of Commerce (Aug. 17, 2021), https://www.globalenergyinstitute.org/best-solution-pain-pump-here-america.
[8] U.S. EPA, "Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2019" EPA 430-R-21-005, pp. ES-11 and 2-13, *available at* https://www.epa.gov/sites/default/files/2021-04/documents/us-ghg-inventory-2021-main-text.pdf?VersionId=yu89kg1O2qP754CdR8Qmyn4RRWc5iodZ.
[9] *Id.*
[10] *See* GEI "Index of U.S. Energy Security Risk – 2020 Edition," *supra* note 3.
[11] *See id.*

increased output. This data underscores the abundance of natural gas throughout the country and its comparative value in enabling reductions in both energy security risk and emissions.

Moreover, when it comes to prices, America's households and industrial consumers benefit greatly from our energy advantage. We pay two to six times less than counterparts in Europe and other industrialized nations.[12] With natural gas stocks at historically low levels, prices breaking records, and several weeks of potential winter demand spikes still to come, many European leaders are concerned that a firm response to Russian aggression could lead to energy supply disruptions. It's a stark reminder that energy security is national security, and as Europe looks to diversify its supplies, the United States is poised to help.

Since 2005, annual consumption of natural gas in the United States has increased by nearly 41 percent or 9 tcf. Electric power (up 60 percent) and industrial sector use (up 28 percent) comprise nearly 90 percent of the increase.[13] Thus, natural gas has displaced other power generation sources to become the primary fuel for electric power generation over the past 10 years.[14] This has led to drastic reductions in national carbon emissions since 2005.[15] Natural gas also now provides almost a third of the energy to the U.S. industrial sector.[16] It is used for on-site electricity generation (fueling boilers and turbines); process heat to melt glass, process food, preheat metals, and dry various products; and combined heat and power (CHP) systems.[17] Natural gas is also used as a material input itself—as a feedstock as opposed to being combusted—to make products such as fertilizers, chemicals, and plastics.[18] All economic sectors consume natural gas.[19] This is in part due to the low cost of production of natural gas driven by the shale revolution.[20]

The Chamber believes that, in the development of its supplemental proposal to regulate new, modified, reconstructed, and existing sources, EPA will be able to meet its GHG reduction goals and incorporate critical aspects of energy security into its deliberations. As demonstrated by the reductions in overall carbon emissions and methane intensity from energy production over the last decade, EPA can drive down GHG emissions without undermining the continued economic security that oil and gas production provides. As EPA designs its regulatory framework, it should be careful to avoid creating a structure that would disincentivize domestic energy production. With market and technological innovations in the oil and gas sector, combined with smart

[12] See Daniel Byers, "U.S. Natural Gas Exports Deliver More Than Just Energy," GEI, U.S. Chamber of Commerce (Jan. 27, 2022), https://www.globalenergyinstitute.org/us-natural-gas-exports-deliver-more-just-energy.
[13] Center for Climate and Energy Solutions ("C2ES") https://www.c2es.org/content/natural-gas/ (last visited Jan. 31, 2022).
[14] *Id.*; *see also* U.S. Energy Information Administration ("EIA"), https://www.eia.gov/naturalgas/ (last visited Jan. 31, 2022).
[15] *See* C2ES, *supra* note 13; U.S. EPA, *supra*, note 8.
[16] *Id.*
[17] *See* C2ES, *supra* note 13; *see also* U.S. EIA, "Natural Gas Consumption by End Use" *available at* https://www.eia.gov/dnav/ng/ng_cons_sum_dcu_nus_m.htm (last visited Jan. 31, 2022).
[18] *Id.*
[19] *Id.*
[20] *See* Daniel Byers, "More Gold Medals for America's Energy Producers," GEI, U.S. Chamber of Commerce (Jul. 28, 2021), https://www.globalenergyinstitute.org/more-gold-medals-americas-energy-producers.

regulations and protocols, EPA can build a certain, predictable, and environmentally effective compliance regime.

II. EPA's Proposal Must Account for and Maintain Appropriate Regulatory Consistency Across Federal and State Agencies

Under the CAA, EPA is given authority to regulate emissions of air pollutants in the U.S.; however, other federal agencies and states may have authority to regulate methane emissions from oil and gas in certain circumstances.[21] The Chamber encourages EPA, in building out the methane regulations, to regulate sources in a manner that would avoid duplication with rulemakings from other federal agencies.

First, smart methane regulations should avoid duplication of regulatory requirements at the federal level to the maximum extent possible. For example, many operators in the West produce oil and gas on both state and federal lands. While DOI agencies, such as the Bureau of Land Management ("BLM"), have jurisdiction over much of the federal land containing oil and gas reserves, there is little reason to have different methane regulations for operations on federal land than for those on private lands. An unfortunate example of unnecessary regulatory overlap was the concurrent development of EPA's methane emission standards in 2016 and BLM's "venting and flaring" rule.[22] They were developed around the same time but without adequate harmonization between the agencies. BLM's rule included extensive emissions control requirements that exceeded its authority and encroached on EPA and state air quality authority under the CAA. The action spurred multiple unnecessary and ineffective follow-on rulemakings and associated litigation, ultimately resulting in a total vacatur of the BLM rule.[23] EPA, as the primary federal agency charged with regulating air quality, should develop a regulatory framework that can be applied across the federal government, avoiding the need for additional rulemakings from other federal agencies and simplifying compliance obligations for the regulated community.

