



September 24, 2019

Administrator Andrew Wheeler
Ms. Elineth Torres
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Proposed Rule: Reclassification of Major Sources as Area Sources Under Section 112
of the Clean Air Act, 84 Fed. Reg. 36,304 (July 26, 2019)

Docket ID No. EPA-HQ-OAR-2019-0282

Dear Administrator Wheeler and Ms. Torres:

EPA has proposed amendments to the General Provisions to the National Emission Standards for Hazardous Air Pollutants that would:

- (1) Permit sources to escape currently applicable requirements—notably, maximum achievable control technology standards prescribed by 42 U.S.C. §7412(d)(2) (“maximum-achievable” standards); residual-risk standards issued under 42 U.S.C. §7412(f); and, for many sources, the requirements imposed by Title V, 42 U.S.C. § 7661a—by accepting limits on their ‘potential to emit,’ or “PTE,” below the major-source threshold of 10 tons of any one hazardous pollutant, or 25 tons of combined hazardous pollutants; and
- (2) Provide inadequate criteria for Potential-to-Emit (PTE) limits which are insufficient to ensure that such limits actually restrict a source’s actual and potential emissions to below the major source thresholds.¹

¹ 84 Fed. Reg. 36,304 (July 26, 2019) (the “Proposal”).

Earthjustice, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club (“Joint Environmental Petitioners”) strongly oppose the proposed rule. If finalized, it would vastly increase emissions of air toxics whose danger to public health Congress firmly instructed EPA to minimize, and unwind decades of progress towards that statutory goal. As explained in greater detail below: the Proposal is inconsistent with the text, structure and purpose of section 112 of the Clean Air Act (Section I); EPA has failed to address the central consequences of its decision—most importantly, the increases in toxic emissions that the Proposal allows (Section II); EPA has failed to include appropriate or lawful rules governing the sources governed by the Proposal (Section III); EPA purports to unlawfully constrain the record for its proposed rule (Section IV); and the proposal fails to require public participation, federal enforceability, and other measures sufficient to ensure the adequacy of PTE limits enabling sources to avoid the applicability of Clean Air Act control requirements for major sources (Section V).

I. THE PROPOSAL IS NOT CONSISTENT WITH THE TEXT, STRUCTURE, AND PURPOSE OF THE SECTION 112 OF THE CLEAN AIR ACT (C-2)

The proposal’s core rationale is that “[t]he statutory definitions of ‘major source’ and ‘area source’ do not contain any language that fixes a source’s status as a major source or area source at any particular point in time.”² That rationale is insufficient. The inference that the Agency would draw from the absence of specific language in section 112(a) is contradicted by the structure, purpose, and text of section 112.

A. *The Structure and Purpose of Section 112 Contradicts the Proposed Rule.*

Section 112’s central purpose is to require mandatory, technology-based controls on the large, industrial facilities that are primarily responsible for toxic air pollution.³ To accomplish that purpose, Congress enacted a sequential, step-by-step structure by which: those large industrial sources are identified and listed (under section 112(c)); appropriate technology-based standards are devised for the listed categories (under section 112(d)); and, following compliance with those technology-based standards, EPA applies health-based standards addressing any residual risks (under section 112(f)). That structure is meant to secure—once and for all—reductions in air toxics sufficient to protect public health (including the health of the most vulnerable populations). EPA has understood the process in precisely such a fashion, applying it so that the final, health-based step encompasses only a “one-

² 84 Fed. Reg. at 36,309-10.

³ A Legislative History of the Clean Air Act Amendments of 1990 (Cong. Res. Serv. 1993) (“Leg. Hist.”) at 8473 (Congress intended standards “based upon the maximum reduction in emissions which can be achieved by application of best available control technology” to be the “principal focus of activity under section 112”).

time review”—assuming that risks eliminated by the technology-based standards are eliminated permanently and securely.⁴

The proposal takes the entirety of that structure—sequential listing of major sources, followed by technology- and health-based controls—and substitutes in its stead the major-source threshold of 10 tons of any one hazardous pollutant, or 25 tons of combined pollutants. Section 112’s goal-directed structure is fundamentally incompatible with that substitution.⁵ The Agency has not, and cannot, reconcile the proposal with that structure, or section 112’s over-riding purpose: securing the maximum-achievable reductions from large industrial sources, through technology-based controls, and ensuring that residual health risks from those large sources are reduced to the levels Congress deemed acceptable.

Congress gave EPA the option—but not any obligation—to subject certain “small, diverse facilities and activities” such as “wood stoves, service stations, [and] dry cleaners” to “generally available control technology standards, in lieu of both maximum-achievable and health-based standards.⁶ That option was included not to enable EPA to bypass section 112’s core requirements, as the proposal would, but rather as a “discretionary authority” to be used where “pollutants and source categories [might] not get listed” otherwise.⁷ EPA’s authority to apply generally available standards to area sources, on a category-by-category basis, was intended to “provide[] additional avenues for public health and environmental protection”⁸—not to exempt large industrial facilities from the maximum-achievable and residual-risk standards that Congress believed appropriate for those facilities.⁹

The Agency’s assertion that the proposal is “consistent with the statutory structure and goals” answers none of these concerns—indeed, that assertion ignores the stated goals of section 112. EPA claims that agencies crafting limits on major sources’ potential to emit will “consider the current and proposed HAP emissions”¹⁰; but that consideration would be detached from the technology- and health-based standards at the heart of section 112. EPA also states that “some major sources” may have undergone unspecified modifications that “may prevent” emissions from

⁴ 77 Fed. Reg. 55,698, 55,699 (Sept. 11, 2012).

⁵ See *NRDC v. EPA*, 822 F.3d 104, 123-24 (D.C. Cir. 1987).

⁶ Leg. Hist. at 8491. See Leg. Hist. at 863 (“Area sources are the small, but possibly numerous sources of toxic pollutants.”); 42 U.S.C. 7412(d)(5), (f)(5).

⁷ *Id.* at 8512.

⁸ *Id.* at 8491

⁹ See Leg. Hist. at 863 (Statute allows EPA to list area source categories, to “require installation of maximum achievable control technology,” but permits use of generally available standards for “sources [for which] this standard may be too costly”).

¹⁰ 84 Fed. Reg. at 36,313

increasing.¹¹ But Congress enacted section 112 to ensure that all major sources (and those area sources capable of doing so) reduced their emissions to the maximum-achievable extent specified in section 112(d), with the health-based backstop provided by section 112(f).¹² And finally, EPA claims that some sources might voluntarily choose to reduce their emissions.¹³ As noted in section II.A.2.d below, there is nothing in the record that reasonably supports that speculation. But more fundamentally, section 112’s “structure and goals,”¹⁴ are not some unspecified, optional reduction (or limited increase) in hazardous air pollutants, secured only through whatever incentives EPA deems most appropriate. It is the prompt and effective minimization of health threats from such pollutants, through the mandatory adoption of technology-based limits at the most significant stationary sources of pollution. The proposal is directly at odds with those goals, and the structure by which Congress required EPA to achieve them.

*B. Section 112’s Text Confirms that the Proposal is Inconsistent with the Statute.*¹⁵

1. The Proposal Conflicts with Section 112(d)’s Maximum-Achievable Standards.

First, the proposal is inconsistent with section 112(d)’s requirement that EPA’s standards:

require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that [EPA], taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental

¹¹ *Id.*

¹² *See Sierra Club v. EPA*, 884 F.3d 1185, 1190 (D.C. Cir 2018) (noting that section 112’s “basic approach is technology-forcing”); Leg. Hist. at 8491 (noting intent to ensure that “stationary sources which would otherwise be subject to the standards are not excluded from control requirements based on arbitrary [distinctions]”), 8510 (“The purpose of the legislation is to assure that each and every source will employ the control methods which assure the greatest reduction in emissions which are achievable for that source”).

¹³ 84 Fed. Reg. at 36,313.

¹⁴ *Id.*

¹⁵ The proposal primarily recapitulates arguments made in litigation over the Agency’s prior implementation of the proposed changes to its administration of section 112; the briefs in that litigation are attached and the arguments within them are incorporated by reference). *See* Attach. 1, Final Opening Brief of Petitioners, *California Communities Against Toxics v. EPA*, No. 18-1085 (DC Cir. Feb. 22, 2019) and Attach. 2, Final Reply Brief of Petitioners, *California Communities Against Toxics v. EPA*, No. 18-1085 (DC Cir. Feb. 22, 2019)

impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies...¹⁶

The proposal would effectively render that mandate—which lies at the center of section 112’s statutory scheme—superfluous. Instead of securing the “maximum” reductions, section 112 would, at most, require a reduction to the major source threshold (10 tons per year of any one pollutant, 25 tons of combined hazardous pollutants). The proposal would make superfluous section 112(d)’s demand for “a prohibition on emissions, where achievable”; no standard could ever require a source to reduce its emissions to zero, if that source is exempted from the standard at 10/25 tons per year. That statutory text directly demonstrates that Congress did not wish the major source threshold to serve as an exemption from maximum-achievable standards, once those standards were in place.

Congress emphasized the non-discretionary nature of section 112’s “maximum achievable” reductions, first, by unambiguously requiring limits on each hazardous air pollutant that a source category emits. By allowing major industrial facilities to escape maximum-achievable standards, simply by reducing emissions to the major source threshold, EPA would, as a practical matter, allow those sources to produce unlimited emissions of many toxics—those, like mercury and dioxin—that are emitted in fractions of tons per year, yet are enormously dangerous in those small quantities.¹⁷ Specifically, because emissions of these pollutants have little or no significant effect on whether a source is above or below the major source threshold, which is expressed in tons per year, EPA’s proposal would allow sources that EPA has identified as the large, industrial sources primarily responsible for these pollutants to either escape section 112 regulation entirely (or to meet “generally available control technology” standards that are less stringent than MACT).

Congress also emphasized the non-discretionary nature of the “maximum achievable” reduction requirement by including a floor: the standards for new sources not be less stringent than the emission limitation achieved in practice by the best controlled source, and the standards for existing sources may not be less stringent than (in most cases) “the average emission limitation achieved by the best performing 12 percent of the existing sources.”¹⁸ The statute further confirms Congress’ intent by requiring EPA to return to its standards regularly, to address new developments, practices, and control technologies that might further reduce

¹⁶ 42 U.S.C § 7412(d)(2).

¹⁷ See 75 Fed. Reg. 63,260, 63,275-76 (Oct. 14, 2010) (“Sixth highest [mercury] emitting source category,” as a whole, emits “about 3.1 [tons per year]” of mercury).

¹⁸ 42 U.S.C. § 7412(d)(3).

emissions.¹⁹ If Congress wished merely to limit emissions to 10/25 tons per year, it would have had no reason to include those provisions in the statute. These elaborate, detailed constraints on EPA’s authority belie any suggestion that Congress intended to provide EPA with the discretion to allow sources to escape their maximum-achievable control obligations, merely because compliance with section 112(d) has produced annual emissions below the 10/25 ton major-source threshold.²⁰

The Agency notes that the statute specifies the circumstances under which EPA may substitute an alternative standard for section 112(d)’s maximum-achievable reductions.²¹ As an initial matter, section 112(h) does not permit EPA to avoid the constraints imposed by section 112(d); on the contrary, the statute specifies that such standards must be “consistent with the provisions of subsection (d)” (or section 112(f), as applicable).²² Moreover, Congress’s decision to enumerate the limited circumstances under which EPA may avoid numeric MACT limits—in the context, especially, of section 112(d)’s emphasis on constraining EPA’s discretion—only emphasizes the unlawfulness of EPA’s proposal to create a new, vastly larger exception of its own design, not just to section 112(d)’s requirement of numeric limits, but to maximum-achievable standards in their entirety.²³

The Agency asserts that its inferential “plain text” reading of section 112(a)(1) overrides that reading’s conflict with section 112(d)’s text.²⁴ But that misunderstands EPA’s task when interpreting a statute; such interpretation requires an agency to “construe statutes, not isolated provisions.”²⁵ EPA cannot, consequently, ignore section 112’s operative text based on its reading of one definitional provision.²⁶

¹⁹ *Id.* § 7412(d)(6).

²⁰ *See* Leg. Hist. at 869 (noting that statute does not permit EPA to “establish[] cutoffs that result in excluding some sources within the category or subcategory” from the emissions limitations or control measures otherwise required.).

²¹ 83 Fed. Reg. at 36,312 (noting that “CAA section 112(h) provides that the EPA, in certain circumstances, can set standards that are different from the MACT floor-based standards”).

²² 42 U.S.C. § 7412(h).

²³ *See NRDC v. Reilly*, 976 F.2d 36, 40 (D.C. Cir. 1992) (noting the “general rule that when a statute lists several specific exceptions to the general purpose, others should not be implied”) (citation omitted).

²⁴ 83 Fed. Reg. at 36, 312. Here, and elsewhere, the Agency’s reasoning—relying exclusively on the Agency’s belief that the text of section 112 is unambiguous—belie any claim that it is properly exercising any discretion afforded the Agency under *Chevron v. NRDC*, 467 U.S. 837 (1984).

²⁵ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

²⁶ *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 319 (2014).

2. The Proposal Conflicts with Section 112's Carefully Structured Emission-Control Benchmarks.

The proposal would further conflict with the careful sequence of regulatory requirements that section 112 imposes upon EPA. For example: Section 112(c)(3) states that: EPA “shall, not later than 5 years after November 15, 1990... list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section.”²⁷ Subsection 112(c)(6) obligates EPA to “not later than 5 years after November 15, 1990 list categories and subcategories of sources assuring that sources accounting for not less than 90 percent of the aggregate emissions of the aggregate emissions of each” of certain especially dangerous air toxics “are subject to standards under subsection (d)(2) or (d)(4).”²⁸

EPA’s own analysis indicates that the proposal will prevent EPA from accomplishing that objective. EPA found, for example, that the Aerospace Industry category accounts for nearly 19% of emissions of polycyclic organic matter (“POM”).²⁹ Its analysis indicates that if it finalizes the Proposal, 113 out of 144 sources subject to maximum-achievable standards within aerospace industry categories will no longer be subject to maximum-achievable standards.³⁰

Those provisions confirm that section 112’s sequence is meant to run in one direction—from listing of categories, to permanent and reliable technology-based standards, to health-based residual risk standards. They both state that EPA’s decision to “list” a category will be sufficient to “ensure” that sources within that category are “subject to regulation.” EPA cannot ensure that “area sources representing 90 percent” of particular air pollutants are subject to regulation, if—even after standards have been promulgated and effective—sources may drop from major- to area-source standards. And EPA cannot, under the proposed regulations, ensure that any sources are “subject to standards” under section 112(d)(2) and 112(d)(4), as section 112(c)(6) demands; the proposal would allow sources to escape those standards at any time. That renders Congress’ carefully drafted benchmarks an essentially empty exercise; EPA’s proposal ensures nothing at all. Again, the

²⁷ 42 U.S.C. § 7412(c)(3).

²⁸ 42 U.S.C. § 7412(c)(6).

²⁹ 69 Fed. Reg. 17,838, 17,847-49 (April 10, 1998).

³⁰ Memo from Brian Palmer to Eric Goehl et. al dated May 2019 (“Palmer Costs Memo”) at 18

statutory text demonstrates that Congress did not intend sources to escape maximum-achievable standards, once those standards were in place.

EPA claims that it is not “reasonable” to interpret section 112(c)(3) and 112(c)(6) as requiring that “90 percent of emissions are subject to regulation on an ongoing basis,” pointing out that regulation will alter the emissions of the sources subjected to regulation.³¹ The statutory text answers that concern; it requires that EPA ensure that the *sources* that produced those emissions, prior to regulation, be “subject to regulation” on a continuous basis—EPA may assess emissions percentages prior to regulation, but it is obligated to “ensure” that the “sources” that produced those emissions are subsequently “subject to” the specified regulation.³² EPA can satisfy that text without entering any “never ending cycle” if—as the Agency has understood those sections—the sources responsible for the specified emissions cannot backslide out of compliance (or, for purposes of 112(c)(3), backslide into area-source status).³³ In contrast, EPA’s newly proposed interpretation would produce a manifestly unreasonable and counter-textual result; the issuance of regulations that have no ability to securely bind the sources to which they apply.

Finally, EPA has interpreted section 112(f) as demanding only a one-time inquiry into the residual risks posed by large industrial sources of hazardous air pollution.³⁴ The proposal permits sources to escape that review, by escaping their maximum-achievable control obligations, even as those sources’ emissions increase.³⁵ The proposal thereby prevents section 112(f) from achieving its goal: to protect against the possibility that “MACT may not provide enough public health protection,”³⁶ by establishing “emissions levels for sources in *each category listed pursuant to section 112(c)* that would eliminate all adverse health and environmental effects associated with emissions from the sources in a category.”³⁷ For that reason, too, the proposal is incompatible with the text of section 112.

3. The Proposal Conflicts with Section 112(i)’s Compliance Provisions.

Section 112(i)(3)—which directly addresses sources’ compliance with section 112(d) standards—further contradicts the proposal. The first sentence of that

³¹ 84 Fed. Reg. at 36,311.

³² 42 U.S.C. §§ 7412(c)(3) & (c)(6).

³³ See 79 Fed. Reg. 74,656, 74,677 (Dec. 16, 2014); 64 Fed. Reg. 38,706, 38,726 (July 19, 1999) (both assuming that sources subject to maximum-achievable controls will not backslide).

³⁴ 42 U.S.C. § 7412(f)(2).

³⁵ See 42 U.S.C. § 7412(f)(5).

³⁶ Leg. Hist. at 951.

³⁷ Leg. Hist. at 8518.

section provides: “After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard.”³⁸ The first phrase of that section directly addresses the timing by which a source’s obligations are established: “the effective date of any emissions standard... promulgated under this section and applicable to a source.”³⁹ The two requirements—which Congress placed together, undivided by any punctuation or other indication that they might be understood separately—are that a standard be “promulgated” and “applicable” to a source.⁴⁰ “After” that date, section 112(i)(3)(A) creates a flat prohibition: “No person may operate such source in violation of such standard,” subject to strictly enumerated exceptions—which do not encompass the proposed rule. That prohibition refers, exclusively and directly, to the “sources” and “standards” set out in the prior phrase—that is, after a standard has been promulgated, and been applicable to a source (even once), *that* source must comply with *that* standard.⁴¹ And Congress’ decision to specify the exceptions to that prohibition, reinforces the unlawfulness of EPA’s proposal to add a new, much broader, exception to section 112(i)(3)(A)’s compliance requirements.⁴² And it confirms that the plain text of the statute requires sources that are above the major-source threshold when EPA promulgates an applicable maximum-achievable standard to comply with that standard.⁴³

This interpretation is confirmed by section 112(i)’s various provisions that would allow sources to delay (but not escape) compliance by undertaking various early reductions.⁴⁴ For example, section 112(i)(5) provides that sources that achieve a 90 percent reduction in emissions of hazardous air pollutants may delay compliance with maximum-achievable standards “for a period of six years.”⁴⁵ That provision was intended to provide an incentive for early reductions, even if those reductions were smaller than those Congress anticipated from EPA’s maximum-achievable standards.⁴⁶ Yet EPA would now understand the statute to permit a source to evade maximum-achievable standards *completely*, and at *any time*—merely by reducing

³⁸ 42 U.S.C. § 7412(i)(3)(A).

³⁹ *Id.*

⁴⁰ *See Utility Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 440 (D.C. Cir. 2018) (statute using past participle applies when act “took place at some prior time”).

⁴¹ *See Culbertson v. Berryhill*, 139 S. Ct. 157, 522 (2019) (statutory term “such” requires reference to that which has been “already described”).

⁴² 42 U.S.C. § 7412(i)(3)(A)-(B) (stating bounded exception for existing sources)

⁴³ EPA acknowledged, but refused to adopt, this interpretation of the Act in a memorandum that it has since withdrawn. Memo. from John S. Seitz to Linda Murphy et al. dated May 16, 1995, at 5-6.

⁴⁴ *E.g.* 42 U.S.C. § 7412(i)(5)-(6).

⁴⁵ *Id.* § 7412(i)(5).

⁴⁶ Leg. Hist. at 8516.

emissions to the major-source threshold. No source would, under that interpretation, have any reason to undertake the 90 percent reduction contemplated by section 112(a)(5) (or the reductions described in 112(a)(6))—an outcome that Congress could not have condoned.

