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BEFORE THE HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT

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Thank you, Chairman Shimkus, Vice-Chairman McKinley, Ranking Member Tonko, and distinguished Members of the Subcommittee, for the opportunity to testify today at this hearing entitled "New Source Review Permitting Challenges for Manufacturing and Infrastructure."

I am Glen Earl Weston Research Professor of Law at the George Washington University Law School, a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform, and past-Chair of the Administrative Law Section of the Association of American Law Schools. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of environmental law, energy law, and administrative law, I specialize in the role of these laws in society. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I am a co-author of textbooks on both environmental law and energy law. Early in my career, I practiced environmental engineering; that experience and training inform my assessment of the role of environmental law in bettering our society.

One year ago almost to the day, I testified before this Subcommittee about the many health and environmental benefits of clean air protections, and I cautioned against efforts to roll back progress achieved over decades of hard work. Today, I urge you to scrutinize recent actions by the Environmental Protection Agency (EPA) that amount to nothing short of an abnegation of

the agency's statutory responsibilities. And I remind you once more that human lives *and* our economy are at stake.

I. EPA Should Not Be Permitted to Shirk Its Statutory Duties

The Clean Air Act (CAA) is a technical and complex statute, but two of its basic policy aims are straightforward. First, it is meant to clean up dirty air. Second, it is meant to help keep clean air clean. By keeping in mind these first principles, it is easy to see what is wrong with EPA's current approach.

A. New Source Review is a Critical Component of the Clean Air Act

The CAA directs EPA to set national ambient air quality standards (NAAQS) for criteria pollutants—those that the agency finds are reasonably anticipated to endanger public health and welfare[1]—which include lead, ozone, particulate matter, carbon monoxide, nitrogen dioxide, and sulfur dioxide. Once the standards are set, states develop state implementation plans (SIPs), which specify how the NAAQS will be attained.[2] The CAA requires EPA to periodically revise its NAAQS, which helps accommodate new scientific knowledge and ensure ongoing progress in making dirty air cleaner.

A cornerstone component of the CAA permitting program is new source review (NSR). Key features of NSR help promote the twin aims of improving dirty air and maintaining relatively clean air. First, new sources of air pollution must get preconstruction permits and install either "best achievable control technology" (BACT)[3] in areas with relatively clean air; or "lowest achievable emission rate" (LAER)[4] in areas that have not attained the ambient air quality standards. Second, existing sources of air pollution were originally grandfathered into the CAA's

[1] 42 U.S.C. §§ 7408-09.
[2] *Id.* § 7410.
[3] *Id.* § 7479(3).
[4] *Id.* § 7501(3).

design, but Congress ensured progress over time by requiring that they, too, obtain permits when they make modifications to their facilities.[5] As the relevant criteria imply, NSR permitting overlays technology-based standards with the quality of the air where a given source of pollution is located, enabling improvement over time and protecting against deterioration of air quality that might otherwise result from construction of new or modification of existing major sources.

From the very beginning, industry has attempted to shirk its duties to comply with NSR, and at times, EPA has been complicit. The courts have largely resolved conflicts according to the CAA's aims—upholding EPA enforcement activities against shirkers, and reining in EPA when the agency itself shirks its statutory duties.[6]

B. EPA's Irresponsible December 7 Guidance Document Is Both Bad Policy and Faulty as a Matter of Administrative Law

On the very same day that EPA Administrator Scott Pruitt testified before *this* Subcommittee that EPA should not use guidance instead of rules,[7] he issued a guidance document of breathtaking scope ("the December 7 Guidance").[8] Not only does it give carte

[5] *Id.* § 7479(2)(C); *see id.* § 7411(4) ("The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.").