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[21] EPA acknowledges its primary authority while recognizing additional regulatory regimes that regulate the oil and gas sector. *See* 86 Fed. Reg. at 63,137-38 ("In addition to States, certain Federal agencies also regulate aspects of the oil and natural gas industry pursuant to their own authorities and have other established programs affecting the industry. The EPA believes that Federal regulatory actions and efforts will provide other environmental co-benefits, but the EPA recognizes itself to be the Federal agency that has primary responsibility to protect human health and the environment and has been given the unique responsibility and authority by Congress to address the suite of harmful air pollutants associated with this source category. The EPA further believes that to have a meaningful impact to address the dangers of climate change, it is going to require an 'all hands-on deck' effort across all States and all Federal agencies.").

[22] *See* BLM, "Waste Prevention, Production Subject to Royalties, and Resource Conservation" 81 Fed. Reg. 83,008 (Nov. 18, 2016).

[23] Shortly after the "venting and flaring" rule was published, industry groups and certain states with significant BLM-administered oil and gas development filed petitions for judicial review. BLM then issued a final rule substantially revising the 2016 Rule. Ultimately, the U.S. District Court for the District of Wyoming found that the BLM exceeded its statutory authority and acted arbitrarily in promulgating the "venting and flaring" rule. *See Wyoming v. DOI*, 493 F. Supp.3d 1046,1064 (D. Wyo. 2020) ("'[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.' When enacting the Clean Air Act in 1970, Congress directly addressed the issue of air pollution and created a comprehensive scheme for its prevention and control.") (Citation and emphasis omitted).

Second, under the cooperative federalism framework of the CAA, EPA should develop regulations that limit significant conflict with certain proven state methane rules. Indeed, EPA notes in the Proposal that it has drawn from regulatory efforts of states in the development of its proposed revisions to BSER standards for methane from the oil and gas sector.[24] The Chamber encourages EPA to adopt, wherever appropriate, standards that the states have successfully demonstrated as workable and cost-effective, particularly as to BSER for existing sources in its NSPS Subpart OOOOc Proposal. For existing sources, the states are now and will continue to be in most instances the primary regulatory authority, making it important that Emissions Guidelines ("EGs") not only meet the BSER standard but also integrate to the extent possible effective state approaches. Of course, when relying on successful state programs, EPA must include in any federal standard all aspects of state standards (including applicability cut-points and exceptions) that are essential to satisfying the CAA requirements that BSER be both "achievable" and "adequately demonstrated."

As a representative of businesses in a wide range of regulated sectors, the Chamber is all too familiar with the inefficiencies and costs created by duplicative or unnecessary regulations. To the extent practicable, EPA should acknowledge that many states have robust programs and should not be subjected to additional requirements without a thorough analysis of the effectiveness of these regulations in reducing emissions in comparison to EPA's Proposal. The Proposal indicates that EPA is drawing from various state standards but also claims that the state standards do not entirely translate to national standards, without disclosing or elaborating on what these limitations are.[25] The Chamber strongly encourages EPA to continue to model its regulations, through the appropriate process, on existing standards in states with proven programs for emission reduction and to avoid creating duplicative regulations or regulations that impose obligations that differ unnecessarily from those imposed at the state level. If evaluated properly for the purpose of establishing national regulations, EPA can adopt proven state standards that reduce GHG emissions while simultaneously providing compliance efficiencies for the regulated community. The Chamber also encourages a rule that allows appropriate flexibility for states to submit their existing regulations as state programs that meet their obligations under CAA Section 111(d).

III. EPA's Proposal Should Prioritize Performance-Based Regulations

Innovation is essential to effectively address the challenge of global climate change while at the same time maintaining the delivery of affordable and reliable energy. America's business

[24] EPA includes a discussion in section V of the Proposal detailing other, related regulatory emission reduction efforts from various state and federal authorities. *See* 86 Fed. Reg. at 63,137 ("Among assessing various studies and emissions data, the EPA reviewed many current and proposed State regulatory programs to identify potential regulatory options that could be considered for BSER. For example, the EPA reviewed California, Colorado, and Canadian regulations, as well as a pending proposed rule in New Mexico, that require non-emitting pneumatic devices at certain facilities and in certain circumstances.").

[25] *See id.* ("The EPA also recognizes that States and other Federal agencies regulate in accordance with their own authorities and within their own respective jurisdictions, and collectively do not fully address the range of sources and emission reduction measures contained in this proposal. Direct Federal regulation of methane from new sources combined with the approved State plans that are consistent with the EPA's EG for existing sources will bring national consistency to level the regulatory playing field, help promote technological innovation, and reduce both climate- and other health-harming pollution from a large number of sources that are either currently unregulated or where additional cost-effective reductions can be obtained.")

community is currently investing billions in research, development, and deployment of cutting-edge technologies. With regard to controlling methane from upstream and midstream oil and gas operations, many of the technologies are still to be developed and yet to be reliably demonstrated, which is why performance-based standards are more appropriate. EPA should build a regulation that focuses on performance in achieving the necessary reductions and should unleash the power of markets to meet that objective in the most cost-effective manner possible.