The proposal indicates that EPA instead intends to give section 112(i)(3) “the same meaning” as provisions containing distinct text—in particular, provisions in which the applicability of a standard does not include any specific timing component.⁴⁷ But that reading ignores Congress’ decision to connect the applicability of a standard to the date of its promulgation. The structure of section 112, and the text described above are not present in other sections of the Act. EPA cannot reasonably re-write the text to undo that choice; indeed, Congress made clear that section 112 and section 111 provide distinct regulatory regimes, and cannot be always understood in parallel.⁴⁸

The proposal asserts that reading section 112(i)(3)(A) to determine a source’s requirements at the time of promulgation would allow a source to escape major-source requirements, if its emissions moved from below the major-source threshold to above the threshold at some time after a standard was promulgated.⁴⁹ As an initial matter, that difficulty is largely created by EPA’s decision to understand “potential to emit” as encompassing limits that a source may easily discard. There is no reason to believe that Congress anticipated that sources that EPA identified as major would routinely increase their emissions, without triggering the “modification” or “reconstruction” provisions of section 112(a). That is especially so given Congress’ manifest expectation that only very small area sources would be exempted from maximum-achievable standards.⁵⁰ And even under EPA’s expanded understanding of potential-to-emit, the “modification” requirements of section 112(g)(2) should correct the oddity the proposal purports to note; a source whose

⁴⁷ 83 Fed. Reg. at 36,313 (citing 42 U.S.C. § 7411(e)).

⁴⁸ *See, e.g.*, Leg. Hist. at 869 (noting that Congress “specifically disapprove of EPA’s practice ... in recent new source performance standards under section 111... of establishing cutoffs that result in excluding some sources within the category or subcategory from the emission limitations or control measures otherwise required”); 8490-91 (noting that section 112’s definition of ‘major source’ “should not be confused with other meanings” elsewhere in statute); 8507 (noting that section 112 is more stringent than other provisions of act, because “this program is for the control of extremely harmful air pollutants”).

⁴⁹ 84 Fed. Reg. at 36,311.

⁵⁰ Leg Hist. at 8491.

emissions rose above the threshold would, in almost all cases, qualify as a “major source” whose emissions rise by a more than de minimis quantity.⁵¹

Moreover, the statute does not say that obligations are set at the moment a standard is promulgated—it prohibits any source from operating in violation of a standard, once that standard has been both “promulgated” and “applicable.”⁵² That prohibition should encompass a standard that became applicable at some point after it was promulgated; at most, a source would be required to comply with both the ‘maximum-achievable’ and ‘generally available’ standards (especially given the minimal generally-available standards EPA has promulgated, such compliance poses no difficulties). And in any event, whatever oddities EPA may feel the text of section 112(i)(3)(A) produces, they cannot justify the radical re-working of the statutory scheme contemplated by the proposal. Even if Congress’s scheme did not directly address a single, unlikely scenario (a source of the small, dispersed type that Congress believed could only be regulated through ‘generally available’ technologies, increasing its potential to emit to exceed the major-source threshold), that provides no justification for EPA to re-write the statute in a fashion that eviscerates Congress’ central purpose: ensuring that the large industrial facilities adopt the ‘maximum-achievable,’ technology-based controls, and reduce their emissions to a level that avoids significant public health risks.

4. The Proposal Conflicts With Section 112(d)’s Provisions Governing the Standards Applicable to Area Sources.

Even if the statute did allow EPA to exempt sources whose emissions have, by virtue of compliance with maximum-achievable technology standards, fallen below the major-source threshold, EPA could not accomplish that exemption through the general amendment it proposes. Section 112 does not, automatically and of itself, relieve listed area sources from maximum-achievable standards. On the contrary, the statutory default is that *all* sources within listed categories, whether area or major, are subject to maximum-achievable standards.⁵³

⁵¹ 42 U.S.C. §§ 7412(a)(5) & (g)(2). *See Sierra Club v. Sandy Creek Assocs.*, 627 F.3d 134, 141 (5th Cir. 2010) (section 7412(g)(2) encompasses ongoing activities at a source, rather than just commencement of construction).

⁵² 42 U.S.C. § 7412(i)(3)(A).

⁵³ 42 U.S.C. § 7412(d)(1) (requiring EPA to promulgate emissions standards “for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) & (d)(2) (specifying generally that “[e]missions standards promulgated under this subsection ... shall require the maximum degree of reduction in emissions of the hazardous air pollutants”). *See U.S. Sugar Corp. v. EPA*, 839 F.3d 579, 652 (D.C. Cir. 2016) (EPA may not apply generally-available standards to sources without “some explanation

Section 112(d)(5) provides EPA with the discretion, when it issues standards for a particular category or sub-category of area sources, to “elect to promulgate standards applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices.”⁵⁴ But that section requires EPA to exercise and justify that discretion on a category-specific (or sub-category-specific) basis—it does not give EPA the authority to conduct the wholesale deregulation of sources that the proposal purports to conduct.

Nor, as a practical and legal matter, could EPA properly exercise that discretion merely through amendment of its general rules. For example, EPA’s assessment of whether generally-available standards are appropriate depends upon the technologies available to a group of area sources; here, maximum-achievable technologies are not only available, but in use, at the sources EPA would exempt. By undertaking a wholesale approach that operates solely upon the definitions of a source, the proposal fails to address those, and other, factors necessary to the decision EPA claims to be making. That is especially so given the reasons Congress provided EPA with the discretion to exempt area sources: to ensure that very small sources, that would not otherwise be listed are still subject to meaningful regulation.⁵⁵

Put differently, section 112 requires EPA to take at least three steps to relieve listed sources of maximum-achievable technology requirements, as the proposal purports to do. First, EPA must list those sources within an area-source category under subsection 112(c). The proposal does not purport to take that step; as noted above, the statute gives the terms ‘major’ and ‘area’ source meaning primarily within section 112(c), and if EPA wishes to revise its understanding of that term, it is required to do so through that section. If EPA wished to re-classify the listed sources that the proposal purports to reclassify, it would have to both interpret and apply section 112(c)—and the proposal does neither.

But even if EPA had the ability to re-categorize sources that it has, in its past National Emissions Standards for Hazardous Air Pollutants, subjected to major-source requirements, merely through an amendment to the general provisions, it would still need to take two additional steps before relieving those sources of their maximum-achievable control obligations. Under section 112(d)(1), listed source categories—whether major or area—are subject to maximum-achievable standards. EPA can only alter that statutory default by, first, determining that those sources

for why [those] standards are more appropriate than [maximum-achievable] standards for those sources and types of pollutants”).

⁵⁴ 42 U.S.C. § 7412(d)(5).

⁵⁵ Leg. Hist. at 8516.

should be exempted from maximum-achievable requirements, and explaining why. 42 U.S.C. § 7412(d)(5). And second, even beyond that, EPA would have to craft generally-applicable standards that are suitable for the newly exempted sources.

EPA does not argue that the proposed rule works to de-list currently listed sources. If it did, it would be subject to the express anti-backsliding requirements of section 112(c)(9), none of which EPA has addressed. 42 U.S.C § 7412(c)(9). But to the extent that the Proposal functions to delist sources currently regulated within major source categories entirely--by removing them from major-source categories but subjecting them to no emissions standard whatsoever—it is unlawful under section 112(c)(9). *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1372-3 (D.C. Cir. 2007).

The Proposal purports only to move sources that are currently regulated within major-source categories, out of that categories—it addresses neither section 112(d)(5) (as it must to substitute generally-available standards for maximum-achievable standards, for a subcategory of area sources) nor 112(c)(9) (as it must to relieve currently listed sources of all emission-reduction requirements).⁵⁶ As such, the Proposal cannot lawfully exempt the sources it describes from maximum-achievable standards. That is true for all of EPA's listed categories. It is not sufficient for EPA to simply amend the regulatory text, insofar as it proposes to do so for some National Emissions Standards for Hazardous Air Pollutants, to adopt language indicating that sources that fell within 'major source' categories will, henceforth, be reclassified as area sources.⁵⁷ Even if EPA had the authority to alter its major- and area-source subcategories in this fashion, EPA has not taken (much less offered a reasonable justification for) the additional steps necessary to exempt sources within those few categories from maximum-achievable requirements: a determination that the reclassified sources are sufficiently distinct to warrant generally available standards; and promulgation of generally applicable standards appropriate to EPA's revised area-source category (or subcategory).⁵⁸

EPA's *past* rules cannot alter that analysis—they cannot have exempted sources complying with maximum-achievable standards from those same standards, nor

⁵⁶ EPA's rationale—which addresses terms that only meaningfully arise in section 112(c)—could not accomplish anything further. *See* Section I.D., below.

⁵⁷ *See* 84 Fed. Reg. at 36,327 (proposing to alter standards that expressly impose major-source requirements on sources whose emissions fall below major-source threshold after compliance).

⁵⁸ 42 U.S.C. § 7412(d)(5). *See* 75 Fed. Reg. at 54,987 (determining that cement kilns that qualify as area sources should be subject to standard that “reflect[s] MACT, rather than GACT, because there is no essentially difference between area source and major source cement kilns,” with regard to HAP emissions and control).

have provided generally-available standards that are appropriate for those sources. All of EPA's 112(d) rules were promulgated when EPA interpreted the statute according to the Once-In Policy—that is, EPA understood that it was obligated to apply maximum-achievable standards to all sources whose emissions exceeded the major-source threshold at the compliance deadline, even if compliance subsequently reduced their emissions below the threshold. The Agency consequently cannot plausibly claim that, when it issued those standards, it determined pursuant to section 112(d)(5) that those sources should be relieved of maximum-achievable requirements, nor that its generally-available standards are appropriate for those sources. Nor can EPA claim that the sources it would now purport to reclassify (those that have already complied with maximum-achievable standards, and thus are by definition capable of doing so) are materially similar to those EPA categorized as area-sources in its past rules (those that never complied with those standards), or that those sources were contained within the categories that EPA's past rules exempted from maximum-achievable standards.

Given the EPA's adoption of the Once-In Memo (a document it has characterized as an interpretive rule) its past rules can only be understood as deciding that listed sources that were major at the compliance deadline, but later reduced their emissions, would remain subject to maximum-achievable standards—even if they could be understood to be area sources—rather than receive the discretionary exemption allowed under section 112(d)(5). EPA cannot change those rule-by-rule decisions merely by amending the general provisions, and without engaging with the category-specific standards set out in section 112(d)(5).

EPA's past rules contain no analysis or reasoning that might support a decision to exempt sources that have complied with maximum-achievable limits from those same limits (nor does the proposal contain any such analysis, see section __, below). Nor do they contain any analysis explaining why maximum-achievable technologies are not generally available to sources that have already installed those technologies. On the contrary, EPA's rules under section 112(d) have consistently affirmed that those rules exempt from its maximum-achievable standards only those sources whose emissions fell below the threshold before the compliance deadline.⁵⁹

⁵⁹ See, e.g., National Emission Standards for Hazardous Air Pollutants: Surface Coatings of Miscellaneous Metal Parts and Products—Summary of Public Comments and Responses (Attach. 3) at 48 (“[F]or purposes of determining applicability of the Miscellaneous Metal Parts and Products NESHAPS, a facility would need to achieve area source status ... prior to the compliance date.”); National Emission Standards for Hazardous Air Pollutants: Surface Coatings of Plastic Parts and Products—Summary of Public Comments and Responses (Attach. 4) at 45 (“To be considered an area (non-major) source for purposes of determining applicability... a facility would need to achieve area source status ... prior to the compliance date.”); Municipal Solid Waste Landfills: Background Information Document for National Standards for Hazardous Air Pollutants, Public Comments

C. Section 112(a)'s Definitions Do Not Provide an Adequate Basis for the Proposal.

The proposal rejects all of the above-described text and context, based on its interpretation of the definitions provided in section 112(a). Because the definitions of ‘major source’ and ‘area source’ “do not contain any language that fixes a source’s status ... at any particular point in time,” EPA concludes that it is free to re-classify a source from ‘major’ to ‘area’ at any time.⁶⁰ It claims additional inferential support from the definitions of ‘new’ and ‘existing’ sources, which “dictate that the new/existing source distinction is determined by when a source commences construction or reconstruction and say nothing about the volume of emissions.” *Id.*

That reasoning does not suffice to justify the proposal. The definitions alone, without reference to the role of the defined terms within section 112, cannot provide an adequate basis for the proposal. The proposal does not address the *definition* of a major source: under the prior Once-In Policy, and under the proposal, a major source is one whose potential to emit exceeded the 10/25-ton threshold. The proposal alters *when* and *how*, within section 112’s regulatory process, EPA divides major and area sources (and what standards apply to the newly categorized area sources). When and how EPA applies the area and major source definitions are questions that cannot be answered by the statute’s definitions—they are answered by the use to which section 112 puts the defined terms.

That is especially so given section 112’s clearly sequenced, step-by-step process. That sequencing is made explicit by the dates specified by Congress for each step’s completion: listing of categories of major and area sources under section 112(c) “[n]ot later than 12 months after November 15, 1990”⁶¹; promulgation of technology-based standards under section 112(d) between “two years” and “10 years” after November 15, 1990⁶²; compliance with those technology-based standards within 4 years following each of those standard’s promulgation⁶³; and, 4 years later, promulgation of health-based residual risk standards under section 112(f).⁶⁴ That progressive structure, in which each step necessarily and expressly builds upon the preceding steps, demands attention to the placement of each defined term within the sequence defined in the statute.

and Responses at 17 (Attach. 5) (noting that “once in, always in” interpretation applies to standards generally, and refusing to modify when issuing specific rule).

⁶⁰ 84 Fed. Reg. at 36,310.

⁶¹ 42 U.S.C. § 7412(c)(1).

⁶² *Id.* § 7412(e)(1).

⁶³ *Id.* § 7412(i)(3).

⁶⁴ *Id.* § 7412(f)(2).

When viewed within that structure, the major-source threshold functions not as an exemption for 112(d)'s maximum achievable standards and 112(f)'s residual risk standards, but rather as a trigger for mandatory application of those standards.⁶⁵ The statute gives the terms 'major source' and 'area source' functional meaning only within section 112(c)—the initial, listing stage. That subsection instructs EPA: to “publish, and ... revise ... a list of all categories and subcategories of major sources ... of [hazardous] air pollutants”⁶⁶; and to “list ... each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment.”⁶⁷

Once EPA has divided sources into those categories and subcategories, section 112 does not use either 'major source' or 'area source' in any sense that suggests that EPA is meant to re-visit the delineation between the two at any later stage in the regulatory process. Subsequent references to major and area sources make clear that those terms are meant to operate within subsection 112(c)—EPA's listing of categories for mandatory regulation—not elsewhere.⁶⁸ Section 112(d), for example, states that EPA must promulgate regulations “for each category and sub-category of major sources and area sources of hazardous air pollutants *listed for regulation pursuant to subsection (c) of this section.*”⁶⁹ The words 'major source' appear nowhere in any fashion that suggests that EPA is permitted to apply the major-source threshold after standards have been promulgated, and sources have complied—much less to support the proposal's perverse conclusion that compliance with section 112(d) standards should serve to exempt sources from those standards.⁷⁰

That the definition of “new” and “existing” sources refers to a specific point in time does not support the proposal. First, EPA presumes “that the presence of a phrase in [section 112(a)(4)] and its absence in [section 112(a)(1)] reveals Congress'

⁶⁵ See Leg. Hist. at 8515 (major source threshold reflects “a prima facie case that ten tons of emissions per year from any single source of the pollutant amounts to a health threat,” such that “standards should be imposed.”)

⁶⁶ 42 U.S.C. § 7412(c)(1).

⁶⁷ *Id.* § 7412(c)(3).

⁶⁸ EPA is not, in the proposal claiming to revise its major and area source categories pursuant to section 112(c)(1); and if it did, it would be constrained by section 112(c)(9)'s express anti-backsliding restrictions. 42 U.S.C. §§ 7412(c)(1) & (c)(9).

⁶⁹ 42 U.S.C. § 7412(d)(1) (emphasis added). See also *id.* 7412(c)(5) (referring to “categories and subcategories of area sources listed pursuant to subsection (c) of this section”).

⁷⁰ See Leg. Hist. at 951 (noting that statute mandates that EPA “promulgate a standard which *requires* the installation of maximum achievable control technology (MACT) by the sources in the category”).

design.”⁷¹ But any such presumption “grows weaker with each difference in the formulation of the provisions under inspection,” and is “unpersuasive” where the two sections are “fundamentally different”—as they are here.⁷² Section 112(a)(4) defines a term—new—that is temporal in nature. That Congress included temporal words to define a temporal term cannot plausibly give rise to any reasonable inference about when and how EPA is to apply terms—such as “major” and “area”—that are not temporal in nature.

Second, that section 112(a)(1) does not tell EPA when and how to apply the major/area source distinction does not, of itself, answer those questions—EPA must still decide when and how to apply the defined terms, within section 112’s sequence. Under the Once-In Policy, EPA applied those terms primarily at the listing stage—but not after compliance with standards. Under the proposal, EPA would apply those terms at every step of section 112’s regulatory process. In both cases, EPA is necessarily “considering timing matters as part of the major/area distinction.” 84 Fed. Reg. 36,310. The absence of the time-specific language that EPA claims is missing from section 112(a)(1), but present in section 112(a)(4), cannot provide a basis for EPA’s choice as to *which* timing it will apply. That basis must, necessarily, arise from the structure and context of the statute in which those defined terms are used.⁷³ That is true of both for both EPA’s understanding of the terms “major” and “area” source, as well as “new” and “existing” source; section 112 makes clear that the latter terms operate at the standard-setting stage, 42 U.S.C. § 7412(d)(3), and at the compliance deadlines, 42 U.S.C. § 7412(i)(3)—EPA cannot determine those terms’ function within the statute without referring to those operational provisions.

EPA cannot interpret section 112’s core functional details without reference to section 112’s operational provisions. That remains true whether EPA wishes to describe the statute as “clear” (as it primarily does), or to resolve some purported ambiguity (which it suggests in passing, in the alternative). The proposal only identifies one source of potential ambiguity: the definitions within section 112(a)—specifically silence, within section 112(a)(1), as to when and how EPA is to delineate major and area sources. But EPA cannot determine whether those definitions are ambiguous, much less reasonably resolve the ambiguity, without reference to the overall statutory context, and especially the portions of the statute that employ the defined terms.⁷⁴ The absence of some constraining language in the definitions,

⁷¹ *Children’s Hosp. Ass’n v. Azar*, ___ F.3d ___ (D.C. Cir. No. 18-5135, Aug. 13, 2019), Slip Op. at 10 (citation omitted).

⁷² *Id.* (citations omitted).

⁷³ *See Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 317 (2014) (agency must interpret definitional terms with reference to “operative provisions” of a statute).

⁷⁴ *See id.* at 321 (any “reasonable statutory interpretation must account for both ‘the specific context in which language is used’ and ‘the broader context of the statute as a whole’”).

especially absent some broader analysis, cannot of itself be an ambiguity of the sort that signifies a congressional delegation of interpretive authority to EPA.⁷⁵

And even if such silence could suggest ambiguity, the proposal's analysis consists entirely of the following: that "Congress's silence ... does not undermine the conclusion that the statute can be reasonably read—and indeed is best read—as not requiring a cut-off date"; and "the absence of any cut-off date or cut-off language in the statutory definitions ... is best read as allowing a source to change from a major source to area source ... at any time."⁷⁶ This analysis does not constitute an adequate exercise of any delegated interpretive authority; it engages none of the structure, context, or purpose of section 112, as it must to support the reasonableness of EPA's reading. EPA's mere preference for a particular outcome does not constitute a valid exercise of interpretive authority.⁷⁷ That is especially so because the policies upon which EPA grounds its interpretation—*eliminating* mandatory technology-based limitations in order to rely on *voluntary* actions by sources that wish to avoid reporting requirements—are diametrically opposed to the policy choices evinced by the statutory text and its legislative history.⁷⁸

D. The Proposal Does Not Adequately Address the Purpose of Section 112.

EPA's proposal, critically, attributes to Congress the belief that sources subject to maximum-achievable standards can readily "further reduce their emissions."⁷⁹ But the statute demonstrates that Congress did not write section 112 to anticipate that possibility; the text demands that EPA's maximum-achievable standards demand the "maximum" reduction, considering costs, and that they be updated regularly to address new developments.⁸⁰ Congress thus expressly designed the statute to foreclose the possibility upon which the proposal depends—that a significant number of sources be able to cost-effectively reduce their emissions below the levels required by extant maximum-achievable standards.

If "EPA has observed significant improvements in technologies and processes that have significantly reduced, or in some cases eliminated, the use of HAP," Congress did not instruct EPA to remove maximum-achievable standards, based on polluters' assurance that doing so might "encourage" such innovations in pollution

⁷⁵ See, e.g., *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 666-68 (D.C. Cir. 1994).

⁷⁶ 84 Fed. Reg. at 36,313.

⁷⁷ *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

⁷⁸ See, e.g., Leg. Hist. at 8473 (maximum-achievable standards are "the principal focus of activity under section 112).

⁷⁹ 84 Fed. Reg. at 36,313 (claiming that proposal is "consistent with statutory structure and goals" because sources might "choose to accept HAP PTE limits that are lower than their current emissions" under maximum-achievable standards).

