COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) AND RAILROAD COMMISSION (RRC) REGARDING THE NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS: COAL- AND OIL-FIRED ELECTRIC UTILITY STEAM GENERATING UNITS—RECONSIDERATION OF SUPPLEMENTAL FINDING AND RESIDUAL RISK AND TECHNOLOGY REVIEW, PROPOSED RULE (84 FEDERAL REGISTER 2670 (FEBRUARY 7, 2019))

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TCEQ agrees with EPA's finding that it is not appropriate and necessary to regulate coal- and oil-fired EGUs under section 112 of the Federal Clean Air Act (FCAA).

In the absence of compelling and significant benefits from reductions in Hazardous Air Pollutants (HAPs) from coal- and oil-fired EGUs, the costs of reducing HAPs from these sources must be considered excessive. EPA's own analysis shows that reductions of HAPs from these sources would only result in approximate monetized benefits of $4 to $6 million annually, while the annual costs of complying with the MATS rule would be approximately $7.4 to $9 billion. This disparity is not compatible with a finding that regulation would be appropriate. A consideration of costs versus benefits in some form is clearly required by Section 112(n), as recognized by the Supreme Court in its decision in *Michigan vs. EPA*, 135 S.Ct. 2699 (2015) on the MATS rule, holding that EPA had erred by not considering costs in its determination that regulation of coal- and oil-fired EGUs was appropriate and necessary. EPA's previous attempt at cost consideration in its 2016 Supplemental Finding (81 Federal Register 24419, April 25, 2016) did not explicitly consider the cost vs benefits difference, instead relying on the Regulatory Impact Statement that it had prepared for the MATS rule. As TCEQ discussed in comments on that finding, such an approach was inappropriate and did not address the deficiencies identified by the Supreme Court in *Michigan*. EPA's proposed alternative analysis in that finding was similarly deficient, as it still did not make an explicit comparison of the costs and benefits of the MATS rule, as also discussed in the previous TCEQ comments.

EPA's current proposal makes a direct comparison of the benefits of the HAP reduction from MATS, and the costs of complying with the rule. This makes clear the stark disparity between the costs and benefits of the rules. Such disparity is not compatible with finding that regulation is appropriate in this case. Therefore, TCEQ supports EPA's conclusion that it is not appropriate and necessary to regulate coal- and oil-fired EGUs under Section 112 of the FCAA.

TCEQ supports EPA's use of actual benefits from regulating HAPs in its analysis and supports EPA's decision to not consider ancillary co-benefits as part of the cost-benefit analysis.

As noted in TCEQ comments on EPA's past actions on MATS, the Federal Clean Air Act (FCAA) Section 112 regulates a specific list of air pollutants, defined as hazardous air pollutants or HAPs. This list of HAPs specified under Section 112(b) does not include pollutants such as particulate matter (PM) or sulfur dioxide (SO_2). Rather, pollutants such as PM and SO_2 are regulated under other sections of the Act. TCEQ supports EPA's

decision not to consider co-benefits from non-HAP pollutants in its cost-benefit analysis. The FCAA contains other mechanisms for regulating such emissions, including the system of establishing and maintaining National Ambient Air Quality Standards for criteria pollutants, including PM and SO_2.

TCEQ agrees with the EPA that the existence and importance of the unquantified benefits of MATS are not enough to overcome the significant differences between the monetized benefits of HAP controls ($4 to $6 million annually) and the costs of compliance with the rule ($7.4 to $9 billion annually).

Although TCEQ agrees that MATS probably has benefits beyond those that can be reduced to the strictly economic, the difficulty in assessing such benefits is profound. In the absence of any means to quantify such benefits, it is most appropriate to rely on monetized benefits in an analysis of costs versus benefits for a regulation. These benefits may be, as EPA concludes, substantial and important, however, they cannot outweigh the overwhelming discrepancy between the calculated costs and monetized benefits of the rule. As TCEQ noted in its comments on the original MATS proposal, in the EPA's 2005 reconsideration of the 2000 finding, they take the reasonable position that *"it may not be "appropriate" to regulate remaining utility HAP emissions if the health benefits expected as the result of such regulation are marginal and the cost of such regulation is significant and therefore substantially outweighs the benefits."* Regulation cannot be "appropriate" where, as here, its direct benefits associated with reductions in HAP emissions are substantially outweighed by its costs.