Prescriptive (sometimes called "command-and-control") regulation directs regulated entities to take specific actions. Methane emissions regulations that are too prescriptive can discourage technological advances. For example, current NSPS regulations for stationary sources can require specific methodologies for leak detection and repair ("LDAR") (*e.g.*, Method 21), which do not always provide for the inclusion of technological advancements in the field of leak detection that can develop rapidly and in advance of regulations. Advancements in the use of aircraft surveys, drones, and/or other remote sensing technologies serve to minimize the number of personnel associated with physical, on-site measurement, avoiding the concomitant risks to safety and health. Performance-based regulation, on the other hand, aligns the interests of asset managers and engineers in the use of technological advances with societal goals to reduce methane emissions because performance-based standards mandate an outcome and encourage regulated entities to employ and develop technological efficiencies that regulators may not anticipate.[26]

To be effective, a performance-based regulation must include a measurement requirement to verify compliance.[27] The rule needs to allow for the flexibility of performance-based standards and not "lock in" a particular technology or apply overly burdensome requirements that effectively do the same. This flexibility will drive continued innovation in methane detection and control technology, as well as drive down costs of compliance. The Regulatory Impact Analysis ("RIA") should reflect a cost-benefit analysis that contemplates a performance-based approach, and the regulations should allow for the advent of new approaches without creating overly bureaucratic hurdles to demonstrate new technology.

IV. EPA's Proposal Must Consider and Support the Good Paying Jobs in the Oil and Gas Sector

The upstream and midstream oil and gas sectors support 9.8 million jobs in the U.S., 5.6 percent of total U.S. employment.[28] Oil and gas together account for about two-thirds of all the energy consumed in the U.S. and provide high-paying American jobs.[29] After declining for decades,

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[26] *See* Robert L. Kleinberg, "Methane Emission Controls: Redesigning EPA Regulations for Greater Efficacy" Columbia Univ./SIPA Center on Global Energy Policy (Oct. 4, 2021) https://www.energypolicy.columbia.edu/research/commentary/methane-emission-controls-redesigning-epa-regulations-greater-efficacy.

[27] *Id.* (*citing* C. Coglianese, "The Limits of Performance-Based Regulation," Univ. of Mich. J. of Law Reform 50: 525–63, http://ssrn.com/abstract=3014768).

[28] American Petroleum Institute, "How Many Jobs Has the Oil and Gas Industry Created," https://www.api.org/oil-and-natural-gas/energy-primers/hydraulic-fracturing/how-many-jobs-has-the-oil-and-natural-gas-industry-created (last visited Jan. 31, 2022).

[29] U.S. Chamber of Commerce, "Statement of the U.S. Chamber of Commerce, Public Hearing on the U.S. Environmental Protection Agency Consideration of Oil and Gas Regulations for New and Existing Sources Pre-Rulemaking Docket, May 14, 2021 [Docket No. EPA-HQ-OAR-2021-0295]" (June 15, 2021).

production of oil and gas in the United States has increased rapidly since 2005, thanks in large part to the industry's ability to produce greater volumes of these products from shale formations using advanced technologies like hydraulic fracturing, horizontal drilling, and advanced 3-D subterranean computer imaging.[30] This growth in the industry has produced a myriad of jobs along with it, from technology to engineering to manual labor. The methane regulations should be crafted in a way to support continued growth and innovation, thereby preserving employment opportunities for the workers that service the industry. Well-drafted regulations can allow energy companies to invest in innovation and technology while curbing methane emissions by equipping a workforce capable of designing and implementing the technologies of the future.

While certain commodity prices are rising, new industries and investments are materializing to take advantage of the increasing availability across a range of commodity prices. The chemical industry, in particular, has realized massive investment in domestic manufacturing as a result of abundant and affordable natural gas, projected to exceed $200 billion across nearly 350 projects, supporting nearly 800,000 jobs.[31] New domestic supplies of affordable natural gas and natural gas liquids from shale formations have created a competitive advantage for U.S. chemical manufacturing, leading to industry growth and new jobs.[32] Companies from around the world are investing in projects to build or expand capacity in the U.S. Since 2010, the chemical industry has invested $99 billion in new or expanded facilities.[33] These 231 projects are completed and operating. Another 44 projects cumulatively valued at $35 billion are under construction, while 76 projects valued at $74 billion are in the planning phase.[34]

EPA should develop its regulations in a manner that continues to promote, not inhibit, the production of oil and natural gas, while decreasing the carbon intensity of production. Doing so can reduce methane not only from the well head or the pipeline but also from electricity production, providing on-demand power needed to scale up wind and solar energy.[35] High-tech materials created from oil and gas products will also make renewable, low-carbon energy sources economically feasible. Twenty-first-century oil and natural gas investment, based on reliable regulations, will create significant economic and employment opportunities to power America's future.

V. EPA's Proposal Must Follow the Appropriate CAA Process for Development of NSPS Regulations to Provide Certainty to the Regulated Community

In the development of regulations for new and existing sources, it is critical that EPA create regulatory standards that are well grounded in the authority of the statute to minimize the possibility that either a court would set aside aspects of the regulations or a future presidential

[30] *Id.; see also* U.S. Department of Energy, the "Economic Benefits of Natural Gas" https://www.energy.gov/sites/prod/files/2020/10/f80/Economic%20Impact%20of%20Oil%20and%20Gas.pdf#:~:text=At%20the%20start%20of%20this%20year%2C%20the%20oil,schools%2C%20hospitals%2C%20and%20public%20infrastructure%20across%20the%20country.