⁸⁰ 42 U.S.C. §§ 7412(d)(2) & (6).

control.⁸¹ Rather, the statute requires EPA to address those improvements through section 112(d)(6)'s requirement that EPA revise its emission standards to “tak[e] into account” new “developments in practices, processes, and control technologies.”⁸² To the extent developments affect only a subset of sources, EPA has the ability to “distinguish” between those, and other, sources.⁸³

In recent section 112 rulemakings, EPA has consistently asserted (as have owners and operators of polluting sources) that no relevant developments have occurred that might allow for significant decreases in toxic emissions from sources subject to maximum-achievable standards.⁸⁴ If those assertions are correct, the proposal can only increase emissions, contrary to Congress' intent. If they are incorrect, the statute provides clear instructions—EPA must update its current standards, not eviscerate them. Put differently: EPA cannot claim fidelity to the statute's purposes, merely because it believes that its standards fail to achieve the maximum-achievable reductions Congress required. The proposal abandons the means by which Congress sought to cure such deficiencies, in favor of a wholly extra-statutory theory of pollution-control whose effects the Agency itself acknowledges to be uncertain.⁸⁵

II. THE AGENCY HAS FAILED TO ADEQUATELY ADDRESS THE CENTRAL CONSEQUENCES OF ITS PROPOSAL

A. *EPA Has Failed to Address the Increased Toxic Pollution that Will Result From the Proposal*

EPA fails to adequately assess the effects of its proposal on emissions of hazardous air pollutants (C-3). Acknowledging that failure, EPA states that “this proposed rule may potentially result in both emissions reductions and increases from a broad array of affected sources,” and that it is “uncertain as to the

⁸¹ 84 Fed. Reg. at 38,328

⁸² 42 U.S.C. § 7412(d)(6).

⁸³ *Id.* § 7412(d)(1).

⁸⁴ *See, e.g.*, 84 Fed. Reg. 15,046 15,063 (April 12, 2019) (asserting that there are “no new or improved add-on control technologies” and no “new or improved operation and maintenance practices, process changes, pollution prevention approaches, or testing and monitoring techniques” that might reduce hazardous air pollutants from stationary combustion turbines); 80 Fed. Reg. 76,512, 76,160 (Dec. 7, 2015) (finding that there are “no new developments in practices, processes, and control technologies” for Aerospace Manufacturing and Rework Facilities source category). 80 Fed. Reg. 45,280, 55,289 (July 29, 2015) (“We did not identify any relevant cost-effective developments in technologies, practices, or processes since promulgation” of original maximum-achievable standards for Mineral Wool Production source category).

⁸⁵ 84 Fed. Reg. at 36,327.

magnitude, direction, and distribution in emissions” that will result.⁸⁶ The Agency thereby declines to address its proposal’s impact on section 112’s core concern: reducing hazardous air pollution. In so doing, EPA neglects the single most “important aspect[] of the problem before it.”⁸⁷ Section 112 demonstrates Congress’s concern with not just aggregate emissions across categories, but with those “most exposed to emissions” from even “a source” within a category.⁸⁸ Simply asserting that there may be some increases, and some decreases, does not address that source-specific concern. Section 112 also demonstrates Congress’ desire that EPA resolve the sorts of uncertainties that it cites in the proposal, before taking action that might release sources from their pollution-control obligations.⁸⁹

EPA has included several memoranda purporting to address some of the emissions consequences of its proposed action. But those memorandums’ analysis fails to offer any meaningful insight into the emissions increases likely to result from EPA’s proposal. Most importantly, the record offers nothing that might allow the Agency to escape the most obvious conclusion: that an action that allows almost four thousand sources to increase their toxic emissions will, in fact, produce an increase in emissions.

1. EPA’s Analysis Fails to Address Sufficient Source Categories to Draw Any Reasonable Conclusion as to the Effect of the Proposal

EPA projects that its proposal will allow nearly 4,000 sources to increase emissions by somewhere between 2.5 and 7.25 tons per year.⁹⁰ EPA’s analysis devotes attention only to a narrow subset of those sources: the 34 sources that EPA has already relieved of their maximum-achievable standards; and another six major-source categories that EPA claims to be illustrative. The categories assessed by EPA comprise just 633 sources in total. That sample is far too small to draw any reliable conclusions as to the effects of the proposal.

First, the sources that have already been reclassified by EPA are those that were willing to do so prior to a notice-and-comment rule-making. That is hardly likely to be a representative group; rather, it is dominated by sources that could readily

⁸⁶ *Id.* at 36,332.

⁸⁷ *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (citation omitted).

⁸⁸ 42 U.S.C. § 7412(f)(2)(A). *Accord* 42 U.S.C. § 7412(c)(9) (categories may be delisted only if “no source in the category ... emits” pollution in quantities causing “a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed”).

⁸⁹ *See, e.g.*, 42 U.S.C. § 7412(b)(3)(C) (requiring EPA to both collect “adequate data” on health and environmental effects,” and to confirm that substance “may not reasonably be anticipated to cause any adverse effects” to human health of adverse environmental effects).

⁹⁰ Palmer Cost Memo at 18-28.

comply with maximum-achievable standards, if those standards were reinstated by the Agency or a court. Consequently, that those sources reveal no short-term divergence from their prior maximum-achievable levels does not reveal anything about the sources that might reclassify under the assurance of a formal and final rule. Second, as EPA notes, the vast majority of the sources that EPA has already re-classified are “coating-type sources.”⁹¹ The small handful of sources from other categories (e.g., four out of more than 900 facilities EPA projects to escape compliance with its ICI Boiler major-source standards) do not represent a sample large enough to draw any reliable conclusions as to other sources within those categories.

Second, EPA’s “illustrative” analysis does not select source categories that are likely to provide insight into the full range of sources affected by the proposal. The proposal selects some categories that are especially idiosyncratic and non-representative; for example, to represent all coating source categories that use add-on controls, EPA selects the metal can source category—in which only one plant is projected to alter its status.⁹² That this one source is subject to a state requirement that might prevent backsliding supports no reasonable conclusion as to every source “for which the compliance method is a combination of low-HAP coatings and potentially add-on controls.”⁹³

EPA also chooses to emphasize coatings facilities in its illustrative sample—an analysis that is largely duplicative of its review of sources that have already escaped their emissions limits. Meanwhile, the proposal studiously ignores source categories which its own analysis suggests will be most dramatically affected. For example, EPA projects that the proposal would reduce refineries’ pollution-control spending by \$22 million per year (over \$750,000 per year at each affected refinery).⁹⁴ Sources covered by the Miscellaneous Organics NESHAP would reduce pollution-abatement by over \$12 million per year.⁹⁵ EPA projects that its proposal

⁹¹ Memo. from Elineth Torres to MM2A Docket No. EPA-HQ-OAR-2019-0282 dated May 2019 (“Emissions Memo”) at 7.

⁹² Emissions Memo at 19.

⁹³ *Id.* at 19, 24. The Memo asserts that categories for which the only control method is “compliant materials” can adequately represent categories for which the “main” method is compliant materials, Emissions Memo at 19 n.9. But for many of those categories, add-on controls play an important role in controlling especially dangerous hazardous air pollutants. *See* 80 Fed. Reg. 76,155-56 (describing role of add-on controls to control some HAP emissions from aerospace facilities). EPA cannot assume that sources without add-on controls are representative of the health-threats posed by such source-categories, in which a substantial minority of sources relies upon add-on controls.

⁹⁴ Palmer Costs Memo at 26.

⁹⁵ *Id.* at 19.

would remove pollution-control obligations worth \$27 million per year at Municipal Solid Waste Landfills.⁹⁶ Over 900 sources within the ICI Boilers and Process heaters would be allowed to increase emissions. The obligations affected by EPA's proposal represent, according to the agency, over \$33 million per year.⁹⁷ But rather than assess impacts on any of the categories that it projects to be substantially affected by its proposal, EPA deems 'illustrative' heavy-industry categories in which just three and five sources would be affected—a choice permitting no rational conclusion as to the effects of its proposal on heavy industry categories generally.⁹⁸

Most broadly, EPA's analysis fails to assess source categories that are plausibly representative of the host of sources whose emissions limitations EPA would alter. A source category within which forty percent of the affected sources are subject to overlapping state requirements is hardly representative of all heavy industry source categories. The features that EPA cites as potentially mitigating emissions increase—overlapping state and federal requirements, for example—have nothing to do with the category—heavy industry, or the use of add-on controls—that EPA purports to “illustrate” with its analysis.⁹⁹ Absent some analysis of how many sources, within its categories, are subject to such state and federal requirements, EPA cannot assert that those requirements are equally ubiquitous within every affected category, merely because each of those categories shares an entirely unrelated characteristic (e.g., the use of add-on controls).

Likewise, the Agency's analysis fails to address source categories that might provide insight into the proposal's consequences for toxic emissions—it does not, for example, examine the categories responsible for the largest quantities of toxic emissions. Nor does it examine the sources that Congress required EPA to make subject to maximum-achievable standards under section 112(c)(6)—despite clear congressional emphasis on the pollutants listed in that section.¹⁰⁰ The Agency has not, as a result, undertaken any analysis that might provide insight into the effects of its proposal on the toxic pollution that is section 112's core concern.

2. *EPA's Analysis Does Not Demonstrate That Its Proposal Will Avoid an Increase in Emissions.*

Even if EPA's selection of sources were representative, the analysis supporting the proposal does not support any suggestion that sources will not increase their emissions if EPA allows them to do so. That is so, first, because of three cross-cutting errors in EPA's overall analysis.

⁹⁶ *Id.* at 25.

⁹⁷ *Id.* at 28.

⁹⁸ Emissions Memo at 25-26.

⁹⁹ *Id.* at 24-25.

¹⁰⁰ See 63 Fed. Reg. 17,838, 17,847-51 (Apr. 10, 1998).

First, EPA’s analysis unreasonably ignores the potential for long-term increases in emissions. Even where sources have “reformulated their products,”¹⁰¹ and may be unlikely to alter that formulation within a single year, as facilities replace equipment and address demand they are likely to revert to the use of higher-HAP (and lower-cost) products.¹⁰² Sources in some categories have maintained add-on controls that allow them to mix high- and lower-HAP materials; those sources will be able to increase emissions (by using high-HAP materials without the use of add-on controls) even in the near term.¹⁰³ Over time, add-on controls (including those that EPA views as “non-adjustable”¹⁰⁴) are likely to degrade, and be inadequately maintained.¹⁰⁵ EPA assumes that controls “integral” to existing equipment will remain in place; but equipment is replaced over time (and the presence of a “catalytic oxidizer” does not guarantee that catalyst will be adequately maintained).¹⁰⁶ Where sources are complying by averaging emissions between different units (as several EPA standards allow¹⁰⁷), they may alter operations to utilize higher-emitting units more frequently, especially over time.¹⁰⁸ In short, EPA relies almost entirely upon short-term constraints on sources’ ability to increase their emissions; those constraints do not suggest that emissions will remain stable over the long term. Indeed, during EPA’s prior rule-making several industrial sources confirmed that over time they would be unable to sustain the emissions levels being achieved under maximum-achievable standards.¹⁰⁹

¹⁰¹ Emissions Memo at 5.

¹⁰² See Comments of Alliance of Automobile Manufacturers at 4-5 (EPA-HQ-OAR-2004-0094-0129 (Attach. 6) (noting likelihood, over long term, that changes in requirements might result in use of “high-HAP coatings” at facilities currently using compliant materials)

¹⁰³ See, e.g., 84 Fed. Reg. 25,093, 25935 (June 4, 2019) (noting that most coil coaters have retained “solvent destruction systems” that “enable[] them to use organic paint solvents as a fuel supplement”).

¹⁰⁴ Emissions Memo at 6.

¹⁰⁵ See, e.g., 64 Fed. Reg. 24,490, 24,492 (June 1, 1999) (noting need to monitor baghouses to determine when “maintenance of the fabric filter is needed); 51 Fed. Reg. 15,438, 15,441 (Apr. 23, 1996) (noting “labor hours ... required to maintain [a] fabric filter in its most efficient state,” and that “[m]aintenance of ESPs also must be performed frequently to achieve greater emission reduction”).

¹⁰⁶ Emissions Memo at 23.

¹⁰⁷ E.g. 57 Fed. Reg. 62,608, 62,646 (Dec. 31, 1992).

¹⁰⁸ See, e.g., Comments of Carestream Health (EPA-HQ-OAR-2004-0094-0137) (Attach. 7) (describing facility using averaging to comply, such that for one coating line “[no] control” is being operated).

¹⁰⁹ See, e.g., Comments of Nucor Corp., EPA-HQ-OAR-2004-0094-0140 (Attach. 8) (observing that even where “MACT control equipment has not been removed, it is unlikely that a facility can ‘immediately’ revert to” compliance with maximum-achievable standards).

Second, EPA’s analysis focuses on changes in annual emissions.¹¹⁰ But many air toxics pose severe harms to human health when exposure occurs over much shorter periods.¹¹¹ Absent some analysis of the proposal’s effects on short-term exposures, EPA cannot assess whether it will produce emissions increases that pose substantial risks to public health.¹¹²

And third, EPA’s analysis focuses on aggregate increases in combined air toxics.¹¹³ But that aggregate figure masks the potential for dangerous increases in some air toxics—dangers that are not necessarily offset, even if other toxics are decreased. Many pollutants governed by section 112 are only ever emitted in very small quantities—and pose major health risks even in those low quantities.¹¹⁴ A source may reduce its overall emissions of other, less harmful air toxics to fall below the major-source threshold, while ceasing any control at all of mercury, dioxin, or some other pollutant—producing dire health effects, even while aggregate air-toxic emissions remain steady or even decrease. Section 112 was not meant to permit EPA to relieve sources of their obligation to reduce such pollutants, merely by reducing emissions of other harmful substances.¹¹⁵ Absent some assessment of increases in specific pollutants, EPA cannot draw any reasonable conclusions as to the effect of its proposal.

a. EPA’s Assessment Depends on Unreasonable Assumptions

¹¹⁰ See, e.g., Emissions Memo at 28 (assessing increases in tons per year), 81 (asserting that annual limit is equivalent in stringency to maximum-achievable standard).

¹¹¹ See, e.g., 79 Fed. Reg. 59,402, 59,415 (Oct. 12, 2005) (noting need to govern 1-hour average HCl emission rate, in addition to annual limit on emissions).

¹¹² See Comments of Minnesota Env’tl Protection Agency (EPA-HQ-OAR-2004-0094-0128) (Attach. 9) (noting effect of proposal on hourly emissions).

¹¹³ E.g., Emissions Memo at 25 (noting “some emission decrease (4 tpy for combined HAP)”).

¹¹⁴ See, e.g., 63 Fed. Reg. 17,838, 17,847-48 (Apr. 10, 1998), JA0291-92 (Table 1, showing total aggregate emissions of dioxins (“2,3,7,8-TCDD”), mercury, and other hazardous air pollutants by entire industrial categories amount to pounds, grams, or fractions of a gram); 57 Fed. Reg. 61,970, 61,980-81 (Dec. 29, 1992) (describing “high risk” air toxics for which “high risks of adverse public effects may be associated with exposure to small quantities”); Leg. Hist. at 3344-3346 (discussing risks from persistent hazardous air pollutants, including mercury, dioxins, and polychlorinated biphenyls).

¹¹⁵ Legis. Hist. at 867 (Congress did not intend to that exemption from the maximum achievable “standard applicable to a given pollutant and type of source could be gained by making reductions in a wholly different pollutant from a wholly separate portion of the plant”).

i. EPA's Assumption that Sources Using Compliant Materials Will Not Increase Emissions Is Not Reasonable.

EPA's analysis assumes that every source that uses compliant materials, within the 34 that have already altered their pollution limits as well as within its chosen categories, will experience unchanged emissions.¹¹⁶ That assertion lacks support in the record. For example, the maximum-achievable standard governing wood furniture manufacturing requires that sources use coatings meeting specified concentrations of formaldehyde and other pollutants.¹¹⁷ EPA asserts that the state-issued potential-to-emit requirements make the "continued use of compliant materials ... an enforceable condition."¹¹⁸ But the sources' state permits do not require the use of materials meeting the standards specified in subpart JJ; the opt-out permit for the Herman Miller facility, for example, requires only that "the permittee determine the HAP content of any material as received and as applied," and confirm that its emissions are below 9 tons per year of any one pollutant, and under 22.5 of combined pollutants—more than 20 times the plant's current emissions.¹¹⁹

Permits for the other wood-furniture facilities assessed by EPA contain similarly lenient provisions; none require the use of the particular materials specified by subpart JJ. EPA's most recent review of the industry, moreover, concluded that there was no significant difference in wood-furniture facilities using alternative, higher-emitting materials, indicating that there would be no particular costs to facilities that wished to use such materials.¹²⁰ The same is true of virtually every "coatings-type" facility within EPA's sample—while the new permits may require sources to monitor and report the HAP-content of their materials, they allow for increased overall emissions. The sources are consequently free to use higher-HAP materials than they would be under the applicable maximum-achievable standard.¹²¹

¹¹⁶ Emissions Memo at 5.

¹¹⁷ 40 C.F.R. Pt. 63 subpart JJ 63.801(a), 63.802.

¹¹⁸ Emissions Memo at 7.

¹¹⁹ *Id.* at 42-43. *See also id.* at 9 (assuming that requirement that will "ensure adequate control to remain" below major-source threshold will avoid increases beyond maximum-achievable limits, even though limits are below threshold).

¹²⁰ Memo. from Kay Whitfield dated Oct. 19, 2010 (Dkt. No. EPA-HQ-OAR-2010-0786-0029) (Attach. 10).

¹²¹ The proposal does not suggest that there is no variation in the HAP content of the available coating materials available. EPA's own analyses indicate otherwise. Surface Coatings of Plastic Parts RTC (Attach. 4) at 67 (some facilities "offset higher emissions from non-compliant coatings with lower emissions from other coatings")

EPA’s assumption that sources using compliant materials will experience unchanged emissions is, according to the Agency, based on “a conversation” with “EPA’s technical lead for the coating source categories,” and their opinion that such sources are “highly unlikely” to change their formulations.¹²² EPA’s Memo asserts that the possibility of unspecified VOC or OSHA regulations justify that opinion.¹²³ But the Agency provides nothing to indicate that those alternative regulations are of equivalent stringency, or that they apply to all facilities; neither OSHA regulations, nor most generally applicable Clean Air Act standards, are as demanding as section 112’s maximum-achievable standards.¹²⁴ Nor does EPA suggest that coatings sources are incapable of using both high- and low-HAP materials; its own analysis suggest otherwise.¹²⁵ Within some categories— aerospace, wood furniture, for example—sources alter their materials on a contract-by-contract basis, and maintain facilities that can accommodate that variability.¹²⁶

ii. EPA Has No Basis to Assume that Add-On Controls Will Be Operated at the Levels Required by Maximum-Achievable Standards.

EPA further assumes that particulate controls—electro-static precipitators and baghouses—are not ‘adjustable,’ and will therefore continue to operate at equivalent levels even after EPA allows emissions to increase. But both ESPs and baghouses require regular maintenance and appropriate upkeep—costly activities that sources are unlikely to continue absent any legal requirement to do so.¹²⁷

EPA even assumes (in the alternative), for its chosen categories, that sources will not change their operation of those controls that EPA acknowledges can be adjusted.¹²⁸ It claims that this assumption is based on its review of the sources that

¹²² Emissions Memo at 5.

¹²³ *Id.*

¹²⁴ *See, e.g.*, 67 Fed. Reg. 72,276, 72,283 (Dec. 4, 2002) (noting distinction between carcinogens regulated under OSHA and those subject to section 112); 76 Fed. Reg. 52,738, 52,755-68 (Aug. 23, 2011) (discussing different scope and stringency of standards under sections 111 and 112).

¹²⁵ *See* Surface Coatings of Plastic Parts RTC (Attach. 4) at 67 (some facilities “offset higher emissions from non-compliant coatings with lower emissions from other coatings”).

¹²⁶ *See* Comment from Shipbuilders Council of America (EPA-HQ-OAR-2004-0094-0158) (Attach. 11) (noting that sources operate on a “per contract basis, with production [and] material usage” rising or falling accordingly).

¹²⁷ *See* Air Pollution Control Technology Fact Sheet: Fabric Filter (Attach. 12) at 5 (noting that baghouses have “relatively high maintenance requirements” to sustain effectiveness); CAM Technical Guidance Document: A.25 ESP for PM Control (Attach. 13) (describing requirements to maintain ESP).