[6] *E.g.*, Envtl. Def. v. Duke Energy Corp., 549 U.S. 561 (2006) (holding EPA could apply annual emission test for NSR); New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006) (holding EPA's industry-friendly routine maintenance exclusion, based on replacement value of equipment, violated CAA); Wisconsin Elec. Power Co. v. EPA, 893 F.2d 901 (7th Cir. 1990) (upholding EPA's determination that fossil-fueled power plant's replacement of major generating equipment constituted a "modification"). For further history, see Thomas O. McGarity, *When Strong Enforcement Works Better Than Weak Regulation: The EPA/DOJ New Source Review Enforcement Initiative*, 72 MD. L. REV. 1204 (2013).

[7] *The Mission of the U.S. Environmental Protection Agency Before the H. Comm. on Energy & Commerce, Subcomm. on Env't.*, 115th Cong., Tr. ll. 1264-66 (Dec. 7, 2017) (Testimony of Scott Pruitt, Administrator, EPA).

[8] Memorandum from E. Scott Pruitt, Administrator, EPA, to Regional Administrators, Re: New Source Review Preconstruction Permitting Requirements; Enforceability and Use of the Actual-

blanche to polluters who want to ignore the NSR's preconstruction requirements, but also it was issued silently, without any opportunity for democratic process.

The December 7 Guidance tells major sources of air pollution that they need not fear enforcement if they fail to appropriately calculate projected emissions for NSR purposes. Further, EPA says it will accept polluters' "intent" to minimize pollution in the future as a reason not to require an NSR permit. And in perhaps the most telling sentence of the Guidance, EPA makes a promise to industry that is anathema to its statutory duties: "EPA does not intend to substitute its judgment for that of the owner or operator by 'second guessing' the owner or operator's emission projections."[9]

With this Guidance, EPA has decided to wholly abdicate its duties as a guardian of clean air under the NSR program. The Guidance should also be viewed in a broader context: it is yet another attempt by the Trump Administration to circumvent the Administrative Procedure Act's (APA) basic democratic procedures that work to ensure participation, deliberation, and transparency—fundamental values of good governance and legitimacy.[10] The President, Administrator Pruitt, and Members of Congress have all spoken against the perils of overreach when agencies make major policies through nondemocratic procedures, yet the December 7 Guidance would do just that. When an agency adopts a policy so blatantly contrary to its mandate, and does so without any public input, that action has no legitimacy. In the words of the Supreme Court in *Heckler v. Chaney*, this agency "has consciously and expressly adopted a

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to-Projected Actual Applicability Test in Determining Major Modification Applicability, Dec. 7, 2017.

[9] *Id.* at 8.

[10] *See, e.g.*, Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017) (holding arbitrary and capricious EPA's attempt to stay effective date of final rule without undertaking notice and comment rulemaking); John McQuaid, *Make America Wait Again: Trump Tries to Delay Regulations Out of Existence*, SCI. AM., July 24, 2017) (discussing widespread attempts to delay final rules).

general policy that is so extreme as to amount to an abdication of its statutory responsibilities."[11] This institution should hold EPA to task—not give it cover to make our air dirtier.

II. Clean Air Protections Save Lives and Promote Economic Growth

These observations are particularly urgent when viewed against what is at stake when we talk about clean air: the lives of people across our country, and the benefits of economic growth. You will hear a lot from industry about the costs of clean air protections and the supposed impediments clean air poses to economic growth, but they won't tell you about the attendant benefits because the numbers are compelling and clearly rebut these protestations.

Between 1970 and 2011, aggregate emissions of air pollutants dropped 68% while the U.S. Gross Domestic Product (GDP) increased 212%. During that same period, private sector jobs increased by 88%.[12] Our population has increased, we have used more energy, and we have built more infrastructure—all while improving our environment.

Consider as well that rules issued by EPA undergo a rigorous cost-benefit analysis. EPA is required to follow Office of Management and Budget (OMB) accounting principles and assess both the costs and the benefits of regulations. Many researchers have concluded that these constrained analyses "vastly understate" the benefits of environmental regulations.[13] Thus, OMB-driven cost-benefit analyses should be understood as very conservative because they

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[11] As explained in the Court's opinion, such abdication may overcome the ordinary presumption of nonreviewability of enforcement decisions. 470 U.S. 821, 833 n.4 (1985) (internal quotations omitted).