[31] American Chemistry Council, "Shale Gas Is Driving New Chemical Industry Investment in the U.S." (Oct.28, 2021), https://www.americanchemistry.com/better-policy-regulation/energy/resources/shale-gas-is-driving-new-chemical-industry-investment-in-the-us.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See* U.S. Chamber of Commerce, *supra*, note 29.

administration would be inclined to revisit them. EPA can achieve this kind of durability only by staying within the clear statutory authority conferred under the CAA and by avoiding overreach – abstaining from attempting novel or untested legal approaches and from overreading the mandate of the Congressional Review Act Joint Resolution that disapproved the prior 2020 Policy Rule.[36] Below, the Chamber offers comments to address certain legal concerns with EPA's Proposal.

A. EPA's November 15, 2021 "Proposal" Cannot Trigger Applicability for Quad Ob Because it Lacks Any Regulatory Text

EPA proposes the applicability date of the New Source Performance Standards, NSPS Subpart OOOOb ("Quad Ob"), as the date of publication of the Proposal (November 15, 2021), not from the date of the planned supplemental proposal. If this proposed applicability date is included in a final rule, new, modified, or reconstructed sources built after that date would have to comply with the new standards despite the Proposal's lack of *any* proposed regulatory text.[37] EPA's approach here does not align with the CAA's definition of a "new source."[38] Specifically, the CAA defines a "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (*or, if earlier, proposed regulations*) prescribing a standard of performance under this section which will be applicable to such source."[39] Since EPA has not yet issued *any* "proposed regulations," applicability for Quad Ob cannot lawfully start on November 15, 2021. At the earliest, applicability could start from the date EPA publishes the proposed regulatory text, presumably in the planned supplemental proposal.

Beyond the dubious legal nature of the proposed applicability trigger, it also has important practical implications. Owners and operators of sources that trigger applicability under the rule must have reasonable prior notice and a clear understanding of the standards prior to commencement of construction, modification, or reconstruction. The Proposal without the text of proposed regulations cannot provide adequate guidance to prospective owners and operators of would-be new sources. EPA has yet to provide any text that describes with the necessary particularity the requirements with which source owners and operators should plan to comply if they are currently contemplating owning or operating a new, modified, or reconstructed source. EPA should not put new or modified unit owners and operators in a position to guess at these uncertain requirements based on preamble text only. The practice of issuing NSPS standards that lack any regulatory text and invoking them as an applicability trigger is arbitrary policy, sets a negative precedent for other NSPS, and is inconsistent with the CAA.

A final reason why EPA should not use the Proposal's date of publication as the applicability trigger for Quad Ob is to avoid creating serious enforceability issues by raising due process and

[36] *See* Joint Resolution, Pub. L. No. 117–23, 135 Stat. 295 (2021); *see also* H.R. Rep No. 117-64 (2021); and EPA's "Legal Basis for Proposal Scope", 86 Fed. Reg. at 63,147-53.
[37] 86 Fed. Reg. at 63,116 ("Specifically, the EPA is proposing to update, strengthen, and expand the current requirements under CAA section 111(b) for methane and VOC emissions from sources that commenced construction, modification, or reconstruction after November 15, 2021. These proposed standards of performance will be in a new subpart, 40 CFR part 60, subpart OOOOb (NSPS OOOOb), and include standards for emission sources previously not regulated under the 2016 NSPS OOOOa.")
[38] *See* 42 U.S.C. § 7411(a)(2).
[39] *Id.* (emphasis added).

fair notice problems. The fair notice doctrine stands for the principle that a regulated source cannot be enforced against for a standard that did not apply under then-applicable regulations.[40] In *Sierra Club v. Sandy Creek Energy Associates*, for example, the Fifth Circuit articulated this doctrine in the CAA context, finding that new facilities covered by a vacated standard must obtain a case-by-case Maximum Achievable Control Technology (MACT) determination under CAA Section 112(g).[41] Likewise, courts have held that due process would preclude enforcement of standards against a source the owner or operator of which had no prior notice of the standards.[42]

For the stated legal, policy, and enforceability reasons, EPA should amend the applicability date for the NSPS to the publication date of the anticipated supplemental proposal, which will presumably include regulatory text sufficient to trigger applicability.

B. EPA's Proposal Seeks Comment on Whether to Expand the Scope of the Source Category Without Proposing to Undertake the Endangerment and Significant Contribution Findings Where Required[43]

EPA's proposal seeks comment on whether numerous additional oil and gas sources are properly categorized for affected facilities under the NSPS. For example, EPA's Proposal states that it requests comments on the potential expansion to and inclusion of additional potentially affected sources in its supplemental rulemaking proposal. Specifically, the Proposal identifies abandoned wells, pipeline pigging operations, pipeline blowdowns, and tank truck loading as potential targets for new standards as part of its rulemaking effort.[44] Although EPA merely seeks comment at this stage, it implies that it can simply add these operations to the existing source category to be regulated without any analysis of whether the operations share a proper commonality with the activities under the production and processing and transmission and storage segments. Pigging and blowdowns, for example, involve pipelines that are not a designated part of the production and processing segment or transmission and storage segment, making them inappropriate to

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[40] *See Sierra Club, Inc. v. Sandy Creek Energy Associates, L.P.*, 627 F.3d 134 (5th Cir. 2010).