¹²⁸ Emissions Memo at 22. Even where EPA accepts that sources may increase their emissions, it ignores the sources that are emitting below the major-source

have already removed maximum-achievable standards. But very few of those sources use controls that EPA deems adjustable. For those few sources, EPA asserts that they are subject to other requirements to continue to operate those controls at equivalent levels. EPA has no reason to believe that *all* similar sources (let alone dissimilar sources) will be subject to the same idiosyncratic requirements. Indeed, within the categories it selected for analysis, EPA acknowledges that a substantial number of sources lack any such requirements.¹²⁹ EPA’s permit-review offers no plausible basis to assume that sources will consistently maintain their current emission rates. In assessing the costs of its proposal, in fact, EPA excludes only capital costs—not operating and maintenance costs—acknowledging that sources are likely to reduce both operation and maintenance of existing controls, allowing emissions to rise.¹³⁰ EPA’s past experience confirms that likely result.¹³¹

The record does not, moreover, support EPA’s assertion that state requirements will adequately prevent backsliding. EPA assumes, for example, that a state requirement to “continue to operate” a thermal oxidizer will ensure emissions reductions equivalent to those secured by the current maximum-achievable standards within the Surface Coating of Metal Cans category.¹³² But thermal oxidizers’ performance (like those of many other control technologies) depends upon detailed operational and maintenance specifications.¹³³ A requirement merely to operate the control will not ensure that the control continues to operate at maximum-achievable levels. EPA similarly assumes that sources’ operating flares will not experience increased emissions¹³⁴; but EPA’s experience has long demonstrated that the destruction efficiency of a flare depends upon a variety of

threshold, but above 75% of that threshold. *Id.* at 22. The Agency offers no basis for its omission of sources between 75% of the threshold and the threshold itself; especially as it plans to remove the monitoring requirements that might induce sources to seek a reasonable compliance margin.

¹²⁹ *E.g.* Emissions Memo at 26 (noting that many sources within “illustrative” categories lack any requirement to maintain emissions below major-source threshold).

¹³⁰ Palmer Costs Memo at 8.

¹³¹ 83 Fed. Reg. 50,444, 50,447-48 & 50,464 (Oct. 5, 2018) (describing plants ceasing to operate nitrogen oxides controls, when allowed to by existing emissions requirements).

¹³² Emissions Memo at 24, 79.

¹³³ *See generally* Comments of Institute of Clean Air Companies (EPA-HQ-OAR-2004-0094-0172) (Attach. 14) at 6-12 (detailing temperature and maintenance requirements for thermal oxidizers, as well as for catalytic oxidizers and fabric filters).

¹³⁴ *E.g.* Emissions Memo at 8 (asserting gasoline distribution facilities using flares will have no increase in emissions).

strict operational conditions, beyond those that EPA notes in its analysis.¹³⁵ And the Agency has also acknowledged that absent monitoring and enforcement, flares are not likely to be operated properly.¹³⁶ Additionally, EPA’s maximum-achievable standards are continuously applicable—including during startup, shutdown, and malfunctions, during which pollution may vastly exceed that produced during normal operations.¹³⁷ Other state and federal requirements are not uniformly applicable during such periods; as a result, even state (or some other federal) standards that impose the same requirements will permit an increase in emissions during startup, shutdown, and malfunction periods.¹³⁸

Even where state standards are currently in place that might be equivalent in stringency to current maximum-achievable standards, the proposal fails to grapple with the possibility that such standards might change. Many states have explicit rules preventing the imposition of emissions-limitations more stringent than those required by EPA.¹³⁹ EPA cannot, consequently, assume that extant state standards will provide a reliable backstop against emissions increases.¹⁴⁰

Likewise, even if the conditions placed on operating permits for already-reclassified facilities were not fatally flawed as we describe above, it would be arbitrary for EPA to assume that permitting authorities would place similar conditions on future sources seeking to reclassify. Although EPA relies on these deficient permit conditions as a basis for concluding that many of the already-reclassified sources will not increase HAP emissions, there is no provision of the Proposal that requires permitting authorities to include such conditions. Absent a requirement that permitting authorities prevent backsliding from MACT levels of control, EPA cannot reasonably assume that permitting authorities will uniformly place conditions requiring continued use of controls at major sources that reclassify under this rule.

¹³⁵ See Parameters for Properly Designed and Operated Flares (EPA OAQPS April 2012) (Attach. 15) 1-1 to 1-3 (noting “numerous factors that should be considered in order to be confident that a flare is operated properly to achieve good combustion efficiency”).

¹³⁶ EPA Flaring Efficiency Violations Enforcement Alert (April 2012) (Attach. 16).

¹³⁷ See, e.g., 80 Fed. Reg. at 56,700, 56,707 (Sept. 19, 2015) (including provisions sufficient to “ensure compliance” during such periods).

¹³⁸ See 78 Fed. Reg. 12,460, 12,485 (Feb. 22, 2013).

¹³⁹ National Association of Clean Air Agencies, Restrictions on the Stringency of State and Local Air Quality Programs (Dec. 8, 2014) (noting that “[o]ver one half” of state agencies “reported that they are precluded from adopting measures more stringent than federal requirements or may do so only under special circumstances”) (Attach. 17).

¹⁴⁰ See, e.g. Emissions Memo at 26 (assuming that current state limit will prevent emission increases).

b. *Even With EPA's Flawed Assumptions, the Assessment Demonstrates the Likelihood of Substantial Emission Increases.*

Even on its own flawed terms, EPA's analysis shows that toxic emissions are likely to rise substantially if the proposal is finalized, even in the near term—especially from the heavy-industrial categories that Congress targeted for maximum-achievable standards. EPA's assessment of the Wet-Formed Fiberglass Mat Production—a category in which EPA projects only five facilities affected by the proposal—concludes that the proposal would produce an emissions increase of up to 32.5 tons per year.¹⁴¹ Likewise, EPA estimates that within the Hydrochloric Acid Production category—in which three plants are expected to be reclassified—emissions are likely to rise by 27 tons per year.¹⁴² Given those increases from categories minimally affected by the proposal, EPA can only anticipate catastrophically large increases from those categories in which hundreds of sources will be released from their emissions-control requirements.¹⁴³ The one category selected by EPA with more than a handful of affected sources demonstrates the near certainty of a massive increase in toxic emissions; EPA's assessment of the Organic Liquids Distribution category indicates a likely emissions increase of 1,140 tons per year of hazardous air pollutants (including benzene and xylene).¹⁴⁴

Those increases demonstrate the need for EPA to address, in more rigorous fashion than the shoulder-shrugging diffidence offered in the proposal, the likely health impacts of its proposal. That is especially so because EPA's proposal exempts these sources from section 112(f)'s residual-risk backstop, even as it allows them to vastly increase their emissions. Congress' clear concern with not just raw tons of air pollution, but with the consequences of pollution to those especially vulnerable to toxic risks, establishes that those consequences are critically important to EPA's decision.

c. *EPA Cannot Assign Zero Emissions Consequences to the Removal of Monitoring Requirements.*

EPA asserts that the proposal will allow polluters to reduce their spending on emissions reduction by approximately \$200 million dollars each year.¹⁴⁵ Even if that reduced spending reflects only the elimination of monitoring and reporting requirements (a proposition for which EPA offers no record support), rather than reduced operation of pollution-control devices or eliminating pollution-reduction

¹⁴¹ Emissions Memo at 26.

¹⁴² *Id.*

¹⁴³ *See* Palmer Costs Memo at 25 (estimating 326 sources affected within Municipal Solid Waste Landfills category) & 28 (908 sources exempted within Industrial Boilers category).

¹⁴⁴ Emissions Memo at 27.

¹⁴⁵ Palmer Costs Memo at 22, 27-28.

practices, EPA cannot assume that monitoring and recordkeeping is unrelated to sources' emissions. Compliance with emissions limits depends on monitoring. Indeed, the monitoring contained within EPA's maximum-achievable standards is defined as that required to ensure that emissions remain at those levels.¹⁴⁶

EPA has never asserted that its maximum-achievable standards include monitoring that is duplicative, or unnecessary to ensure compliance. On the contrary it has consistently confirmed that its standards “represent what EPA believes to be the *minimum* needed to ensure compliance with the emission limits in the final rule.”¹⁴⁷ The Agency cannot remove the monitoring that is sufficient and necessary to ensure compliance, and simultaneously assume that compliance—and emissions that depend on compliance—will be unchanged. EPA has ample evidence of non-compliance by sources subject to maximum-achievable standards.¹⁴⁸ Eliminating monitoring requirements necessarily makes enforcement of those requirements less consistent and likely, or impossible. The proposal ignores the resulting increases in pollution.¹⁴⁹

¹⁴⁶ See 42 § U.S.C. 7661c(c) (requiring “monitoring ... requirements sufficient to assure compliance”).

¹⁴⁷ Surface Coatings of Plastic Parts RTC at 96 (Attach. 4) (emphasis added). *Accord* National Emission Standards for Hazardous Air Pollutants: Gold Mine Ore Processing and Production Area Source Category; and Addition to Source Category List for Standards, 76 Fed. Reg. 9450-01 (specifying monitoring “sufficient for determining that [pollution controls] are operating properly”). National Emission Standards for Hazardous Air Pollutants: Surface Coating of Automobiles and Light-Duty Trucks; Surface Coating of Miscellaneous Metal Parts and Products; Surface Coating of Plastic Parts and Products; Surface Coating of Large Appliances; Printing, Coating, and Dyeing of Fabrics and Other Textiles; and Surface Coating of Metal Furniture Residual Risk and Technology Review (Aug. 16, 2019), Pre-Publication Document (“Surface Coatings RTR”) at 100-2 (confirming that “on-going periodic performance testing” necessary to ensure compliance, because “as the control device ages over time, the destruction efficiency of the control device can be compromised due to various factors”); National Emission Standards for Hazardous Air Pollutants for Area Sources: Acrylic and Modacrylic Fibers Production, Carbon Black Production, Chemical Manufacturing: Chromium Compounds, Flexible Polyurethane Foam Production and Fabrication, Lead Acid Battery Manufacturing, and Wood Preserving, 72 Fed. Reg. 38,864-01 (“Federal standards promulgated pursuant to the 1990 Clean Air Act Amendments are presumed to obtain monitoring sufficient to assure compliance.”). See also 84 Fed. Reg. 29,860, 29,861 (“[A]ll NESHAP standards require” notifications, reports, and records, and such “notifications, reports and records are essential in determining compliance.”).

¹⁴⁸ See e.g. Consent Decree, *United States v. Tesoro Refining & Marketing Co. LLC*, Civ. No. SA-16-cv-00722 (W.D. Tex. July 18, 2016) (Attach. 18).

¹⁴⁹ See *New York v. EPA*, 413 F.3d 3, 35 (D.C. Cir. 2005) (EPA's failure “to explain how it can ensure ... compliance without the relevant data” is unlawful).

d. EPA's Assessment of Emissions Decreases Contradicts Its Own Prior Statements.

The proposal, by its terms, only serves to increase the amount of pollution that affected sources are allowed to produce. EPA speculates that the proposal may nevertheless induce some sources to reduce their pollution. The proposal offers no reasonable basis for that implausible claim.

As an initial matter, EPA's approach to emission decreases is notably asymmetric to its approach to pollution. Where its emissions-increase analysis ignores those categories that threaten the largest emissions increases, its analysis of potential decreases selects only those with "the highest potential for costs savings."¹⁵⁰ That combination ensures that EPA understates the potential for emissions increases, even as it overstates the possibility of emission decreases. And while it finds that a source-by-source analysis is required to assess emissions increases,¹⁵¹ it claims to be able to characterize decreases without any such fine-grained analysis.¹⁵²

Setting those unexplained discrepancies aside, EPA's analysis is based on average compliance costs, rather than marginal costs—an assumption that EPA accepts as flawed.¹⁵³ The costs of past reductions in hazardous emissions do not reflect the costs of additional reductions; reductions beyond the maximum-achievable specified by EPA in its extant standards require controls that are more expensive than those currently in place (to the extent such controls exist at all). In its technology reviews, EPA has repeatedly confirmed that additional reductions will be more costly than the average cost per ton of the emissions-reductions already achieved. For example, in its Residual Risk and Technology Review for the Miscellaneous Metal Parts NESHAP, EPA found that there are no means available to reduce emissions from sources within that category that are not "prohibitive" in cost, aside from the possibility of an add-on "thermal oxidizer" for two subcategories, at a cost of \$9,500 to \$11,700 per ton.¹⁵⁴ Yet for the proposal, EPA assumes an aggregate cost for future reductions of \$3,070 per ton, across all sources.¹⁵⁵ The Agency has not explained, and cannot justify, its reliance on the

¹⁵⁰ Memo from Larry Sorrels to EPA Docket No. EPA-HQ-OAR-2019-0282 dated May 2019 ("125% Memo") at 2.

¹⁵¹ Emissions Memo at 1

¹⁵² 125% Memo at 1.

¹⁵³ *Id.* at 3.

¹⁵⁴ Surface Coatings RTR at 118-21.

¹⁵⁵ 125% Memo at 4. EPA's analysis does not clearly explain whether its emissions-reductions costs are based on reductions to the threshold, or to 75% of the threshold. As the agency assumes that polluters will only reclassify if they can reduce

lower figure. Nor, more broadly, has it explained why it now believes that cost-effective controls are available, when its standard-setting and Residual Risk and Technology Reviews have consistently confirmed that no such controls exist.

To the extent that EPA's analysis asserts the existence of cost-effective controls for such categories, moreover, it has failed to account for section 112's requirement that the Agency update its standards to address "developments in practices, processes, and control technologies."¹⁵⁶ EPA tacitly assumes that current standards will remain in place, even where cost-effective control options exist that would produce meaningful reductions in hazardous pollution. But if those options exist, section 112(d)(6) requires EPA to update its standards to reflect those additional reductions. EPA's analysis fails to account for the emission reductions that would necessarily be produced by those technology reviews—reductions that should duplicate any emission decreases that might result from the proposal (while avoiding the increases that the proposal will produce).

e. Other Analyses Have Demonstrated a Risk That the Proposal Will Result in Significant Pollution Increases.

EPA also ignores other analyses demonstrating that the Proposal could lead to substantial increases in dangerous HAP pollution at a large number of sources. For example, the Agency itself prepared an analysis in 2007 of the possible impacts of allowing major sources in the synthetic organic chemical manufacturing industry (SOCMI) to reclassify as area sources in response to an inquiry by the House Committee on Energy and Commerce.¹⁵⁷ Based on data from the 1999 National Emissions Inventory, that analysis concluded that 55 of the 228 major sources in that source category emitted below the major source thresholds and could be eligible to reclassify. Focusing only on the minority of those sources that were not located in ozone nonattainment areas (at that time), EPA concluded that those sources could increase HAP emissions by a maximum of 358 tons per year. EPA further concluded that these emissions increases would outweigh any potential decreases from sources that voluntarily reduce emissions in order to reclassify as area sources—even after assuming that even sources emitting up to *twice* the 10/25 ton per year thresholds would be induced to reduce their emissions.

More recently, Environmental Defense Fund prepared an analysis of the impacts of allowing reclassification of major sources following the release of the January

emissions to 75% of the threshold, EPA's costs assessment should use that assumption.

¹⁵⁶ 42 U.S.C. § 7412(d)(6).

¹⁵⁷ Letter from William L. Wehrum, Acting Assistant Administrator to the Hon. John D. Dingell, Chairman, House Committee on Energy and Commerce, Responses to Questions for the Hon. Stephen L. Johnson 1-2 (Mar. 30, 2007) (Attach. 19).

2018 Wehrum memorandum.¹⁵⁸ EDF's analysis focused on the potential impacts of the Wehrum memorandum in the Houston-Galveston region, based on 2014 NEI data, information from the Agency's Enforcement and Compliance History Online (ECHO) database, and a review of facility-specific permit information. EDF identified up to 26 major sources of HAPs in the region that emit below the major source thresholds and could potentially avoid complying with MACT standards if they were to reclassify as area sources. If those sources were to increase their emissions from a 2014 baseline to the major source thresholds, EDF found that the facilities' total HAP emissions would increase by 152 percent (an increase of nearly 800,000 pounds). Many of these facilities are located in communities that are highly vulnerable to the impacts of air pollution: half of the facilities EDF examined are located in areas where more than one in five residents live in poverty, and where people of color make up more than thirty percent of the population.

A 2018 analysis by the Environmental Integrity Project likewise examined the impacts of the Wehrum memorandum at twelve major source industrial facilities located in the Midwest. EIP's analysis concluded that HAP emissions from these facilities could more than quadruple if they were to reclassify as area sources, reaching a total of 540,000 pounds of HAP per year. EIP found that over 60,000 people live within just one mile of the facilities included in the study, most in neighborhoods with poverty rates at least twice the national average.¹⁵⁹

B. EPA Has Failed to Address Its Administration of the Section 112 Program, Which Has Unfolded in Reliance on the Once-In Policy.

The proposal would drastically revise EPA's understanding of section 112, and do so after EPA has completed its administration of the majority of the statute's requirements. EPA's past actions critically relied upon the Once-In Policy. For example, EPA's area source standards have been devised on the assumption that the sources within area-source categories differ significantly from those in major-source categories.¹⁶⁰ Where EPA's area source categories have encompassed sources that are, for emissions-control purposes, identical to those in the corresponding

¹⁵⁸ See Tomás Carbonell, Rama Zakaria and Surbhi Sarang, *Pruitt's New Air Toxics Loophole 2* (Environmental Defense Fund, Apr. 2018), available at <https://www.edf.org/sites/default/files/documents/OIAI-Houston%20case%20study%20FINAL.pdf>. (Attach. 20).

¹⁵⁹ Env'tl. Integrity Project, *Toxic Shell Game 1* (Mar. 26, 2018), available at <https://www.environmentalintegrity.org/wp-content/uploads/2017/02/Toxic-Shell-Game.pdf>. (Attach. 21).

¹⁶⁰ See, e.g., *U.S. Sugar*, 830 F.3d at 654 (EPA's standard based on assumption that would only govern "smaller boilers").

major source category, the Agency has recognized that it should apply the same maximum-achievable standards to both categories.¹⁶¹

The Once-In Policy ensured that distinction; the proposal would upend it. EPA's generally available standards would apply to sources governed by major source standards and, by definition, fully capable of complying with maximum achievable standards. EPA's past rules critically relied upon the Once-In Policy—a vital reliance interest the proposal fails to address. That is especially so for EPA's standards which expressly incorporate the Once-In Policy; the Agency cannot amend those rules to remove the Once-In Policy, without also reassessing the standard-setting decisions contained within them.¹⁶²

EPA has, likewise, addressed several of section 112's key benchmarks. It has, for example, concluded that it has ensured that especially high-risk pollutants are subject to maximum achievable standards, as required by section 112(c)(6). That finding relied on the Once-In Policy's rule that sources subject to maximum achievable standards would not backslide out of them.¹⁶³ Likewise, EPA's residual-risk standards under section 112(f) have presumed that, pursuant to the Once-In policy, sources subject to maximum achievable standards will continue to be governed by those standards.¹⁶⁴ EPA has not addressed the impact of its proposal on those actions, all of which were taken in reliance upon the Once-In Policy.

C. EPA's Failure to Include the Identities of the Major Sources on Which Its Emissions Impacts and Cost Estimates Are Based Contravenes The Clean Air Act.

The Regulatory Impact Analysis (RIA) accompanying EPA's proposal indicates that the agency's estimates of both the impacts on emissions and costs are based on

¹⁶¹ See, e.g., 59 Fed. Reg. 29,750, 29,757 (June 9, 1994) (where there are “no technological or economic reasons why ... area sources cannot achieve the same level of control as ... major sources,” maximum-achievable standards should apply to both); 75 Fed. Reg. 54,970, 54,987-88 (Sept. 9, 2010) (where there is “no essential difference between” area and major sources, EPA should impose “common ...limits based on [maximum-achievable control technology]” to area sources).

¹⁶² E.g., 84 Fed. Reg. at 36,327 (proposing to change “several NESHAP subparts that reflect the 1995 OIAI policy,” but not addressing standards within those subparts).

¹⁶³ See 79 Fed. Reg. 74,656, 74,677 (Dec. 16, 2014).

¹⁶⁴ E.g., 79 Fed. Reg. 72,874, 72,884-85 (Dec. 8, 2014); 83 Fed. Reg. 46,262, 46,272 (Sept. 12, 2018). EPA's cursory assessment of emissions increases produced by its proposal does not answer this concern. First, the analysis does not address all of the categories covered by EPA's residual-risk determinations. And second, section 112(f)'s requires EPA to examine “the individual most exposed to emissions from a source in the category”—that aggregate category-wide emissions may not rise, even if true, does not answer that requirement.

projections about which sources will obtain area source status. EPA projects very specifically that 3,912 major sources (49.4 percent of all major sources) will obtain area source status.¹⁶⁵ The agency also provides projections for each source category. For example, EPA projects that of the 424 petroleum refineries that are subject to its MACT rule for this category, 149 will obtain area source status.¹⁶⁶ EPA fails, however, to identify the vast majority of sources on which its estimates are based. Nowhere in the record, for example, does EPA identify the 149 refineries that it expects to obtain area source status.¹⁶⁷

EPA has indicated that it intends to provide sufficient identifying material into the record for the Proposal, and re-open the comment period. Should EPA's fail to do, it will deprive the public of an opportunity to fully comment on the proposal and, ultimately, deprive the Agency of public input that it needs to make informed decision on the proposal. First, the public cannot comment on whether EPA's projections about which facilities will obtain area source status are correct. EPA has stated that these projections are based on which sources have actual emissions below 75 percent of the major source threshold.¹⁶⁸ The public cannot comment on whether EPA is correct in its assumptions about which sources do in fact have actual emissions at this level.