[12] ENVTL. PROTECTION AGENCY, THE CLEAN AIR ACT AND THE ECONOMY, at https://www.epa.gov/clean-air-act-overview/clean-air-act-and-economy#_ednref6 (last visited Feb. 15, 2016).

[13] *E.g.*, Elsie M. Sunderland et al., *Benefits of Regulating Hazardous Air Pollutants from Coal and Oil-Fired Utilities in the United States*, 50 ENVTL. SCI. & TECH. 2117, 2117 (Feb. 5, 2016); *see generally* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

systematically undervalue things like human life and a clean environment.[14] Even with this caveat, the results are compelling. For example, OMB reported to Congress that from 2004 through 2014, the economic benefits of all of EPA's major rules exceeded the costs by a ratio of nearly 21 to 1.[15]

Just what are some of those conservatively estimated benefits? Air pollutants have considerable adverse health and environmental effects: ozone, for instance, is linked to respiratory illnesses, heart attacks, premature death, and negative effects on forests and crop yields.[16] When people are sick, caring for ill loved ones, or dying too early, they cannot work, which is detrimental to the economy. By contrast, clean air protections offer savings:

- OMB reports that the monetized benefits of CAA regulations accounted for 80% of the benefits of all regulations analyzed for its 2015 report to Congress.[17]

- A 2011 peer-reviewed EPA study showed that the benefits of the 1990 CAA Amendments and implementing regulations exceed costs by a factor of more than 30 to 1.[18]

- The 2011 study also revealed that EPA's CAA rules saved over 164,000 lives in 2010, and are projected to save 237,000 lives in 2020.[19]

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[14] The Congressional Research Service and others have demonstrated that a September 2010 report widely cited by opponents of environmental regulations like the Small Business Administration relied on flawed methodology. Curtis W. Copeland, ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS, CONG. RESEARCH SERV. NO. 7-5700 (Apr. 6, 2011). In fact, the report's authors failed to even consider regulatory benefits. *Id.* at 25; *see also* Joseph P. Tomain, *The Twin Demons of the Trump-Bannon Assault on Democracty*, CTR. FOR PROGRESSIVE REFORM 16-21 (June 2017) (providing background).

[15] OFFC. OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 9 (2015).

[16] *See generally* Final Rule, National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015).

[17] OMB, *supra* note 15, at 12.

[18] ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, 7-1 (Mar. 2011).

[19] *Id.* at 7-9.

- These same rules saved 13 million days of lost work and 3.2 million days of missed school in 2010. By 2020, these numbers will increase to 17 million and 5.4 million days, respectively.[20]

- Since EPA began regulating lead as a criteria pollutant under the CAA, the median concentration of lead in the blood of children between 1 and 5 years old has decreased 93% as of 2011-12. Moreover, several studies have documented an association between reducing exposure to lead and a reduction in criminal behavior.[21]

- A study published in the proceedings of the National Academies of Sciences found the cumulative benefits to the economy of CAA air toxics regulations by 2050 to be over $104 billion.[22]

These numbers speak for themselves and demonstrate that opponents of clean air protections have set up a false choice: clean air and economic growth *do* go hand-in-hand.

III. Conclusion

EPA's effort to encourage regulated sources to escape NSR—without regard to the adverse health and environmental impacts of their emissions—would vitiate the kinds of benefits that clean air protections have provided in the past. I urge you to bring the Administrator back before this Subcommittee. Hold him to his commitment not to use guidance documents improperly, and most importantly, to his duty to ensure that our clean air protections remain strong.

[20] *Id.* at 5-25 (Tbl. 5-6).
[21] *Id.* at A216.
[22] Amanda Giang & Noelle E. Selin, *Benefits of mercury controls for the United States*, 113 PNAS 286 (Jan. 12, 2016).