[41] *See id.* at 141-42 ("Thus, the question really is not whether Sandy Creek must comply with § 112, but rather, the question is *when* and *how*. Because Sandy Creek is currently constructing a 'major source,' we find that § 112(g)'s MACT requirement for new sources constitutes the most appropriate application of § 112 to the Riesel plant. *In so finding, we find it important to note that any construction Sandy Creek undertook prior to March 14, 2008, should not be considered in violation of § 112(g)(2)(B). We agree with the EPA's position '[that] consideration [must be given] to the effect of prior construction, undertaken in reasonable reliance on now-vacated rules.* "') (emphasis added, citation omitted).

[42] *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997) (EPA cannot penalize company for relying on reasonable interpretation of regulation where EPA had not provided notice of differing interpretation and where EPA interpretation was not "ascertainably certain"); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (due process requires fair notice of what is required).

[43] To the extent EPA asserts that these findings are not needed for source category creation or expansion based on the Joint Resolution passed under the Congressional Review Act, that resolution serves only to eliminate the 2020 Policy Rule, and does not amend substantive law; thus the enactment of the resolution does not implicitly preclude EPA from utilizing the underlying rationales or reasoning that may have been included as part of its legal basis and other support. *See* Joint Resolution, Pub. L. No. 117–23, 135 Stat. 295 (2021) ("Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Administrator of the Environmental Protection Agency relating to 'Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review' (85 Fed. Reg. 57018 (September 14, 2020)), and such rule shall have no force or effect.").

[44] 86 Fed. Reg. at 63,240-47.

include summarily as part of this source category without first undertaking certain legally required findings.

In general, if EPA wishes to add additional sources to a source category, it must either demonstrate a legitimate nexus between the proposed additional sources and the existing sources within the category or undertake a process to expand (or create a new) source category, consistent with the requirements in CAA Section 111(b)(1)(A). EPA failed to comply with these statutory requirements in 2012 when transmission and storage sources were improperly brought into the production and processing segments without making the requisite findings.[45] As the original expansion of the source category to transmission and storage did not include the requisite statutory findings, if EPA now adds pigging operations or pipeline blowdowns to the transmission and storage segment, it will continue to improperly expand the source category in violation of the statute.

If EPA seeks to regulate GHG emissions (together or in the form of methane) from the oil and gas sectors under CAA Section 111, it must determine through rulemaking that (1) such "air pollution" endangers public health or welfare and (2) the pollutant-specific emissions from each of these sectors "contributes significantly" to that air pollution.[46] Gradually expanding the universe of sources within the transmission and storage segment as EPA proposes to do here without making the requisite findings exacerbates the legal concerns associated with the rulemaking. This approach could have the net effect of expanding an existing source category incrementally in an end run around the CAA's requirements to undertake an endangerment finding and a significant contribution finding. To the extent these items are included in the supplemental proposal or any proposal thereafter within the oil and gas NSPS, EPA must comply with the process requirements of the statute for a source category expansion. EPA should, therefore, take this opportunity to help ensure the legal durability of these important regulations by making all requisite findings for the transmission and storage segment.

C. While the Chamber Shares EPA's Goal of Identifying and Controlling "Large Emission Events," the Proposal's "Community Monitoring" Program Goes Beyond CAA Authority

EPA is taking comment on "how to take advantage of the opportunities presented by the increasing use of advanced methane detection technologies to help identify and remediate large emission events (commonly known as 'super-emitters')."[47] EPA's proposal includes this suggestion in the context of the proposed Quad Ob and Oc standards for the control of the group of fugitive emissions components at well sites and compressor stations.[48] Specifically, "the EPA seeks comment on how to evaluate, design, and implement a program whereby communities and others could identify large emission events and, where there is credible information of such a large emission event, provide that information to owners and operators for subsequent investigation and remediation of the event."[49]

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[45] *See* 77 Fed. Reg. 49,490, 49,496-99 (Aug. 16, 2012).
[46] *See* 42 U.S.C. § 7411(b)(1)(A); *see also* U.S. Chamber of Commerce, supra, p. 2 n. 29.
[47] 86 Fed. Reg. at 63,177.
[48] *Id.*
[49] *Id*.

While the CAA allows for citizen enforcement as a supplement to governmental enforcement, it does not contemplate citizen inspections in a similar manner to those conducted by governmental authorities.[50] EPA should rethink this approach to prioritize the role of state regulators, given that states, not citizens, will generally be implementing the CAA program. This request for comment suggests that citizens could create new compliance obligations for affected facilities by merely submitting a report, which would be unprecedented and unsupported under the CAA and would raise questions about the lawfulness and propriety of the delegation of enforcement or other regulatory authority to private parties. These requirements also stand in stark contrast to the rigid regulatory protocols that industry sources must employ for leak detection. EPA does not explain the legal basis for empowering third-party citizens to create new compliance obligations on these sources, which could add a new layer of complexity to the sources' obligations to manage regulatory compliance, potentially with little benefit. If EPA pursues this issue in the supplemental proposal, it should explain the legal basis for its proposal.

One approach that EPA could further explore would be for notices from community members to first go to the appropriate state agency, which could perform a review to validate the quality of the data being reported to ensure that it meets current EPA standards set for the industry and to determine whether the data present an issue that warrants further investigation. The state (or EPA) would then be responsible for deciding how and when to work with the operator of the affected source to understand the issue and take any appropriate actions. Without a validation mechanism by regulators with expertise, allowing private parties to trigger new compliance obligations would lay an undue burden on companies to both manage regulatory compliance and respond to private-party inquiries.