Second, and as a result, the public cannot fully comment on EPA's estimates about emission impacts. Without knowing which sources EPA's estimates are based on, the public cannot assess, or fully comment on, the accuracy and reliability of those estimates. Depriving the public of this opportunity is especially problematic given EPA's heavy reliance on "illustrative" claims about a small number of categories. Without knowing the specific sources will obtain area source status in the many categories EPA did not use as "illustrations," the public cannot fully demonstrate the extent to which those illustrations are inaccurate and misleading. For example, the RIA shows that 149 refineries will obtain area source status and benefit to the tune of more than \$150,000 per refinery each year.¹⁶⁹ Because the identity of the benefiting refineries is absent from the docket, however, the public cannot fully assess what the emissions impacts will be—either from these refineries individually or from all of them collectively. More generally, because such information is missing for many source categories, the public cannot fully comment on the inaccuracy of EPA's estimates of emissions impacts.

¹⁶⁵ RIA at 1-6, Table 1-1.

¹⁶⁶ RIA at Table 3-1.

¹⁶⁷ While the record includes spreadsheets that identify the sources by "EIS" numbers, the EIS system is unavailable to the public. Moreover, for many of these sources there is no identifying data available.

¹⁶⁸ RIA at 2-1.

¹⁶⁹ *Id.* at Table 3-1.

Third, the public cannot discover or comment on the impacts EPA's rule will have on specific communities. If EPA is correct that 149 refineries will obtain area source status, then people in many communities will face significant increases in exposure to toxic emissions. These people will not be able to learn about the impending increase in exposure, let alone act to address or avoid it. The organizations presenting these comments have members in communities across the nation that are impacted by refinery emissions. Without the information that is currently missing from the docket, they cannot inform their members of the additional exposure and risk they face or enable them to seek help from their government representatives.

Fourth, EPA is currently engaged in many risk-based rulemakings under Clean Air Act § 112(f).¹⁷⁰ These rulemakings must be based on the risk to most exposed individual as well as the risks to the exposed populations more generally. Without knowing which facilities will obtain area source status and increase emissions, the public cannot fully assess or comment on the risk to either the most exposed individual or the broader risk to exposed populations. For example the public cannot fully comment on EPA's assessment of risk from refineries without knowing which specific refineries will obtain area source status and increase their emissions.

EPA has determined that the proposed rule is subject to Clean Air Act § 307(d).¹⁷¹ Clean Air Act § 307(d)(3) provides that EPA's proposed rules must include a summary of: "(A) the factual data on which the proposed rule is based" and "(B) the methodology used in obtaining and in analyzing the data."¹⁷² It further provides "[a]ll data, information, and documents referred to in this paragraph on which the proposed rule relies *shall be included in the docket on the date of publication of the proposed rule.*"¹⁷³ Until it supplements the record and reopens the comment period, EPA has not included in the docket for its proposed rule all the data information and documents on which the proposed rule relies. Accordingly, its proposal contravenes § 307(d)(3).

EPA released some of this material, to some parties, upon inquiry during the closing weeks of the comment period. That does not, however, satisfy EPA's obligations under section 307(d)(3), which requires EPA to make available, at the time of proposal and in the docket, all the information upon which EPA's proposed rule relies.¹⁷⁴ Providing it to some parties, a few days prior to the close of the comment period, is insufficient. And, centrally, the various databases that provide facility-identifying information to those who might understand the numeric references in EPA's files are not in the record for the proposed rule. Moreover, any

¹⁷⁰ 42 U.S.C. § 7412(f).

¹⁷¹ 84 Fed. Reg. at 36,336.

¹⁷² 42 U.S.C. § 7607(d)(3).

¹⁷³ *Id.* (emphasis added).

¹⁷⁴ 42 U.S.C. § 7607(d)(3).

person who wishes to use those databases would need to search for thousands of identification numbers, one-by-one, in EPA’s ECHO database. Nor can the public be expected to search for EIS numbers in EPA’s NEI data, which has more than a million EIS identification numbers within it (and there are many EIS numbers in the RTR workbook that are not listed in the 2017 NEI data). Finally, there are several facilities in the RTR workbook that lack both FRS and NEI ID—there is no evident way to identify those facilities at all.

III. THE PROPOSAL’S ADMINISTRATIVE PROVISIONS SHOULD INCLUDE AN ANTI-BACKSLIDING REQUIREMENT, BUT CANNOT EXTEND THE STATUTORY COMPLIANCE DEADLINE

A. EPA Cannot Permit Backsliding

EPA acknowledges that many industrial facilities now regulated as major sources of HAP would have the ability and incentive to modify or remove their pollution limits, and increase dangerous pollution, if they were to reclassify themselves as area sources under the interpretation of section 112(a) advanced in the proposal.¹⁷⁵ As explained above, Joint Environmental Commenters believe that the potential increases in dangerous pollution associated with reclassification of major sources would contravene the language and intent of section 112 of the Clean Air Act, and are a primary reason why EPA’s proposed interpretation of section 112(a) to allow reclassification is neither a permissible nor a reasonable reading of the statute—much less a compulsory reading.

Nevertheless, EPA also suggests in the proposal that the harmful impacts of allowing reclassification of major sources could be mitigated if the agency were to interpret section 112(a) in a way that includes “safeguards” against potential emission increases once the source has been reclassified. In particular, EPA suggests that the term “considering controls” in section 112(a) can reasonably be interpreted to require that a currently major source adopt an enforceable limit on PTE that protects against emission increases as a condition of reclassification.¹⁷⁶ EPA requests comment on the legal basis for requiring such safeguards, as well as the form such safeguards should take.¹⁷⁷ (C-6)

Should EPA finalize this unlawful and misguided proposal, Joint Environmental Commenters believe that the agency must adopt effective safeguards to prevent reclassified sources from backsliding from MACT levels of control. In this section of

¹⁷⁵ See Proposal, 84 Fed. Reg. at 36,332, Table 3 (indicating that reclassified sources in Wet Formed Fiberglass, HCl Production, and Non-Gasoline OLD source categories could increase HAP emissions by combined total of 1,200 tons per year under the proposal).

¹⁷⁶ *Id.* at 36,312.

¹⁷⁷ *Id.* at 36,313.

our comments, we describe three statutory mechanisms that EPA can and must implement to mitigate the harmful consequences of its unlawful and arbitrary proposal to allow major sources to reclassify themselves as area sources.

First, assuming *arguendo* that paper restrictions on a source’s emissions or operations can limit its potential to emit, EPA is correct in suggesting that such limits must prevent backsliding from MACT levels of control. *Second*, EPA has a responsibility under section 112(c) to establish appropriate area source categories for the “new” area sources that will result from reclassification (or to create new subcategories for those sources where an already-listed area source category applies), and to establish an appropriate emission limitation for those reclassified sources under section 112(d). Given that these newly-reclassified sources have already been complying with MACT standards and are fully-equipped to continue doing so, there is no basis for EPA to establish a less-stringent level of control for these area sources. *Third*, as EPA recognizes in the proposal, section 110(l) of the Act prevents the Administrator from approving “any” revision to a state implementation plan—including any revision to major source NESHAP requirements that are included in the SIP—if doing so would “interfere” with attainment or reasonable further progress towards attainment of a NAAQS.¹⁷⁸

1. Section 112(a) Should be Understood to Prevent Reclassified Sources from Backsliding from MACT Levels of Control

In the Proposal, EPA asserts that the term “potential to emit considering controls” in section 112(a) can, when applied to a major source that adopts a PTE limit as a condition of reclassifying to an area source, be fairly read to prevent the source from backsliding from the MACT level of control it achieved while a major source.¹⁷⁹ Indeed, the statute *must* be interpreted this way if EPA proceeds to adopt its unlawful interpretation of section 112(a) allowing major sources to reclassify as area sources at any time. Any rule finalizing this interpretation must protect against harmful increases in hazardous air pollution by requiring that any PTE used as the basis for reclassification provide safeguards against departing from MACT levels of control.

If EPA reads the statute as the proposal suggests (setting aside that reading’s unlawfulness), the phrase “potential to emit considering controls” can only be understood to include controls that a source *is utilizing at the time that it adopts the PTE, while it is still subject to a major source NESHAP*. As EPA notes in the proposal, the courts have recognized that a PTE must reflect “effective” controls, and is “not allowed to take into account controls that are only chimeras and do not

¹⁷⁸ 42 U.S.C. § 7410(l).

¹⁷⁹ Petitioners do not, by this, mean to suggest that the proposal is any sense lawful.

really restrain an operator from emitting pollution.”¹⁸⁰ Further, while PTE must reflect the “maximum capacity” of a source to emit pollution,¹⁸¹ and can only consider controls that are federally enforceable, the courts have also determined that the concept “contemplates the maximum emissions that can be generated while operating the source as it is intended to be operated and as it is normally operated.”¹⁸²

When a major source adopts a PTE as a condition of reclassifying to an area source, then, section 112(a) does not permit, let alone require, that EPA or state permitting authorities approve *any* PTE that happens to fall below the major source threshold—particularly where that PTE is premised on the source weakening or removing pollution controls that are *already* in place and required under the then-applicable, federally-enforceable major source NESHAP. Such a PTE would clearly not actually reflect a limit on the source’s “potential to emit considering controls.” Further, it would not be an “effective” limit, and would instead be a “chimera” that “do[es] not really restrain the operator from emitting pollution” as the D.C. Circuit warned against in *NMA*.¹⁸³ Contrary to the case law cited above, such a PTE would also not reflect the operation of the source “as it is normally operated” while it is still subject to a major source NESHAP.¹⁸⁴

Allowing a reclassified source to adopt a PTE premised on weakened or removed pollution controls would also undermine the express purpose of section 112(d)—reinforcing that “potential to emit considering controls” must be interpreted to prevent backsliding from MACT levels of control. As EPA suggests in the Proposal, section 112(d) should inform the proper interpretation of section 112(a).¹⁸⁵ The words of section 112(a) must be read “in their context and with a view to their place

¹⁸⁰ *NMA v. EPA*, 59 F.3d 1351, 1362 (D.C. Cir. 1995).

¹⁸¹ 40 C.F.R. § 63.2

¹⁸² *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1157-58 (D. Colo. 1988).

¹⁸³ *NMA*, 59 F.3d at 1362.

¹⁸⁴ *Louisiana-Pacific Corp.*, 682 F. Supp. at 1157-58.

¹⁸⁵ Proposal, 84 Fed. Reg. at 36,313 (“[S]ome interested parties have presented arguments opposing the EPA’s plain language reading on timing based on CAA section 112(d)— specifically, that major sources must be subject to MACT floor standards that are at least as stringent as what is achieved by the best performing sources, as provided under CAA section 112(d)(2) and (d)(3). The EPA is seeking comment on whether the arguments presented in opposition to EPA’s plain language reading on timing are appropriately considered on the question of the sufficiency of the PTE limit and support the conclusion that PTE limits used to support reclassification must not allow sources to increase emissions as a result of reclassification.”)

in the overall statutory scheme.”¹⁸⁶ And as Joint Environmental Commenters explain above, the context for section 112(a) clearly indicates that Congress did not intend for a major source to be able to escape MACT controls simply because compliance with a MACT standard happens to drive HAP emissions from that source below the major source threshold.

Indeed, the “maximum achievable control technology” requirement of section 112(d)(2) specifically provides that MACT standards must include a “*prohibition* on [HAP] emissions, where achievable.” Moreover, section 112(d)(2) goes on to enumerate specific control measures that should be considered in establishing a MACT standard, including measures that “*eliminate emissions* of [HAPs] . . . through process changes, substitution of materials or other modifications,” “enclose systems of processes to *eliminate emissions*,” “*collect, capture, or treat* such pollutants,” and combinations of such measures.¹⁸⁷ Thus, section 112(d)(2) expressly requires major sources to be subject to standards that prohibit or eliminate HAP where feasible—a statutory command that would be frustrated if EPA were to interpret section 112(a) in a way that allows major sources to escape MACT levels of control by reclassifying themselves as area sources.¹⁸⁸ Because “[w]e cannot interpret federal statutes to negate their own stated purposes,”¹⁸⁹ a safeguard ensuring that reclassified sources adopt PTEs that reflect MACT levels of control is the only reading of section 112(a) that will give proper effect to section 112(d) in the event that EPA finalizes this unlawful proposal.

2. The Plain Language of Section 112 Requires That EPA, At Minimum, Prescribe for Reclassified Sources GACT Standards That Reduce Their Emissions of Hazardous Air Pollutants.

In the Proposed Rule, EPA acknowledges that sources reclassifying from major source status are “subject to any applicable area source requirements issued pursuant to CAA section 112.”¹⁹⁰ EPA, however, gives insufficient attention to what

¹⁸⁶ *King v Burwell*, 135 S.Ct. 2480, 2483 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

¹⁸⁷ 42 U.S.C. § 7412(d)(2)(A)-(E) (emphasis added).

¹⁸⁸ Although section 112(d)(2) applies by default to area sources as well, section 112(d)(5) grants EPA discretion to apply less stringent “generally available control technology” standards to area sources instead – an authority EPA has exercised frequently. By contrast, Congress clearly intended that major sources be required to abide by MACT levels of control, including MACT standards that prohibit HAP emissions where feasible.

¹⁸⁹ *N.Y. State Dept. of Social Servs. v. Dublino*, 413 U. S. 405, 419-20 (1973).

¹⁹⁰ 84 Fed. Reg. at 36,323; *see also id.* at 36,324 (acknowledging that major sources reclassifying to area source status must comply with “applicable area source NESHAP requirements”).

those requirements will be. Specifically, EPA fails to acknowledge that, in many cases, section 112 will require the Agency to set NESHAPs specifically for reclassified sources and, in virtually all others, grant it the authority to do the same. If EPA finalizes this misguided proposal to withdraw its longstanding Once-In Policy, the Agency must fully describe, as outlined below, its statutory responsibility to create categories for sources reclassifying from major source categories that lack area source category counterparts, and its authority to create area source subcategories where appropriate. The Agency must also fully detail its statutory responsibility to set, at minimum, GACT standards for reclassified sources. As we detail below, such standards must ensure reductions in HAP emissions. And until EPA takes those steps, it cannot release sources from their current, maximum-achievable control obligations. *See* Section I.B.4, *above*.

Because some major source categories do not have a corresponding area source category, some reclassifying sources may not fall within a pre-existing area source category. Such sources cannot simply become orphaned, free-floating sources with no category to call home. *See* 42 U.S.C. 7412(c)(6) (limiting EPA’s ability to de-list). Rather, EPA must establish an area source category for them under subsection 112(c)(3).¹⁹¹ That provision states that EPA “shall list . . . *each* category or subcategory” of area sources that pose a threat to human health or the environment.¹⁹² That language leaves no room for area sources to exist beyond the bounds of some category. EPA must therefore list under (c)(3) reclassified sources that do not fall within a pre-existing area source category.

Reclassified sources within these newly listed categories will be subject to MACT by statutory default,¹⁹³ and there is no basis for EPA to establish a less-stringent level of control. These newly reclassified sources, built as they were with major source capacity, already have controls and practices in place for complying with MACT standards, and are fully equipped to continue to do so going forward. If EPA wants to apply GACT instead of MACT, the Agency must provide a reasoned

¹⁹¹ *See* 42 U.S.C. § 7412(c)(3) (emphasis added); *see also id.* § 7412(c)(1) (stating that EPA shall publish and periodically revise its list of area source categories, demonstrating that EPA’s nondiscretionary obligation to list area source categories is ongoing).

¹⁹² 42 U.S.C. § 7412(c)(3) (emphasis added); *see also id.* § 7412(c)(1) (stating that EPA shall publish and periodically revise its list of area source categories, demonstrating that EPA’s nondiscretionary obligation is ongoing).

¹⁹³ *See* 42 U.S.C. § 7412(d)(1) (requiring EPA to promulgate emission standards for each category or subcategory of area sources); *id.* § 7412(d)(2) (stating that such emission standards must require the “maximum degree of reduction . . . achievable”).

explanation for its action.¹⁹⁴ And this explanation must make clear how less-stringent GACT standards can possibly be more appropriate for reclassified sources given their continuing ability to meet MACT standards.

Assuming that EPA provides an adequate explanation for applying GACT and proceeds to in fact apply it, the provision that allows it to do so—section 112(d)(5)—plainly embodies an anti-backsliding ethos that requires EPA to take measures to ensure that application of GACT does not increase pollution. Section 112(d)(5) states that, in lieu of MACT standards, EPA “may . . . elect to promulgate standards or requirements [for area sources] . . . which provide for the use of generally available control technologies . . . by such sources *to reduce emissions of hazardous air pollutants.*”¹⁹⁵ This language does not permit GACT standards that allow for an increase (or even stasis, for that matter) in HAPs emissions. The statute plainly contemplates that GACT must be “use[d]” by area sources “*to reduce emissions of hazardous air pollutants.*” It is therefore not sufficient for EPA to promulgate GACT standards aimed merely at keeping an area source’s emissions below the major source threshold. GACT standards for reclassified sources in newly created source categories, if there are to be any such standards, must be stringent enough to ensure reductions in HAP emissions.

Under EPA’s proposal, it will also often be the case that a major source reclassifies into a pre-existing area source category. In these instances, where sources within the pre-existing area source category are subject to MACT, the reclassified source is also subject to MACT and should remain so given that these reclassified sources already have MACT controls installed and are already meeting MACT standards. If sources within the pre-existing area source category into which the major source is reclassifying are subject to GACT, EPA should create a subcategory for the reclassifying major sources and ensure that sources within said subcategory are, at minimum, subject to GACT standards. Subcategorization in this manner would clearly be within EPA’s authority under the section 112,¹⁹⁶ but we here again emphasize that, if EPA is to subject any reclassified sources to GACT standards, the agency must provide “some explanation for why [those] standards

¹⁹⁴ See *U.S. Sugar*, 830 F.3d at 652–53 (“Despite the Agency’s broad discretion, we cannot sustain its action in the absence of some explanation for why GACT standards are more appropriate than MACT standards for these sources and types of pollutants.”); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring the agency to articulate “a rational connection between the facts found and the choice made”) (internal citation omitted).

¹⁹⁵ 42 U.S.C. § 7412(d)(5) (emphasis added).

¹⁹⁶ See *id.* § 7412(c)(5) (“[T]he Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants”); see also *id.* § 7412(c)(1) (“Nothing in the preceding sentence limits the Administrator’s authority to establish subcategories under this section, as appropriate.”).

are more appropriate” than MACT¹⁹⁷—a showing that it cannot make, given that the sources are already complying with MACT levels of control.

Subcategorization along these lines would also be sound policy given that reclassified sources would be differently positioned relative to other area sources in the GACT-subject category. Again, reclassified sources will already be equipped to meet more stringent standards given their prior classification as major sources. GACT for these sources should therefore require, at minimum, the continued use of the control technologies, methods, and practices to which these sources were subject when they were major sources. This would likely be the most efficient, least-cost means to ensure that major sources reclassifying to area source categories subject to GACT “use” those control technologies “to reduce emissions of hazardous air pollutants.”¹⁹⁸

3. *State Air Toxics Provisions in SIPs*

As EPA acknowledges in the Proposed Rule, the Agency cannot approve the removal of state air toxic provisions from SIPs—whether initiated by a State, or by EPA under § 110(k)(6)—unless the Agency can conclude that such revisions would not interfere with attainment of, or result in backsliding toward, the NAAQS.¹⁹⁹ Such backsliding might occur if a state intentionally relies on its air toxics provisions to address criteria pollutant emissions, which EPA has implicitly acknowledged is a possibility.²⁰⁰ Such backsliding could also occur if a state’s air toxics provisions *incidentally* have the effect of limiting criteria pollutant emissions, which EPA has also implicitly acknowledged previously.²⁰¹ In determining whether a SIP revision would satisfy the requirements of section 110(l), “EPA considers the relevant impacts of the proposed change in light of the type of requirement affected by the requested revision.”²⁰² Proposed SIP changes as a consequence of this rulemaking must therefore analyze the possible impacts to criteria pollution of any proposed SIP change pursuant to this rulemaking, and demonstrate that the change would not interfere with NAAQS attainment or reasonable further progress.

¹⁹⁷ *U.S. Sugar*, 839 F.3d at 652.

¹⁹⁸ 42 U.S.C. § 7412(d)(5) (emphasis added).

¹⁹⁹ See 84 Fed. Reg. at 36,323; see also 42 U.S.C. § 7410(l).