TCEQ disagrees with EPA's proposal to leave coal- and oil-fired EGUs listed under section 112, as well as the proposal to leave the MATS rule in place. In the absence of a legally sound appropriate and necessary finding, EPA lacks the necessary legal foundation to leave these sources listed.

EPA's proposed finding that it is not "appropriate and necessary" to regulate coal- and oil-fired EGUs under Section 112 removes a necessary legal prerequisite for listing these sources under Section 112. In the absence of the foundational "appropriate and necessary" finding, the EPA lacked the initial authority to list these sources. Therefore, it would not be appropriate for EPA to leave the MATS rule in place.

Nearly twenty years of history that must be considered to fully analyze why EPA's proposed action to leave the MATS rule in place is inappropriate, and why the agency should, instead, repeal the rule. Much of this has been discussed in previous Texas comments on the EPA proposed actions relating to MATS, which are incorporated by reference herein.[1]

EPA should repeal the MATS rule. The MATS rule and the litigation over the standard, up to and including the Supreme Court decision in *Michigan*, is distinguishable from CAMR and the *New Jersey* decision. *New Jersey v. EPA*, 517 F.3d 574, No. 05-1097 (D.C. Cir.

[1] *See* Texas comments on the National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, submitted to EPA on 8/4/11; and Texas comments on the Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, submitted to EPA on 1/15/16.

2008). The appropriate and necessary finding was invalid when originally promulgated by EPA, and the current proposal discusses in detail why it cannot be appropriate to regulate HAPs from coal- and oil-fired EGUs, given the enormous disparity between cost of complying and monetized benefits from the rule. In the absence of a legally sound appropriate and necessary finding, EPA's original listing was invalid.

When EPA promulgated CAMR, they had reversed their previous necessary and appropriate finding through an administrative action, relying on deference normally afforded to agency actions for such actions. The D.C. Circuit found that such an action was not appropriate, and that EPA was required to go through the formal de-listing procedure required by the FCAA. The *New Jersey* court found that this was required under Chevron step 1, regardless of why EPA had listed the sources, even if the agency made an administrative decision that the original listing had been a mistake. That original finding, however, was never subject to notice and comment, or to judicial review.

The finding that is the necessary prerequisite of the current MATS rule, however, was subject to judicial review. This included review by the Supreme Court, which found the original finding to be fatally flawed for having failed to appropriately consider cost. In the absence of a legally sound appropriate and necessary finding, EPA lacked a necessary and required foundation to list coal- and oil-fired EGUs under Section 112. There was not an administrative decision by EPA that it made a mistake in listing these sources, such as the decision EPA made previously when it promulgated CAMR. Instead, the Supreme Court found that EPA had failed to conduct a required analysis. This renders EPA's foundational necessary and appropriate finding lacking, and without this required finding, EPA lacked the authority to list these sources under Section 112. Therefore, EPA should remove coal- and oil-fired EGUs from the list of regulated sources under Section 112 because the original listing is not valid. Without a valid, legal necessary and appropriate finding to support listing coal- and oil-fired EGUs under Section 112, the MATS rule lacks a necessary foundational support. Therefore, the MATS rule itself should be repealed by EPA.

EPA's previous attempt to address the deficiencies identified by the Supreme Court in *Michigan* in its 2016 Supplemental Finding does change the conclusion that EPA lacks the legal foundation for the necessary and appropriate finding. As discussed by EPA in the current proposal, EPA did not actually compare monetized costs and benefits in the Supplemental Finding. Absent such an analysis, that Finding did not address the deficiencies identified by the Supreme Court, which clearly indicated that a consideration of costs was a required element of the necessary and appropriate finding. Without a legally valid necessary and appropriate finding, EPA cannot leave coal- and oil-fired EGUs, listed as Section 112 sources. As stated previously, without such a listing, the MATS rule lacks a necessary legal foundation, and should be repealed.

Arguably, EPA cannot leave coal- and oil-fired EGUs listed as sources under Section 112 without having an obligation to regulate HAPs from these sources. Congress clearly intended these sources be regulated for HAPs only if EPA found that it was appropriate and necessary to list them as regulated sources under Section 112. With EPA's original finding having been found legally deficient by the Supreme Court, EPA lacked the necessary prerequisite for listing, and the agency should remove these sources from the Section 112 list of regulated sources.