Another aspect of this approach that EPA must explain are the differences between the data that EPA uses to create the standards and the data that private parties potentially could employ in monitoring for "large emission events." Third parties might use any type of monitoring technology available to them without the appropriate training or understanding of the produced data, which could create inconsistent results compared with the results of monitoring methods employed in the regulations. For example, EPA's Proposal suggests that satellite monitoring for methane emissions from a source would create de facto evidence of a "large emission event."[51] To the extent EPA moves forward with this proposal, it must ensure that a party making the report properly validate and verify that the data, manner, and method comport with regulatory standards before any such third-party reports are made and accepted as adequately credible and reliable. EPA should not allow such disparities between how a source manages compliance and the manner in which third parties may collect information for reports associated with large emission events. Such a disparity does not comport with the CAA's requirements for establishment of appropriate BSER controls for affected sources. In addition, EPA has not adequately explained how it would seek to implement these measures, while acknowledging the complexities and difficulties in doing so.[52]

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[50] *See* 42 U.S.C. § 7604.

[51] 86 Fed. Reg. at 63,177.

[52] *Id.* ("[I]n order to make this approach viable, the EPA would need to specify what actions an owner or operator must take when notified of a large emission event, including deadlines for taking such actions…. We seek comment on what specific follow-up actions or other procedures would be appropriate to require once a large emission event is identified, as well as appropriate deadlines for these actions.")

D. EPA Should Recognize Statutory Limitations Raised By Its Proposing Mandatory Procedural Requirements for "Meaningful Engagement" in the Environmental Justice Context

The Chamber encourages and supports the important goals of environmental justice (EJ) reviews and EPA's outreach efforts as it developed the Proposal. Beyond the consultation and reviews that EPA has already undertaken, EPA is proposing to include an additional requirement associated with the adoption and submittal of State Plans pursuant to Quad Oc "by requiring States to meaningfully engage with members of the public, including overburdened and underserved communities, during the plan development process and prior to adoption and submission of the plan to the EPA. The EPA is proposing this specific meaningful engagement requirement to ensure that the State plan development process is inclusive, effective, and accessible to all."[53]

While the Chamber supports meaningful engagement with members of the public and with members of disadvantaged communities, neither Section 111(d) nor Section 301 of the CAA provides a legal basis for EPA's proposed actions. EPA has not adequately explained how the CAA could allow EPA to promulgate EJ requirements as part of an NSPS or EGs, or how EPA could require states to provide EJ regulatory requirements as a part of a state plan.[54] The CAA provides no authority for EPA to include EJ requirements in the EGs as the model for states. Likewise, EPA can neither compel states to include EJ requirements in State Plans nor disapprove a State Plan if a state fails to include EJ analysis. If a state, based on its own authorities, voluntarily includes EJ requirements as part of its State Plan, EPA cannot convert the EJ elements into federally enforceable requirements. And finally, when issuing a Federal Implementation Plan (FIP) for states that fail to develop appropriate State Plans, EPA cannot include EJ requirements, as that would exceed the scope of EPA's CAA authority.

VI. EPA Should Explain the Applicability of Quad O, Oa, Ob, and Oc and Should Do So in a Manner Consistent with the CAA

Without regulatory text, EPA's views regarding the applicability of Subparts Quad O, Oa, Ob, and Oc is unclear. Some preamble language, however, suggests that EPA believes a source can be covered concurrently by requirements for both new and existing sources, and that there will be some sort of yet-to-be-explained process based on the stringency of individual provisions to establish which provisions control. This view is incorrect as a matter of law and unworkable administratively. In the forthcoming supplemental proposal, EPA should explain how it views the relative applicability of these Subparts.

The Chamber believes, consistent with the CAA Section 111(a)(2) definition of "new source" and with Section CAA 111(d)'s scope for the "existing source" program, that EPA should make clear the following in the supplemental proposal. First, if a source is currently regulated as a "new source" under Subparts O, Oa, or Ob, it cannot be regulated as an "existing source" under Subpart Oc. Second, Subpart Oc would apply only to those sources not covered by Subparts O or Oa on the date of the Subpart Ob applicability, which should occur no earlier than the

[53] *See* 86 Fed. Reg. at 63,145.
[54] *See id.*

publication date of a supplemental proposal with proposed regulatory text. Third, in the future, sources covered by Subpart Oc would transition to Subpart Ob if they undergo a modification or reconstruction. This approach is grounded in the statute, eliminates the ambiguity of the current Proposal, prevents unnecessary duplicative regulatory requirements, and also would be workable by the regulated parties and EPA.