²⁰⁰ See, e.g., Kentucky SIP Revision, 75 Fed. Reg. 2,440, 2,441-42 (Jan. 15, 2010) (deleting Kentucky’s air toxics regulation from the state’s SIP in part because the state “has never used this rule to regulate CAA Section 110 criteria pollutants in any way that is related to the attainment and maintenance of NAAQS”).

²⁰¹ *Id.* (“Kentucky has not relied on *or attributed* any emission reductions from this rule to any NAAQS attainment or maintenance plans required under Section 110 of the CAA.” (emphasis added)).

²⁰² Proposed Alabama SIP Revision, 72 Fed. Reg. 18,428, 18,429 (Apr. 12, 2007).

B. The Proposal's Efforts to Allow Compliance at Periods Later than Three Years from a Standard's Effective Date Are Unlawful and Unnecessary.

EPA proposes to grant certain sources—those that need to “undergo physical changes” or “install additional control equipment”—a three-year period before they would be required to comply with applicable generally-available standards, even after they cease complying with maximum-achievable standards.²⁰³ Those sources would, as a result, be exempted from any section 112 standard for as much as three years.²⁰⁴

That proposal has no basis in the statute (C-36, C-37, C-38). Section 112(i)(3)(A) requires EPA (or a State) to demand “compliance as expeditiously as practicable, but in no event later than 3 years after *the effective date of such standard....*”²⁰⁵ EPA claims that the “principle” of section 112(i)(3)(A) is that EPA may grant a source up to three years whenever “it determines that such time is appropriate based on the facts and circumstances.”²⁰⁶ But the statutory text does not provide anything approaching that broad authority. First, EPA cannot allow for compliance any later than 3 years after a standard’s effective date.²⁰⁷ That language provides no room for EPA’s proposal—which would instead delay compliance for three years past EPA’s extra-statutory exemption of sources from previously applicable maximum-achievable standards. That Congress expressly tied its compliance timeline to the effective date of the standard (which is, under section 112, the date of the standard’s promulgation²⁰⁸) confirms that the standard with which a source must comply is determined when the standard is “promulgated.”²⁰⁹ That EPA’s proposal requires it to re-write that clear text demonstrates the proposal’s unlawfulness.²¹⁰

Moreover, section 112(i)(3)(A) requires compliance “as expeditiously as practicable”—not whatever timeframe EPA deems ‘appropriate’ based on its view of ‘facts and circumstances.’ That unspecified “physical changes” (which the proposal suggests might even encompass to the need to control different “emission points”) might be required does not establish that compliance cannot be achieved immediately; that is especially so given that many of EPA’s generally-available

²⁰³ 84 Fed. Reg. at 36,366.

²⁰⁴ 84 Fed. Reg. at 36,324.

²⁰⁵ 42 U.S.C. § 7412(i)(3)(B) (emphasis added).

²⁰⁶ 84 Fed. Reg. at 36,324.

²⁰⁷ 42 U.S.C. § 7412(i)(3)(A).

²⁰⁸ *Id.* § 7412(d)(10)

²⁰⁹ *Id.* § 7412(i)(3)(A).

²¹⁰ *See UARG*, 573 U.S. at 328 (“[T]he need to rewrite the clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn”).

standards require *de minimis* operational requirements (e.g., the annual tune-up required of industrial boilers).

EPA further proposes that “a source that reclassifies from major to area source status and then later reclassifies back to major source status” will be granted a similar extension, if the applicable maximum-achievable standard has increased in stringency.²¹¹ It requests comments on alternatives that would provide for extensions under other circumstances.²¹² All of those proposals would violate section 112(i)(3)(A)’s plain text, which does not allow for compliance at any point later than 3 years past the effective date of the standard (C-43 through C-48).²¹³ And there is no practical need for any such extensions for sources that “revert.” Section 112(g)(2) requires that any entity that “modif[ies]” or “construct[s]” a major source first secure a determination that applicable maximum-achievable standards will be met.²¹⁴ Any source that proposes to increase its emissions to exceed the major-source threshold should, under those requirements, be required to plan sufficiently to comply with such standards before it increases its emissions.²¹⁵

IV. EPA CANNOT IGNORE OR EXCLUDE ADVERSE COMMENTS AND MATERIAL FROM THE 2007 RULEMAKING

The proposal states that “EPA will not be responding to comments received on the 2007 proposal.”²¹⁶ To the extent that the Agency is asserting that it can ignore adverse materials from its prior rule-making, or that those materials are not properly part of the administrative record for its current action, it is incorrect. EPA’s proposal expressly relies on elements of its prior rule-making record.²¹⁷ Having claimed that support, EPA must also grapple with the substantial opposition expressed by comments on its 2007 proposal.²¹⁸

That opposition includes:

²¹¹ 84 Fed. Reg. at 36,325.

²¹² *See id.* (noting options that include “providing all sources that revert back to major source status a defined period to comply,” “adopting additional exceptions to” immediate compliance”).

²¹³ 42 U.S.C. § 7412(i)(3)(A).

²¹⁴ *Id.* § 7412(g)(2).

²¹⁵ Section 112(g)’s references to ‘major source’ can only be understood to refer to the source’s emissions *after* it is constructed or modified; no source has emissions over the 10/25-ton threshold before it is constructed. 42 U.S.C. § 7412(g)(2)(B).

²¹⁶ 84 Fed. Reg. at 36,308.

²¹⁷ *E.g. id.* at 36,309.

²¹⁸ *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (agency may not “exclude[] from the record evidence adverse to its position”).

- (a) Comments from EPA’s own regional offices, contradicting the self-serving industry assertion that an action that allows *increased* pollution will in fact *decrease* pollution²¹⁹;
- (b) Comments from numerous state pollution control agencies, confirming the likelihood of an emissions increase²²⁰;
- (c) EPA’s responses to congressional enquiries as to the likelihood of an emissions increase²²¹;
- (d) Comments from numerous additional stakeholders, noting both the likelihood of an emissions increase and the unlawfulness of EPA’s proposal. For example, the Institute of Clean Air Companies provided a detailed technical assessment demonstrating that plant-owners operating thermal oxidizers, and a variety of other common HAP controls, are likely to increase emissions if relieved of their maximum-achievable control obligations, and that

²¹⁹ Memo. from Michael Brandowski to David Cozzie dated Mar. 10, 2006 (EPA-HQ-OAR-2004-0094-0151) (Attach. 22).

²²⁰ *See, e.g.*, Comments of Illinois EPA (EPA-HQ-OAR-2004-0094-0131) (Attach. 23) (noting likelihood of backsliding, evisceration of section 112(f) health-based review); Comments of Minnesota EPA (EPA-HQ-OAR-2004-0094-0128) (Attach. 9) (emissions likely to rise, emphasizing distinction between hourly and annual emissions); Comments of Oregon DEQ (EPA-HQ-OAR-2004-0094-0142) (Attach. 24); Comments of New York DEC (EPA-HQ-OAR-2004-0094-0123) (Attach. 25) (emissions will rise); Comments of the Regional Air Pollution Control Agency of Dayton (EPA-HQ-OAR-2004-0094-0115) (Attach. 26) (emissions will rise); Comments of Virginia DEQ (EPA-HQ-OAR-2004-0094-0116) (Attach. 27) (same); Comments of Pennsylvania DEP (EPA-HQ-OAR-2004-0094-0144) (Attach. 28) (same); Comments of South Carolina DHEC (noting “strong financial incentive” for sources to increase emissions) EPA-HQ-OAR-2004-0094-0166) (Attach. 29) ; Comments of Wisconsin DNR (EPA-HQ-OAR-2004-0094-0074) (noting that emissions likely to rise) (Attach. 30); Comments of NACAA (EPA-HQ-OAR-2004-0094-0134) (Attach. 31).

²²¹ Letter from Hon. John D. Dingell to Administrator Stephen Johnson dated May 3, 2007 (Attach. 32), Letter from William L. Wehrum to Hon. John D. Dingell Letter dated Mar. 30, 2007 (Attach. 19), from John D. Dingell to Administrator Stephen Johnson dated Feb. 23, 2007 (Attach. 33) (EPA-HQ-OAR-2004-0094-0151, Attachments 10, 11 & 12) (noting that certain sources would increase HAP emissions as a result of change).

reducing monitoring requirements will lead to increased emissions, by eroding compliance.²²²

EPA has an obligation to address each of those comments in this rule-making; they are within the Agency's possession, directly relevant to the decision at hand, and address matters critical to that decision.²²³

V. EPA'S PROPOSED CHANGES TO POTENTIAL TO EMIT REQUIREMENTS FAIL TO INCLUDE SUFFICIENT ENFORCEABILITY AND PUBLIC PARTICIPATION REQUIREMENTS.

EPA explains that "effectiveness is a minimum element of limitations on a source's HAP PTE, and the EPA has an obligation to ensure that limits considered in determining a source's HAP PTE are effective." 84 Fed. Reg. 36318/1. Assuming *arguendo* that paper limits purporting to limit a source's potential to emit are lawful, and that "effectiveness" is the appropriate standard for assessing potential to emit,²²⁴ we agree with EPA's proposal to incorporate effectiveness criteria, into the Part 63 regulation and to require that PTE limits satisfy these criteria in order to be included in a source's PTE calculation. (Comment C-20). However, the specific criteria provided in EPA's notice are insufficient, and unless EPA also includes a means to ensure that the criteria are implemented, their inclusion in federal regulations will be no more useful than providing them in a guidance document. To ensure that appropriate criteria are implemented and PTE limits actually limit facility HAP emissions to below the major source thresholds, EPA must (1) require PTE limits to be federally enforceable, (2) require that there be an opportunity for public comment on the development and modification of all PTE limits as well as an opportunity for state administrative and judicial review, (3) clearly state that PTE limits that do not meet these criteria may not be used to calculate the facility's PTE for purposes of determining whether the source is, or has been, a major source under Clean Air Act § 112, (4) expressly provide that relaxation or elimination of a HAP PTE limit that results in the source becoming a major source requires that the source comply with § 112 MACT requirements as though it were never built, and (5) supplement and strengthen the proposed criteria as specified below. (Comments C-17, 18).

²²² EPA-HQ-OAR-2004-0094-0118 (Attach. 34), EPA-HQ-OAR-2004-0094-0172 (Attach. 14). *See also* Comments of NRDC et al., (EPA-HQ-OAR-2004-0094-0151) (Attach. 35).

²²³ *Kent County v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992) (agency has obligation to examine own files to include in record material relevant to its decision).

²²⁴ Petitioners do not concede either of these points.

Our discussion below utilizes examples of PTE limits issued by states for both MACT and NSR/PSD avoidance. While we recognize that EPA’s proposal is not intended to affect PTE limits taken for purposes other than MACT avoidance, all Clean Air Act PTE limits have historically been subject to the same enforceability criteria. *See, e.g.*, 84 Fed. Reg. at 36317, n. 22 (citing to PTE guidance applying to MACT, Title V, and NSR/PSD avoidance). Accordingly, a state’s issuance of a defective NSR/PSD or Title V PTE limit is indicative of deficiencies in its overall approach to establishing PTE limits for all Clean Air Act programs. And EPA cannot finalize its Proposal without considering evidence, from other parallel programs, that illuminate the deficiencies of its proposed PTE requirements.

*A. Public Participation and Federal Enforceability are Critical Components of Effective PTE Limits.*²²⁵

Experience shows that public involvement and EPA oversight are critical to ensuring that sources are subject to effective PTE limits. Thus, we strongly oppose EPA’s proposal to eliminate the requirement that a PTE limit be federally enforceable, 84 Fed. Reg. at 36321/1-2, which not only eliminates the public’s ability to enforce PTE limits via the Clean Air Act’s citizen suit provision, but also eliminates PTE limits as “applicable requirements” with respect to which a source’s Title V operating permit must assure compliance. We also strongly oppose EPA’s suggestion that a PTE limit that is not subject to public notice and comment could be considered “effective.” *Id.* At a minimum, the examples noted below demonstrate that the role of public participation and federal enforceability in ensuring the effectiveness of PTE limits is a vitally important aspect of the issue addressed by the Proposal, which EPA is required to address before making any final decision. *See Nat’l Lifeline Ass’n v FCC*, 921 F.3d 1102, 1112-13 (D.C. Cir. 2019).

1. Title V Orders Reveal That a Combination of Public and EPA Oversight is Needed to Ensure that PTE Limits are Effective.

At present, most state-issued PTE limits (both HAP and NSR/PSD) appear to be federally enforceable. Thus, if a source is subject to the requirement to obtain an operating permit under Clean Air Act Title V, the source’s PTE limits (for avoiding MACT and/or NSR/PSD) are “applicable requirements” with respect to which the source’s Title V permit must assure compliance. 40 C.F.R. § 70.2. An important aspect of Title V permitting is that all initial and renewal permits and significant permit modifications must be subject to public comment and an opportunity for EPA review and objection. *Id.* § 70.7(h). If EPA does not object to a permit on its own accord, any person may petition EPA to object to a permit. *Id.* § 70.8(d). EPA

²²⁵ As EPA explains in the notice, public notice and federal enforceability are closely linked because in the past, EPA has stated that public participation is a component of federal enforceability. 84 Fed. Reg. at 36,322 n.35. Furthermore, any federally enforceable Clean Air Act requirement must be addressed by a source’s Title V permit, and Title V requires an opportunity for public participation in permit issuance and permit modifications.

publishes all of its orders in response to Title V petitions online.²²⁶ As shown on the table below, EPA has objected to state-proposed Title V permits due to ineffective PTE limits on numerous occasions.

EPA Objections to Ineffective PTE Limits in Title V Permits

EPA Order	State	PTE Limit Deficiency
<p><i>In the Matter of Bristol-Myers Squibb Co, Inc.,</i> 2005 EPA CAA Title V LEXIS 1, 70-75 (Feb. 18, 2005)</p>	<p>New York</p>	<ul style="list-style-type: none"> • Permit contained two conflicting NOx PTE limits • Insufficient monitoring to assure compliance with NOx PTE limit (did not identify all units subject to limit, did not identify a method for demonstrating compliance) • SO₂ PTE limit insufficient; needed fuel use limit. • Need to specify emission factors or basis of the calculation methods for demonstrating PTE limit compliance. • VOC PTE limit inadequate because no solvent usage limit and recordkeeping requirement inadequate due to failure to specify a method for determining emissions.
<p><i>In the Matter of Cash Creek Generation, LLC,</i> 2012 EPA CAA Title V LEXIS 5, 46-60 (June 22, 2012)</p>	<p>Kentucky</p>	<ul style="list-style-type: none"> • VOC PTE limit unenforceable as a practical matter because no showing that the compliance demonstration method accounts for all actual VOC emissions; assumes that flare will achieve 99.5% combustion efficiency at all times without including conditions to assure such efficiency is actually achieved; does not account for flare emissions during shutdowns. • Calculation for HAP PTE limit compliance demonstration insufficient because did not appear to include flaring emissions associated with operations other than standby and startup.
<p><i>EPA Region 2, Reopen for Cause, C.I.D. Landfill,</i></p>	<p>New York</p>	<ul style="list-style-type: none"> • VOC PTE limit did not recognize contribution of uncollected landfill gas

²²⁶ Available at <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>.

New York (June 30, 2003) ²²⁷		<p>emissions to facility-wide VOC emissions and inability of controls to reduce emissions to below the limit</p> <ul style="list-style-type: none"> • CO PTE limit based on constraints not included in Title V permit.
<i>In the Matter of Columbia University</i> , 2002 EPA CAA Title V LEXIS 57, at *90-93 (Dec. 16, 2002)	New York	<ul style="list-style-type: none"> • Insufficient recordkeeping and reporting to support fuel-specific emission limits needed to restrict NO_x PTE. • SO₂ PTE limit unenforceable because lacks limit on quantity of fuel burned.
<i>In the Matter of Hu Honua Bioenergy Facility</i> , 2014 EPA CAA Title V LEXIS 1, at *25-41, 49-60 (Feb. 7, 2014).	Hawaii	<ul style="list-style-type: none"> • HAP PTE limits not enforceable as practical matter because permit did not specify how emissions would be determined, and it was unclear whether all actual individual and total HAP emissions would be considered • CO and NO_x PTE limits insufficient because failed to specify how compliance calculated, no reporting required, did not clearly provide that all actual facility CO and NO_x emissions must be considered.
<i>In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC</i> , 2001 EPA CAA Title V LEXIS 44, at *17-26 (May 2, 2001)	New York	<ul style="list-style-type: none"> • Objected to state's failure to provide a new public comment opportunity after state fundamentally altered the facility's approach to limiting PTE.
<i>In the Matter of Motiva Enterprises, LLC</i> , 2004 EPA Title V LEXIS 10, at *77-81 (Sept. 24, 2004)	New York	<ul style="list-style-type: none"> • HAP PTE limit insufficient because permit fails to establish relationship between gasoline throughput limit and compliance with the HAP limit; required emission calculations and technical basis did not appear in permit record. • Limit phrased in unenforceable

²²⁷ Available at: https://www.epa.gov/sites/production/files/201508/documents/chaffee_abraham_response2002.pdf.

		language.
<i>In the Matter of Piedmont Green Power</i> , 2016 EPA CAA Title V LEXIS 6, at *24-46 (Dec. 13, 2016)	Georgia	<ul style="list-style-type: none"> • HAP PTE limit unenforceable as a practical matter; requirement to utilize clean cellulosic biomass was critical to compliance, but permit lacked adequate fuel testing, monitoring, and reporting requirements. • Permit failed to specify which HAP other than HCl needed to be included in emissions calculations and did not identify a method for determining monthly emissions of each HAP.
<i>In the Matter of Yuhuang Chemical Inc. Methanol Plant, St. James Parish, Louisiana</i> , 2016 EPA CAA Title V LEXIS 4, at *37-82 (Aug. 31, 2016)	Louisiana	<ul style="list-style-type: none"> • CO, VOC & NO_x PTE limits unenforceable as a practical matter; all written as “blanket” annual limits potentially allowing for compliance to be demonstrated only once a year. Other PTE-limiting conditions insufficient for myriad reasons.
<i>In the Matter of Kentucky Syngas, LLC</i> , 2012 EPA CAA Title V LEXIS 4, at *90-100 (June 22, 2012)	Kentucky	<ul style="list-style-type: none"> • PTE limits for VOCs, methanol, and H₂S/TRS unenforceable as a practical matter. <ul style="list-style-type: none"> • Failed to demonstrate that limits account for all facility emissions • No methodology for ensuring compliance • Insufficient limits on gas flaring • HAP PTE limit unenforceable because relied on unenforceable methanol limit.

The above objection orders demonstrate that states have continued to draft ineffective PTE limits despite EPA’s issuance of guidance more than two decades ago explaining how to make PTE limits enforceable. *See* 84 Fed. Reg. at 36317, n.22 (identifying longstanding PTE guidance documents). The PTE limit deficiencies identified in these orders are not mere oversights by state permitting authorities; rather, because a Title V petition can only be based on issues that were raised with reasonable specificity in comments to the permitting authority on the draft permit, 40 C.F.R. § 70.8(d), all of these EPA objections were issued under circumstances where the state permitting authority had already been alerted by the public to the inadequacy of the source’s PTE limits and the state refused to take corrective action.

Furthermore, the above orders most certainly represent only the tip of the iceberg in terms of the total number of sources subject to ineffective PTE limits. First, only a very small percentage of Title V permits receive public comments. Second, for a person to obtain an EPA objection, they must have both the ability to pursue their permit challenge for a lengthy period and ample resources: after waiting for the state to respond to their comments (sometimes for as long as a year) and then filing their petition, most petitioners have had to sue EPA to force the agency to respond.

Despite the obvious need for EPA involvement in ensuring the effectiveness of PTE limits, it does not appear that EPA takes the initiative to review the adequacy of state PTE limits outside of the Title V context. Rather, EPA's Title V permit objections have almost always been issued in response to Title V petitions, to which EPA is statutorily obligated to respond. But without EPA's involvement, public efforts to address the deficiencies in these PTE limits would have failed; in each instance the petitioner attempted without success to have the state correct the deficiencies prior to petitioning EPA.

In sum, EPA's Title V orders demonstrate that (1) states continue to issue ineffective PTE limits that contravenes longstanding EPA guidance, (2) an opportunity for public comment is essential to identifying ineffective PTE limits, and (3) EPA oversight is needed to ensure that states address PTE limit deficiencies identified by the public.

If EPA chooses to eliminate the requirement that PTE limits be federally enforceable, EPA likely will lose its ability to use Title V to object to ineffective PTE limits. This is because state-only PTE limits will no longer be "applicable requirements" for Title V permits. While a "state-only" PTE limit can be included in a Title V permit, Title V's public participation and EPA review and objection requirements do not apply to state-only requirements. 40 C.F.R. § 70.6(b)(2).²²⁸ Thus, eliminating federal enforceability will almost certainly result in an increase in ineffective PTE limits.

2. Even in the Absence of EPA Involvement, Public Participation Plays an Important Role in Ensuring the Effectiveness of PTE Limits So Long as There is an Opportunity for Administrative and Judicial Review.

As explained above, a combination of public comment opportunities and EPA oversight is the best method for ensuring that PTE limits are effective. But advocates have had some success in improving PTE limits even without EPA's

²²⁸ In *Clean Air Implementation Project v. EPA*, 1996 U.S. App. LEXIS 18402, No. 96-1224 (D.C. Cir. June 28, 1996), the D.C. Circuit remanded and vacated the requirement for federal enforceability of potential to emit limits under Part 70 in light of the Court's decisions in *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Chemical Manufacturer's Ass'n v. EPA*, 1995 U.S. App. LEXIS 31475, No. 89-1514 (D.C. Cir. 1995).

involvement, at least where the state provides an opportunity for administrative and judicial review of its permitting decisions. In addition to the Title V petition orders described above, the following examples illustrate why public notice and comment procedures are needed to ensure the effectiveness of PTE limits. (Comment C-30, 31).

a. Enviva Greenwood Plant (Formerly Colombo Energy) in South Carolina

In 2018, a coalition of public interest organizations learned that the South Carolina Department of Health and Environmental Control (DHEC) issued a construction permit for the Enviva Greenwood wood pellet manufacturing plant in Greenwood County, South Carolina. The permit authorized the plant to install controls needed to comply with the MACT and PSD PTE limits established in its initial 2013 construction permit (the original owner had greatly underestimated the facility's HAP and VOC emissions, entirely omitting some significant emitting units from its emissions calculation). Like the plant's initial 2013 permit, the 2018 permit revision purported to establish enforceable PTE limits for MACT and PSD avoidance. Unfortunately, the public interest organizations discovered that neither the initial PTE limits nor the revised limits were effective. In particular, neither permit restricted the facility's wood pellet production to 500,000 tpy even though both the state and the source agreed that the facility's emissions would exceed the major source threshold if the facility produced above that level. Instead, the permits simply declared that the facility's annual emissions could not exceed the major source emissions threshold. While the unenforceable facility "description" in the permit declared that the facility's "as-built" configuration was a 500,000 metric tons wood pellet manufacturing facility," the company had conceded post-construction that the actual capacity was 669,000 tpy.²²⁹ Even with the additional controls approved under the modified 2018 permit, the facility's VOC emissions would still exceed the PSD major source threshold if the facility were operated at full capacity. The PTE limit did not restrict the source's "potential" to emit.

Though DHEC did not provide public notice or an opportunity for public comment on the 2018 permit revisions, the public interest organizations found out about the permit and filed a request for "final permit review" with DHEC.²³⁰ In their request, the organizations pointed to EPA's guidance explaining that "[w]hen a permit contains no limits on capacity utilization or hours of operation, the potential to emit calculation should assume operation at maximum design or achievable capacity (whichever is higher) and continuous operation (8760 hours per year)."²³¹ They further argued that the 2018 permit's VOC PTE limit was

²²⁹ Request for Final Review of Air Permit Number 1240-0133-CB, Issued to Colombo Energy, Inc. on January 12, 2018 (Jan. 26, 2018), at 8 (Attach. 36).

²³⁰ *Id.*

²³¹ *Id.* at 6.

unenforceable because the permit contained no equation for calculating VOC emissions, provided no VOC emission factor, and required no ongoing monitoring.²³² With respect to HAP emissions, they contended that because the initial 2013 HAP PTE limits suffered from similar inadequacies, the facility should have been required to comply with MACT requirements from the outset.²³³ They also contended that the permit's HAP monitoring requirements were insufficient.

In lieu of identifying specific monitoring and the compliance demonstration method that the Greenwood plant must use to demonstrating compliance with its PTE limits, the permit stated:

An algorithm, including example calculations and emission factors, explaining the method used to determine emission rates shall only be included in the initial report. Subsequent submittals of the algorithm are required within 30 days of the change if the algorithm or basis for emissions is modified or the Department requests additional information.²³⁴

Thus, DHEC left it up to the Greenwood plant to determine how it would demonstrate compliance with its PTE limits. A review of other South Carolina permits establishing PTE limits reveals that this condition is consistent with South Carolina's general practice regarding implementation of PTE limits.²³⁵

DHEC rejected the organizations' final review request.²³⁶ DHEC did not dispute that the permit failed to provide an equation for calculating VOC and HAP emissions, VOC/HAP emission factors, or specific monitoring to assure the facility's compliance with the VOC and HAP PTE emission limits.²³⁷ Instead, DHEC declared:

The fact that the permit gives the permittee some flexibility in establishing a compliance algorithm and calculating emissions does

²³² *Id.* at 9.

²³³ The groups agreed that the new controls authorized by the 2018 permit revisions would reduce the facility's HAP emissions to below the major source thresholds.

²³⁴ Construction Permit for Colombo Energy, Inc., Permit No. 1240-0133-CB (Issued Jan. 12, 2018), Permit Condition C.14, at 11 (Attach. 37).

²³⁵ *See, e.g.*, Synthetic Minor Construction Permit for Carolina-Pacific Briquetting Co., LLC, Permit No. 0160-0025-CA (Issued July 28, 2015), Condition No. D.13, at 7 (Attach. 38); Synthetic Minor Construction Permit for Piedmont Wood Pellet Johnston, Permit No. 0980-0047-CA (issued May 6, 2014), Permit Condition D.11, at 8-9 (Attach. 39).

²³⁶ DHEC Staff Response, Docket No. 18-RFR-4 (Attach. 40).

²³⁷ *Id.* at 12-13.

not make this requirement, or the overarching requirement to demonstrate compliance with the rolling annual limits, any less enforceable. Rather, this just recognizes that a once-size-fits-all approach will not always work, and that the permittee, by virtue of its closer familiarity with planned operations, inputs, and equipment, may be equally if not better positioned to identify an effective approach for calculating emissions. Enforceability is preserved through the Department's oversight of the process, including the Department's authority to require modification of any algorithm or calculation deemed inadequate for verifying compliance.²³⁸

In other words, directly contrary to EPA's longstanding guidance,²³⁹ Title V orders,²⁴⁰ and the proposed effectiveness criteria in this proposed rule, 84 Fed. Reg. at 36319-21, DHEC declared that it does not have to specify required monitoring or how the source is to demonstrate compliance with its PTE limit. Rather, DHEC contends that it is enough for the permit to state that the facility will perform some sort of unspecified monitoring and compliance demonstration, to be developed by the source after final permit issuance.

Regarding the permit's failure to establish the purported 500,000 tpy wood pellet production limit as an enforceable permit condition, DHEC declared that the facility had represented in its permit application that it had a 500,000 metric ton capacity facility, and that representation, as well as its assumption that it would utilize no more than 90% pinewood as raw material, "may be considered enforceable requirements of the permit, despite having not been expressly identified as such."²⁴¹ DHEC did not address the fact that the permit applicant had admitted in its 2018 permit application that its actual production capacity was 669,000 tpy.

After DHEC dismissed the organizations' final permit review request, the organizations began preparing a request for a trial-like "contested case hearing" before the South Carolina Administrative Law Court. Prior to filing their hearing request, however, they reached out to the permittee to determine whether the parties could reach an agreement as to how the permit could be revised to address the PTE enforceability concerns. Ultimately, the permittee agreed to request that DHEC revise the permit to include an enforceable 500,000 tpy wood pellet production limit as well as specific monitoring and reporting requirements to track

²³⁸ *Id.*

²³⁹ *See* 84 Fed. Reg. at 36317 n.22.

²⁴⁰ *See, e.g., In the Matter of Piedmont Green Power*, 2016 EPA CAA Title V LEXIS 6, Pet. No. IV-2015-2, at 21 ("[F]or an emission limit to be enforceable as a practical matter, the permit must clearly specify how emissions will be measured or determined for purposes of demonstrating compliance with that limit.").

²⁴¹ *Id.* at 15.

compliance with that limit.²⁴² DHEC agreed to the request and revised the permit,²⁴³ and the organizations did not file for a contested case hearing.

Like the EPA Title V orders described above, this South Carolina permit proceeding illustrates the point that states continue to issue permits with obviously deficient PTE limits, and that the opportunity for public comment and judicial review is critical to identifying and correcting those deficiencies. This example also illustrates the need for opportunities to periodically reevaluate PTE limits to ensure their adequacy, since in this instance, the permittee had dramatically underestimated facility emissions prior to construction and as a result, had been emitting air pollution at levels that exceeded major source levels for nearly five years prior to the 2018 permit revision.

b. Enviva Hamlet Plant in North Carolina

In 2018, the North Carolina Department of Natural Resources (DENR) announced a public comment period on the draft “synthetic minor” permit for Enviva Hamlet, a wood pellet plant in North Carolina. A coalition of public interest organizations commented that the permit omitted production or operating limits on a key unit.²⁴⁴ The company’s application had estimated that the particular unit would process no more than 85% of the entire facility’s throughput, but was in fact capable of processing up to 100%.²⁴⁵ The commenters argued that the facility’s PTE limit was ineffective because the permit failed to restrict the unit’s production to 85% of facility throughput as assumed, and calculating PTE at the maximum processing rate for the unit resulted in facility-wide PTE that exceeded the major source PSD threshold.²⁴⁶ In addition, the commenters argued that the facility-wide wood pellet production limit was too high to ensure that emissions remained below the major source threshold and that Enviva either needed to accept a lower production limit or install additional pollution controls. After DENR rejected their concerns, the commenters petitioned for a contested case hearing before North Carolina’s Office of Administrative Hearings. Prior to the hearing, the organizations reached a settlement agreement with Enviva and DENR requiring that the permit be revised to include the 85% throughput limit, require the facility install additional

²⁴² Letter from Alan H. McConnell, Counsel to Enviva Pellets Greenwood, LLC, to Keri N. Powell, Counsel for Environmental Integrity Project, dated Mar. 8, 2018 (Attach. 41).

²⁴³ Revised Enviva Pellets Greenwood Permit issued Jan. 12, 2018, revised Mar. 20, 2018 (Attach. 42).

²⁴⁴ Comments on the Draft Air Quality Permit for Enviva Pellets Hamlet, at 2 (Nov. 15, 2018) (Attach. 43).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

controls, and require the facility to perform appropriate monitoring to verify its compliance with these new requirements.²⁴⁷

c. Enviva Northampton Plant in North Carolina

The Enviva Northampton facility, also in North Carolina, was initially permitted as a synthetic minor source subject to PTE limits for VOC and HAP, including both operating restrictions and an emission limit of 249 tpy.²⁴⁸ In 2015, however, just two years after commencing operations, the facility requested and the state granted an unlawful permit modification allowing the source to become a major source of VOCs and HAPs without complying with major source MACT and PSD requirements.²⁴⁹ Specifically, though the 2015 modification removed the facility's HAP PTE limits and made the facility "major" (North Carolina DENR estimated that the new HAP emissions would be 27.8 tpy), the facility was not required to comply with MACT because EPA has not promulgated a MACT standard for this sector, and the facility had already been allowed to construct without undergoing the case-by-case MACT assessment required for new sources pursuant to Clean Air Act § 112(g).²⁵⁰ The 2015 permit revision also greatly increased the VOC PTE limit for PSD purposes using a dubious application of the "one-time doubling" policy, which enabled the facility to continue to avoid PSD so long as it kept its VOC emissions below 456.4 tpy, greatly exceeding the applicable 250 tpy major source threshold for this source category.²⁵¹

Notably, neither the initial construction permit nor the 2015 modification were subject to public notice or comment.²⁵² The first-ever opportunity for public comment on the Enviva Northampton plant occurred nearly five years after issuance of the facility's construction permit, when North Carolina DENR proposed to issue the facility a Title V operating permit in 2017. DENR received extensive public comments on the facility's Title V permit from an array of commenters.²⁵³ The commenters pointed out that North Carolina's 2015 decision to allow the facility to nearly double its emissions without undergoing PSD contravened the

²⁴⁷ Enviva Hamlet Plant Settlement Agreement, at 2 (June 2, 2019) (Attach. 44).

²⁴⁸ Comments on Draft Title V Permit for Enviva Pellets Northampton, LLC, at 2 (Oct. 20, 2017) (Attach. 45).

²⁴⁹ *Id.*

²⁵⁰ Air Permit Review for 2015 Enviva Pellets Northampton, LLC (Permit Issue Date Oct. 12, 2015) at 4 (Attach. 46) ("The facility will now be classified as a major source of HAP emissions. This modification does not trigger any new HAP requirements.").

²⁵¹ *Id.* at 3 ("The proposed [PSD] avoidance limit is baseline (207.4) plus 249 or 456.4 tons per consecutive 12-month period.").

²⁵³ Comments on Draft Title V Permit for Enviva Pellets Northampton, LLC (Oct. 20, 2017) (Attach. 53).

“Source Obligation Rule” in the federal PSD regulations at 40 C.F.R. 52.21(r)(4), which is incorporated into North Carolina’s Clean Air Act state implementation plan. That provision provides that “[w]hen a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification to emit a pollutant ... then the provisions of [North Carolina’s PSD regulations] shall apply to the source or modification as though construction had not yet begun on the source or modification.” NC SIP Rule 15A NCAC 2D.²⁵⁴ The commenters further alleged that the facility had underestimated its HAP emissions in its initial application, and that the facility’s actual HAP emissions had exceeded the major source threshold ever since construction. Thus, the facility should have been required to undergo case-by-case MACT at the outset.

Though DENR never responded to the public comments and the Title V permit has not been issued, Enviva ultimately decided following receipt of public comments to apply to install new controls that would enable it to reduce its HAP and VOC emissions below the major source thresholds for MACT and PSD.²⁵⁵

d. MRE Crossville Plant in Alabama

Under prior ownership, the wood pellet plant now known as MRE Crossville in Alabama had acknowledged it was subject to Title V as a major source, but had not yet applied for a Title V permit.²⁵⁶ When MRE Crossville purchased the plant in 2018, however, the company decided it would prefer to accept PTE limits to avoid Title V applicability.²⁵⁷ The state therefore released a draft state operating permit for public notice and comment, and the draft permit contained several operating and production restrictions that allegedly restricted VOCs to less than the 100 tpy Title V threshold.²⁵⁸ A coalition of public interest organizations submitted comments arguing that, based on numerous stack tests from other facilities, the

²⁵⁴ The most recent version of North Carolina’s PSD regulations includes the same language but in a different place: 15A NCAC 2D. 0530(k).

²⁵⁵ Comments on the 2019 Revised Draft Air Quality Permit for Enviva Pellets Northampton (Aug. 23, 2019). This permit authorizing Enviva’s installation of controls has not yet been issued, however, and the facility continues emitting far higher rates of VOCs and HAP than had the facility been required to comply with major source requirements in 2015 as it should have been (in 2015, BACT for VOCs in this industry had been firmly established as regenerative thermal oxidizers capable of at least 95% reduction in VOCs and similar reductions in organic HAPs.)

²⁵⁶ Comments on Draft Synthetic Minor Operating Permits for MRE Crossville, at 2 (May 2, 2018) (Attach. 47).

²⁵⁷ *Id.*

²⁵⁸ These limits included a 120,000 tpy production limit and a maximum softwood production rate of 50%. *See id.*

production limit was too high to restrict PTE to below the Title V threshold.²⁵⁹ After the state rejected those comments and issued the permit, the groups filed an administrative appeal and eventually settled the case with MRE Crossville.²⁶⁰ The settlement required the facility to apply for a Title V permit, commit to a firm stack testing deadline, and reduce production by 33% until it received the Title V permit.²⁶¹ The stack tests, meanwhile, have confirmed that the source's PTE under the production and operating limits of the state operating permit far exceeded the Title V threshold of 100 tpy, with a PTE of at least 180 tpy.²⁶²

e. Conclusion

These public participation experiences highlight the importance of public involvement in the establishment of PTE limits, but also reveal that it is often insufficient for members of the public to simply be provided with an opportunity to raise their concerns in public comments. Rather, clean air advocates must also have the ability to elevate their concerns in state administrative hearings and state court for there to be a reasonable likelihood that states will heed advocates' concerns and make the needed changes to proposed permits. Thus, in response to EPA's query as to whether it should include public participation as part of its PTE limit effectiveness criteria (Comment C-20, 30, 31): Yes, absolutely. But in addition, EPA must require that states provide an opportunity for state administrative and judicial review. (Comment C-18). We also emphasize that state public participation opportunities, alone, are insufficient to ensure widespread effectiveness of PTE limits. Rather, EPA oversight is needed, especially via Title V, which enables EPA to bar a state's issuance of a permit that contains ineffective PTE limits.

3. Absent Federal Enforceability, Public Participation in the Development and Modification of PTE Limits is Likely to be Reduced or Eliminated.

Though EPA has, by guidance, authorized states to establish state-only PTE limits so long as they are "legally and practicably enforceable," most states appear to have continued to promulgate their PTE limits as federally enforceable requirements, which generally means that the public is given an opportunity to comment. However, once EPA promulgates a regulation stating that PTE limits need not be federally enforceable, many states will be pressured to eliminate federal

²⁵⁹ *Id.*

²⁶⁰ Settlement Agreement between GASP and MRE Crossville (Oct. 12, 2018) (Attach. 48).

²⁶¹ *Id.* at Conditions (A)(1), (A)(3), and (B)(1).

²⁶² Subsequent to the issuance of the permit at issue, the state granted a second state permit to increase allowable softwood processing from 50% to 80%, therefore the stack tests at issue occurred while processing 80% softwood. The initial test produced a PTE of 262 tpy, which we reduce by 30% to roughly estimate PTE with a 50% softwood limit.

enforceability because it would go beyond what federal law requires. Unfortunately, our recent experience indicates that states often eliminate or reduce public participation opportunities when limits no longer need to be federally enforceable (and often even when the state does intend for the limit to be federally enforceable). There are likely many states that do not provide for public comment on at least some of their PTE limits (or changes to their PTE limits); the following are a few examples.

a. Georgia

Georgia has amended its regulations to eliminate the federal enforceability requirement for PTE limits (for both criteria pollutants and hazardous air pollutants).²⁶³ Under Georgia's regulations, only permits that are federally enforceable need to undergo public comment.²⁶⁴ Though it does not appear that Georgia's state implementation plan has been revised to incorporate this change, Georgia already issues PTE limits without public comment, and refuses to provide for public comment even when a public comment period is requested. For example, on May 24, 2017, Georgia published notice of receipt of a permit application for construction of the Bord na Mona wood pellet manufacturing facility in Washington, Georgia. The facility proposed facility-wide emission and production/operation limits designed to restrict its emissions of HAPs, PM, CO, NO_x, and VOCs to below the applicability threshold for case-by-case MACT and PSD. In response to the notice, a coalition of public interest organizations requested that Georgia provide the public with an opportunity to comment on the facility's draft permit (as opposed to only the facility's application), explaining that it has often been the case that PTE limits for wood pellet manufacturing facilities are ineffective, and that the groups wanted an opportunity to evaluate the Bord na Mona limits. Georgia refused to provide for public comment on the draft permit, explaining:

Georgia Air Quality rules do not require public review of the draft permits for non Title V and non PSD sources. The air quality permit proposed to be issued by EPD is a SIP permit and not a Title V permit. Hence, EIP's request to comment on [sic] draft permit is not granted.²⁶⁵

Though still permitted, construction never commenced on the Bord na Mona facility.

b. North Carolina

²⁶³ Ga. Comp. R. & Regs r. 391-3-1-.01(ddd) (defining "potential to emit" to allow for consideration of restrictions that are "legally and practically enforceable").

²⁶⁴ Ga. Comp. R. & Regs r. 391-3-1-.03(2)(i) ("Prior to the issuance of any federally enforceable operating permit, EPA and the public will be notified and given the chance for comment on the draft permit.").

²⁶⁵ Permit Narrative for Bord na Mona Permit, at 7 (Attach. 49).

Likewise, North Carolina DENR declared that no public comment opportunity was required when it issued a construction permit for the Enviva Northampton wood pellet manufacturing facility that established PTE limits that enabled the source to avoid both PSD and MACT compliance. Specifically, DENR stated in the narrative accompanying the facility’s 2012 construction permit that “Public notice is not required for this state-only construction permit under 15A NCAC 02Q.0300.”²⁶⁶ The facility began operations on April 22, 2013. As discussed above, in September 2015, Enviva applied to have the HAP PTE limits removed from the facility’s permit, and DENR granted Enviva’s request—again, without providing for public comment.²⁶⁷

As explained above, though the 2015 removal of the facility’s HAP PTE limits made the facility “major,” DENR did not require the facility to comply with the case-by-case MACT requirements that apply to new major sources in sectors for which EPA has not promulgated a MACT standard.²⁶⁸ Likewise, though the 2015 permit revision increased the facility’s VOC PTE limit to 456.4 tpy—well above the applicable 250 tpy threshold for PSD applicability—DENR did not require the facility to comply with PSD requirements. Because no public comment was provided on either the initial construction permit or on the 2015 permit revision, the community impacted by the facility’s emissions was completely unaware that the facility had been authorized to construct without installing up-to-date air pollution controls, and then to nearly double its emissions beyond its original limits, still without installing controls.