VII. EPA Should Abandon its Position that State Provisions that Go Beyond What EPA Has Determined To Be the "Best System of Emission Reduction" Can Be Federally Enforced

In the Proposal, EPA asserts that "[t]o the extent a State chooses to submit a plan that includes standards of performance that are more stringent than the requirements of the final EG, States have the authority to do so under CAA section 116, and the EPA has the authority to approve such plans and render them Federally enforceable if all applicable requirements are met."[55] This is an incorrect view of the CAA and relevant case law. While CAA Section 110(a)(2)(b) was found in *Union Electric Co. v. EPA*, 427 U.S. 246, 265 (1976), to allow states to adopt more stringent State Implementation Plans (SIPs) than those minimally required by EPA to ensure attainment with National Ambient Air Quality Standards, and have those plans approved by EPA, Section 111(d) of the CAA is fundamentally distinct from the SIP process under CAA Section 110. Section 111(d) differs significantly because it does not prescribe minimum conditions but instead requires standards of performance that reflect BSER as determined by the Administrator of the EPA.[56] If states voluntarily choose to go beyond what the EPA has determined as BSER, those standards of performance can continue as state-only requirements but cannot be approved as a federal requirement.

VIII. EPA's Proposed BSER Standard Must Allow for Innovation and Not Limit Compliance to Certain Technologies

EPA's Proposal would establish numerous changes to the BSER for affected oil and gas sources, some of which seem inappropriate or inadequately supported. For example, EPA has proposed overreaching requirements for the BSER for pneumatic controllers. But for pneumatics used in Alaska, EPA has established a zero-bleed emission rate as the compliance standard for all pneumatic controllers, including intermittent controllers, without any explanation of how this would be achieved.[57] EPA should provide further support showing that the proposed compliance technologies have been adequately demonstrated, considering costs for both the Quad Ob new

[55] *See id.* at 63,251.

[56] *See* 42 U.S.C. § 7411(requiring the "best system of emission reduction which . . . the *Administrator determines* has been adequately demonstrated") (emphasis added); *see also* 40 C.F.R. § 60.22(a) ("Concurrently upon or after proposal of standards of performance for the control of a designated pollutant from affected facilities, the Administrator will publish a draft guideline document containing information pertinent to control of the designated pollutant form designated facilities.").

[57] *See id.* at 63,178-79 ("[W]e are proposing a requirement that all controllers (continuous bleed and intermittent vent) must have a VOC and methane emission rate of zero. The proposed rule does not specify how this emission rate of zero must be achieved, but a variety of viable options are discussed in Section XII.C. including the use of pneumatic controllers that are not driven by natural gas such as air-driven pneumatic controllers and electric controllers, as well as natural gas driven controllers that are designed so that there are no emissions, such as self-contained pneumatic controllers. As noted above, the EPA is proposing that the definition of an affected facility would be each pneumatic controller that is driven by natural gas and that emits to the atmosphere. As such, pneumatic controllers that are not driven by natural gas would not be affected facilities, and thus would not be subject to the pneumatic controller requirements of NSPS OOOOb.")

source and the Quad Oc existing source standards, or EPA should revise its Proposal to remove unsupported or otherwise inappropriate requirements.

EPA has proposed "presumptive standards" for existing facilities that will form the basis of the EGs for future state plans.[58] The presumptive standards generally track the BSER standards applied to new, modified, or reconstructed affected facilities.[59] However, under the CAA, the EGs for existing sources should likely differ from "new source" requirements, given factors such as age, historic design, and operation constrictions that can be presented by facilities that may otherwise be "grandfathered" from an NSPS standpoint.[60]

The costs associated with compliance with standards for EGs must account for performance-based compliance options (e.g., developments of new technologies), given that they are almost identical to the standards for new sources. For example, EPA should consider whether its proposed application of BSER to existing sources, in the form of presumptive standards of performance under Quad Oc, properly consider the life of the asset. The Proposal makes no mention of recognized approaches such as the Financial Accounting Standards Board (FASB) accounting standards for depreciation of property, plant, and equipment overall.[61] EPA notes in its rulemaking that states can still choose to account for the useful life of an asset in State Plans, but EPA presumes, inappropriately, that its EGs will allow for appropriate rulemaking standards, notwithstanding the fact that such life-of-the-asset determinations have not been made.[62]

[58] *Id.* at 63,169-85.
[59] *Id.*
[60] *Id.* at 63,134 ("The EPA identifies the degree of emission limitation achievable through application of the BSER as part of its EG. See 40 CFR 60.22a(b)(5). While standards of performance must generally reflect the degree of emission limitation achievable through application of the BSER, CAA section 111(d)(1) also requires that the EPA regulations permit the States, in applying a standard of performance to a particular source, to take into account the source's remaining useful life and other factors.")
[61] *See* Accounting Standards Codification (ASC) 360-10.
[62] *See* 86 Fed. Reg. at 63,249 ("The statute further requires the EPA to permit States, in applying a standard of performance, to consider a source's remaining useful life and other factors. Accordingly, based on both the mandatory and discretionary aspects of CAA section 111(d), a certain level of process is required . . . and if the State chooses, [it may consider the] remaining useful life and other factors in applying a standard of performance to a designated facility. For this EG the EPA is proposing to translate the degree of emission limitation achievable through application of the BSER (*i.e.*, level of stringency) into presumptive standards of performance that States may use in the development of State plans for specific emission points. . . . Put another way, the EPA is choosing to format this EG such that if a State chooses to adopt the presumptive standards as the standards of performance in their State plan, then the EPA believes that such plan could be approved as meeting the requirements of CAA section 111(d) . . . In this way, the presumptive standards included in the EG serve a similar purpose as a model rule because they are intended to assist States in developing their plan submissions by providing the States with a starting point for their standards that are based on general industry parameters and assumptions.").

IX. EPA's Cost-Benefit Analysis Should Be Finalized Only After The Interagency Working Group on the Social Cost of Greenhouse Gases Develops Durable Social Cost of GHGs Estimates That Are Established Through A Robust Science, Economic, and Stakeholder Engagement Process[63]

The Chamber supports appropriate consideration of GHG emissions and social cost estimates as part of the cost-benefit analyses for regulatory actions required under the Executive Order 12866 process. The Chamber also supports continued efforts to refine and improve upon existing estimates by the Interagency Working group ("IWG") on the Social Cost of Greenhouse Gases ("SC-GHGs")[64], consistent with previous business community comments requesting the IWG to engage in a more transparent and deliberate public engagement process.[65] We appreciate EPA's recent notice indicating the EPA will be putting the draft final SC-GHG estimates through peer review.[66]

As required by EO 13990, the IWG has reconvened to update the SCC estimates. The IWG, co-led by the White House Council of Economic Advisers and Office of Management and Budget ("OMB") and including experts from more than a dozen federal agencies and offices, was created to attempt to develop a uniform government-wide estimate. Through the process mandated by EO 13990, the discount rates that underpin the SC-GHGs are being revised and will substantially affect how those standards ultimately get finalized.[67] A recent brief filed by the Department of Justice in litigation challenging the interim SCC estimates suggested that the IWG will propose revised final SCC estimates in the spring of 2022, and that the public will be given an opportunity to comment.[68] EPA should allow the process of the IWG to conclude and should then conduct a further robust notice and comment process before finalizing the cost-benefit analysis relating to this Proposal. An open public process is critical to public trust in scientific information, analysis, and its real-world application. Any reliance on SC-GHG estimates as

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[63] *See* U.S. Chamber of Commerce et al., Comments on Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" (June 21, 2021); *see also* U.S. Chamber of Commerce et al., Comments on "Certification of New Interstate Natural Gas Facilities (Docket No. PL18-1-000)" (May 26, 2021).

[64] *Id*.

[65] *See* U.S. Chamber of Commerce et al. Comments on Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" (June 21, 2021) https://www.regulations.gov/comment/OMB-2021-0006-0013; and letter to Robert Fairweather et. al. (February 16, 2021) https://www.globalenergyinstitute.org/sites/default/files/2021-02/Trade%20Association%20letter%20on%20SCC%202.16.21.pdf.

[66] *See* 87 Fed. Reg. at 3,801 (Jan. 25, 2022).

[67] *See* Memorandum for the Heads of Executive Departments and Agencies, "Modernizing Regulatory Review, January 20, 2021, 86 Fed. Reg. 7223 (Jan. 26, 2021), which amongst other matters directs the Office of Management and Budget ("OMB") to recommend ways to revise OMB's 2003 Circular A-4, Regulatory Analysis – a document detailing best practices for measuring costs and benefits by federal agencies – so that the new circular "fully accounts for regulatory benefits that are difficult or impossible to quantify." *See also* IWG on Social Cost of Greenhouse Gases "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990, United States Government" (Feb. 2021), 86 Fed. Reg. 24,669 (May 7, 2021). SC-GHG estimates are commonly calculated using economic models known as Integrated Assessment Models (IAMs) to translate a marginal increase in emissions into a future physical climate response and then into a subsequent economic impact. A discount rate is applied to convert future damages into present-day value. Key considerations in calculating SC-GHG estimates include the geographic scope, discount rate, and IAM used (as well as the model's assumptions, many of which are user-defined).

[68] Def. Supp. Br., 23, *La. v. Biden*, No. 2:21-cv-01074 (W.D. La. Jan. 21, 2022).

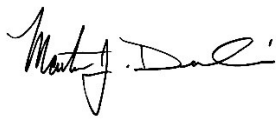
currently published should proceed cautiously, as the federal government's SC-GHG estimates are all under review and subject to change.

In its cost-benefit analysis for the methane regulation, EPA should continue to follow longstanding requirements and principles that apply to the development of such analyses and should treat the SC-GHG estimates with appropriate caution, as these estimates are not yet final and are not appropriately reliable at this time.[69] EPA's RIA for the Proposal makes a number of assumptions that feed into the monetized benefits and costs associated with the rule (e.g., climate benefits, compliance costs, and value of product recovery generated by the capture of natural gas). EPA should carefully consider how it applies the estimates so as not to prejudge, or create problematic inconsistencies with, the outcomes of the IWG process, which we now know is expected to be a more thorough evaluation of the SC-GHG estimates. Through the process to revise the SC-GHG estimates, the IWG has an excellent opportunity to establish sound estimates based on the best available, peer-reviewed science. The Chamber wants to assist the IWG in this regard as this process continues.[70] EPA's supplemental methane proposal should allow for the IWG process to conclude and should utilize the full outcome of the IWG process in an updated cost-benefit analysis for the Proposal.

X. Conclusion

The Chamber appreciates the opportunity to provide these comments and looks forward to reviewing and commenting on EPA's supplemental rulemaking proposal.

Sincerely,



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[69] *See* Opposition of U.S. Dep't of Justice Motion for Preliminary Injunction, *Louisiana v. Biden*, No. 2:21-cv-01074-JDC-KK (W.D. La. Sept. 1, 2021), ECF No 68.
[70] *See* U.S. Chamber of Commerce et al. Comments on Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" (June 21, 2021), pp. 5-6.