The first-ever opportunity for public comment on the Enviva Northampton plant occurred nearly five years after issuance of the facility’s construction permit, when DENR proposed to issue the facility a Title V operating permit in 2017. At that point, DENR received extensive public comments detailing why the plant’s PTE limits were ineffective, how the facility had underestimated its emissions, and why the facility should have been required to comply with major source requirements, including MACT and PSD²⁶⁹

To date, Enviva has not been issued a Title V operating permit for its Northampton plant, which continues to operate under its defective 2015 state air permit. In 2018, Enviva applied for a new state air permit that would authorize the facility to expand its operations and install controls, but that would continue to classify the source as “minor” for PSD based on PTE limits, and would not require Enviva to apply for a case-by-case MACT determination. Given the demonstrated

²⁶⁶ Air Permit Review for 2012 Enviva Pellets Northampton Permit (Permit Issue Date Mar. 9, 2012) (Attach. 50).

²⁶⁷ Air Permit Review for 2015 Enviva Pellets Northampton Permit (Permit Issue Date Oct. 12, 2015) (Attach. 46).

²⁶⁸ *Supra* at V.A.2.c.

²⁶⁹ *Id.*

public interest in this facility, DENR voluntarily provided for public comment on its 2019 draft state air permit, which has not yet been issued as final. To our knowledge, EPA has never sought to review any of the PTE limits and associated MACT/PSD applicability determinations in the Northampton state air permits.

c. Virginia

Finally, though Virginia’s regulations state that a PTE limit must be federally enforceable,²⁷⁰ it does not appear that this regulatory provision was ever incorporated into Virginia’s state implementation plan, and Virginia does not require its PTE limits to be federally enforceable. Likewise, Virginia does not provide for public comment on HAP PTE limits if a source is otherwise not subject to the requirement to obtain a federal air permit. For example, in 2012, Virginia issued a state-only air permit authorizing construction of the Enviva Pellets Southampton, LLC in Franklin, Virginia.²⁷¹ Though the permit established PTE limits designed to restrict the facility’s emissions below the major source threshold for MACT and PSD, the state noted in the materials accompanying issuance of the final permit that no public comment period was required.²⁷²

As the above examples amply illustrate, it is not uncommon for states to issue PTE limits without providing any opportunity for public comment when they aren’t expressly required to do so by federal law. Thus, EPA must not assume, as it did when considering whether to eliminate federal enforceability in 1989, “that most State and local procedures would allow for some sort of public scrutiny even if Federal enforceability were deleted.” 54 Fed. Reg. 27,274 (June 28, 1989). Due to the important role of public participation in ensuring the effectiveness of PTE limits, EPA must not rely on states to voluntarily provide public participation opportunities. Rather, regardless of whether EPA decides to retain its own authority to review and enforce state-issued PTE limits, EPA must require states to provide public notice and an opportunity for public comment on every permitting action that establishes or modifies a PTE limit.

4. EPA Must Not Allow PTE Limits to be Issued, Modified, or Eliminated Without an Opportunity for Public Comment and Legal Challenge (Comment C-30, 31, 32, 33, 34, 35)

Regarding EPA’s request for comment on “whether there are specific criteria for deciding under what circumstances a source’s proposed HAP PTE limits would need to undergo public review and comment,” we strongly urge EPA to require every PTE permitting action to be subject to public notice and comment. The challenge with PTE limits is that if they are ineffective, the source will emit, or have the potential

²⁷⁰ 9 Va. Admin. Code R. 5-60-130.

²⁷¹ Permit Checklist, Enviva Pellets Southampton LLC, dated June 18, 2012 (Attach. 51).

²⁷² *Id.* at 1-2, 8.

to emit, in excess of the major source threshold—otherwise, the source would not need a PTE limit. Thus, every PTE permitting action is significant, in that it is enabling a source that would otherwise qualify as a major source for HAP to escape the requirement to utilize maximum achievable control technology, and in some cases, to instead operate without any pollution controls whatsoever.

None of the criteria that EPA suggests for narrowing the type of PTE limits subject to public comment (“controversial or complex sources, sources with actual emissions close to the major source thresholds”), 84 Fed. Reg. at 36321/3, would be reasonable. Regarding the suggested “controversial” criterion, EPA is correct that the possibility of public controversy requires public comment. But often a source only becomes “controversial” after the public is notified that the source will be exempt from MACT requirements. It makes no sense to enable a permitting authority to issue a PTE limit without providing public notice based on the permitting authority’s own assessment of whether the source is controversial. In most cases, the permitting authority’s office is located far from the location of the source being permitted, and many permitting authorities rarely ever inspect synthetic minor sources. Thus, while a permitting authority might know that a facility is *already* controversial, there is no reason to assume that the permitting authority would be in a good position to assess in advance of providing public notice whether enabling a source to avoid major source requirements *will be* controversial.

Likewise, whether a source is “complex” is not necessarily related to whether the source’s PTE limit is ineffective, or whether a source has unreasonably projected that its actual emissions will be below the major source applicability threshold. The public should have an opportunity to comment on a PTE limit that enables a source to avoid major source control requirements regardless of how simple the source might be.

Regarding EPA’s suggestion that public comment might only be necessary for sources with actual emissions close to the major source thresholds, a key concern in PTE permitting is whether the source has projected its emissions properly. EPA and states have repeatedly declared in response to public concerns regarding a source’s emissions estimates that the government will not second-guess the emissions estimate because the source is agreeing to enforceable restrictions on its potential to emit.²⁷³ And, as demonstrated by **the Enviva Greenwood (South Carolina)** case study described above where the facility applied to install controls years after

²⁷³ See, e.g., *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, 2001 EPA CAA Title V LEXIS 4, Pet. No. II-2000-07 (May 2, 2001) at 64-65 (“Although the facility must make a credible effort to project what its emissions will be, it is simply not possible for the facility, particularly in this case, to compute precisely its emissions until the facility is operational. To the extent that Masada has underestimated emissions, the PTE limit serves to constrain facility operations to keep emissions below the major source cutoff.”)

construction upon discovering that its actual emissions were far higher than originally estimated,²⁷⁴ sources sometimes substantially underestimate their emissions prior to construction. Public comments can reveal that a facility has dramatically underestimated its emissions, and that the facility's emissions will exceed the major source threshold even with the facility's proposed controls and production limits. For example, the Environmental Integrity Project (EIP) recently filed comments with the Mississippi Department of Environmental Quality (DEQ) demonstrating that a synthetic minor permit application filed for the **AED Copiah wood pellet manufacturing plant Hazlehurst, Mississippi** had entirely failed to consider emissions from a significant emitting unit.²⁷⁵ EIP demonstrated that once emissions from the omitted unit are counted, the facility's potential emissions substantially exceed the major source threshold.²⁷⁶ (Mississippi has yet to release a draft permit for public comment, however, EIP discovered after filing its comments that the state already authorized the source to move forward with construction, declaring that the PTE limits in the facility's permit application are "enforceable" even prior to their inclusion in a final permit).²⁷⁷

Another example of a permit-applicant dramatically underestimating its emissions is the Drax-owned **Amite BioEnergy plant in Gloster, Mississippi**. In 2017, public interest organizations submitted comments on the facility's draft Title V operating permit in which they contended that the facility was vastly exceeding its VOC PTE limit of 249 tpy.²⁷⁸ Drax vigorously defended its emissions estimates.²⁷⁹ Yet in November 2018, the company's attorneys reported that the facility may be violating its PTE limits (and therefore, major source PSD requirements), and on February 22, 2019, the company reported stack testing showing that facility-wide VOC emissions were a whopping **795 tpy**.²⁸⁰ (To date, Mississippi DEQ has not responded to public comments and the facility continues to operate without complying with major source requirements based on obviously deficient PTE limits.)

Public input on the renewal Title V operating permit for Drax's **Morehouse BioEnergy plant in Bastrop, Louisiana** likewise revealed that the Morehouse plant had dramatically underestimated its emissions and that its actual emissions far exceeded its PTE limit. The Louisiana Department of Environmental Quality

²⁷⁴ DHEC Staff Response to Final Review Request, at 13, n.15 (Attach. 40) ("When Permit CA was drafted, emission factors derived from information available at the time...suggested significantly lower emissions than were later realized.").

²⁷⁵ AED Copiah Permit Application Comments (Attach. 52).

²⁷⁶ *Id.*

²⁷⁷ Preconstruction Approval Letter for AED Copiah dated Nov. 15, 2018 (Attach. 53).

²⁷⁸ Comments on Drax Amite BioEnergy draft Title V Permit (Attach. 254).

²⁷⁹ Drax Response to Public Comments on Amite BioEnergy Permit (Attach. 55).

²⁸⁰ Amite Bioenergy Correspondence and Stack Test Results (Attach. 56).

(LDEQ) released a draft Title V renewal permit for the Morehouse BioEnergy plant on April 10, 2018. The facility had been operating as a synthetic minor source for VOC and HAP since its construction in 2012. The draft Title V renewal permit proposed to revise the facility's pre-existing VOC PTE limit up to 249.3 tpy.²⁸¹ Public interest groups submitted comments arguing that, in reality, Drax Morehouse's emissions were three to four times higher, relying on numerous stack tests from plants in other states.²⁸² LDEQ ultimately agreed with public commenters, issuing a response to comments saying that "based on information provided by the commenter and after further discussions with Morehouse BioEnergy, [the agency] is persuaded that the Wood Pellet Manufacturing Facility is a major stationary source under the Prevention of Significant Deterioration (PSD) program."²⁸³ Drax, meanwhile, conducted "engineering testing for VOCs based on comments from the Environmental Integrity Project (EIP) on the draft Title V renewal permit."²⁸⁴ These tests showed the facility had a VOC PTE of **1,150 tpy**.²⁸⁵ The facility subsequently agreed to install new controls that will reduce VOCs and HAPs by 95% or more.²⁸⁶

In sum, there is no reasonable basis for relying on a source's own emission projections to conclude that a PTE limit need not undergo public comment. These projections are not carefully vetted by permitting authorities and may be substantially underestimated. Regardless of how low a facility claims that its emissions will be, the public must be given an opportunity to review the basis for the facility's emission estimates as well as the PTE limits included in the source's permit.

Regarding EPA's request for comments on whether "cost" or "the additional time associated" with requiring public comment on PTE limits designed to enable a major source to reclassify as an area source "is an issue," 84 Fed. Reg. at 36321/3, expediency in processing permit applications should not be allowed to trump the public's ability to participate in a permitting authority's decision regarding whether to exempt a source from stringent HAP control requirements. As shown above, it is

²⁸¹ Comments on the Draft Title V Permit for Morehouse BioEnergy dated May 14, 2018), at 2 (Attach. 57).

²⁸² *Id.* at 2-11.

²⁸³ LDEQ Response to Comments and Notification of Final Permit Action, at 6 (Jan. 23, 2019) (Attach. 58).

²⁸⁴ Letter from Todd Tolkinen, Director of 2-11Legal, Compliance, and Administration, Drax Biomass, Inc., to Antoinette Cobb, Louisiana DEQ, at VI.I. (response to Compliance Order VI) (July 19, 2019) (Attach. 59).

²⁸⁵ Letter from Timothy W. Hardy, Counsel for Drax Biomass, to Elliott B. Vega, Assistant Secretary, Office of Environmental Services, Louisiana Department of Environmental Quality (Jan. 24, 2019) (Attach. 60).

²⁸⁶ Morehouse BioEnergy, BACT Analysis for VOC Emissions PSD Application, (May 1, 2019) (Attach. 61).

often through the public comment process that it is revealed that a source has underestimated its emissions or that the permitting authority's PTE limits are ineffective. As EPA admits, it "has an obligation to ensure that limits considered in determining a source's HAP PTE are effective." 84 Fed. Reg. 36318/1. To date, almost all oversight of PTE limit effectiveness has occurred as a direct result of public involvement. Thus, any EPA decision to limit the public's ability to receive notice of and an opportunity to comment on proposed PTE limits would be inconsistent with EPA's obligation to ensure that PTE limits are effective, and therefore would be arbitrary and capricious.²⁸⁷

In response to EPA's query regarding whether a state's minor NSR public participation procedures would be sufficient for HAP PTE limits (84 Fed. Reg. at 36321/3), these procedures would only be adequate if they provide for public notice and at least a 30-day public comment period as specified in EPA's minor NSR regulations at 40 C.F.R. 51.161. As EPA is aware (and as demonstrated above), many states exclude at least some minor NSR permits and permit modifications from public comment. Though this violates EPA's regulations, EPA has done nothing to address the problem. Accordingly, while it makes sense to process HAP PTE limits in tandem with a facility's minor NSR permit, EPA must not declare that the public participation procedures utilized in a state's minor NSR program are *per se* sufficient to satisfy public participation requirements for establishing HAP PTE limits. (Comment C-34).

Finally, for the reasons provided above, we strongly oppose EPA's suggestion that a PTE limit that is issued without public notice and comment would "be effective and support reclassification from major to area source under section 112 of the CAA." 84 Fed. Reg. at 36321/3. There is no reason why a PTE limit taken to reclassify a major source as an area source would be any less vulnerable to errors and deficiencies than any other PTE limit. Moreover, while all PTE limits should be subject to public comment, to the extent that the controversial nature of a permitting action is relevant to whether public comment should be provided, there can be no doubt that the reclassification of such sources is controversial and of interest to the public given the ongoing litigation and press coverage. As with all permitting actions establishing or modifying PTE limits, EPA must require an opportunity for public comment on PTE limits taken to enable major sources to reclassify as area sources. (Comment C-30).

5. States Cannot Be Relied Upon to Enforce PTE Limits if EPA and Citizen Enforcement is Eliminated. (Comment C-22)

EPA asks "whether state-only or local-only enforcement authority alone is sufficient to impose a credible risk of enforcement." 84 Fed. Reg. at 36,318/3. It is,

²⁸⁷ We support the use of electronic notice, which in most cases is far more effective than newspaper notice at alerting the public to the availability of a draft permit for public comment.

too often, not. State environmental agencies are sometimes subject to intense pressure from the regulated community not to enforce PTE limits, especially when there is no threat of EPA or citizen suit enforcement. Two recent experiences with PTE limit violations illustrate this point.

Archer Forest Products and Appling County Pellets, Georgia: The Archer Forest Products facility in Nahunta, Georgia and the Appling County Pellets facility in Baxley, Georgia are both subject to wood pellet production limit designed to keep their emissions below the major source threshold for MACT and NSR. Both facilities are owned by Fram Renewables. Not long after Georgia EPD issued operating permits to these facilities, in spring of 2019, Fram decided that it wanted to be able to exceed the wood pellet production limits at both facilities. To do so but continue to avoid MACT and NSR applicability, Fram needed to install pollution controls. Rather than wait to increase its production until after installing the controls, however, Fram simply requested a consent order from EPD to commit what would otherwise be a criminal offense: knowingly (and intentionally) violating the PTE limits in its permit.²⁸⁸ Georgia acquiesced.²⁸⁹ The resulting consent order authorized Fram to increase its production rate at each of the two plants above the applicable PTE limits until such time as its new controls are operational. In exchange for its intentional PTE limit violations, Fram agreed to pay nominal penalties.

In comments to Georgia EPD submitted on August 9, 2019, Environmental Integrity Project informed Georgia EPD that it cannot lawfully provide the facilities with advance authorization to intentionally violate the PTE limits in their permits.²⁹⁰ EIP further informed Georgia EPD that its consent decree does not constitute diligent prosecution of Fram's Clean Air Act violations and that the company remains at risk of citizen and EPA enforcement if it moves forward with violating its limits.

If EPA proceeds with eliminating the requirement that PTE limits be federally enforceable, EPA and citizen groups like EIP will not be able to take action to ensure compliance with PTE limits when state agencies succumb to industry pressure to authorize violations.

Enviva Southampton, Virginia: Another example of a state failing to adequately enforce HAP and VOC PTE limits is in the case of Enviva Southampton. In April 2018, a coalition of organizations alerted Virginia's governor that credible

²⁸⁸ 42 U.S.C. § 7413(1) (criminal to knowingly construct or operate a facility subject to NESHAP standard in violation of applicable NESHAP (here, case-by-case MACT)); 42 U.S.C. § 7413(c)(1) (criminal to knowingly violate an applicable SIP requirement).

²⁸⁹ EPD Consent Order for Fram Renewable (June 5, 2019) (Attach. 62).

²⁹⁰ EIP Comments on Fram Permit Applications (Sept. 9, 2019) (Attach. 63).

evidence showed that Enviva Southampton constructed a major source of HAP and VOC without undergoing appropriate permitting and that the facility had been violating its PTE limits since it began operations in 2014.²⁹¹ In response, Virginia DEQ directed the facility to perform stack testing. Enviva then informed Virginia DEQ that it plans to expand the facility and install controls and requested permission to wait to perform stack testing until after completion of those plant modifications. Virginia DEQ agreed.²⁹² The public interest organizations then followed up with a letter to Virginia DEQ in November 2018 requesting that DEQ hold Enviva accountable for constructing and operating a major source for HAP and VOC for nearly six years without installing MACT- and BACT-level controls.²⁹³ In particular, the organizations contended that even without stack testing, credible evidence demonstrates that the facility has been violating its PTE limits. Of course, nothing prevented Virginia from requiring the plant to perform stack testing before undertaking the plant modifications if needed for enforcement purposes.

Unfortunately, to date, Virginia DEQ has provided no indication that it is willing to pursue enforcement against Enviva to address its longstanding violations its HAP and VOC PTE limits. Because Virginia's HAP PTE limits are not federally enforceable, the organizations do not have the ability to bring a Clean Air Act citizen suit to address Enviva's PTE limit violations.

These two enforcement examples illustrate the unwillingness of states to effectively enforce PTE limits. In the Georgia case, the state actually utilized its enforcement authority to authorize intentional PTE violations. In the Virginia case, the state has failed to hold the facility accountable for exceeding its HAP PTE limits for years, despite abundant and easily available information demonstrating that the facility's HAP and VOC emissions far exceeded its PTE limits.

Commenters agree with EPA that for a PTE limit to be effective, there must be a credible threat of enforcement if it is violated. State agencies do, and must, serve as the primary enforcers of Clean Air Act requirements, including PTE limits. However, states are more likely to serve as effective enforcers if EPA and members of the public are also able to bring enforcement actions if necessary. And where states do not follow through where enforcement is needed, EPA and citizen suit enforcement provides a critical backstop to ensure that federal Clean Air Act compliance is achieved and public health is protected. Accordingly, making PTE limits enforceable by EPA and the public "provides a level of compliance incentive unmatched by enforcement by only a state or local authority that warrants it to be part of the effectiveness criteria." (36318/3) (Comment C-23). State-only or local-

²⁹¹ Letter to the Honorable Ralph S. Northam, Governor, Commonwealth of Virginia, from Eric Schaeffer, *et al.*, dated April 26, 2018 (Attach. 291).

²⁹² Virginia Letter to Enviva Southampton dated Aug. 1, 2018 (Attach. 65).

²⁹³ Public Interest Group letter to Michael G. Dowd, Virginia Department of Environmental Quality, dated Nov. 5, 2018 (Attach. 66).

only enforcement authority alone is insufficient to impose a credible risk of enforcement and, therefore, ensure compliance with the HAP PTE limits. (Comment C-22).

B. EPA Must Clarify that PTE Limits that Do Not Meet the Specified Criteria Cannot be Used in Determining Whether a Source is Subject to Major Source MACT Requirements Under Clean Air Act § 112.

Consistent with *United States v. Louisiana-Pacific*, 682 F.Supp. 1122, 11133 (D. Co., 1987), EPA should clarify in its regulations that a PTE limit that does not meet federal effectiveness criteria cannot be relied upon to calculate a facility's PTE, even if it is included in a state-issued air permit. EPA almost never independently reviews state-issued PTE limits; in fact, EPA rarely, if ever, reviews or submits comments to a state on minor source permits for any reason. Furthermore, unlike for Title V permits, EPA has no opportunity to object and bar issuance of other types of state-issued permits. Thus, EPA must explicitly state in its regulations that regardless of whether a state includes a limit in a permit that purportedly enables the source to be classified as an area or minor source, that limit cannot be relied upon to shield a source from enforcement for violating major source requirements if it does not meet the federal enforceability criteria.

The **Amite BioEnergy** plant example described above illustrates why it is important to specify that an ineffective PTE limit cannot serve to shield a major source from enforcement for constructing and operating without complying with major source requirements. In that case, the facility's state air permits establish a VOC PTE limit of less than 250 tpy, but the facility concedes that stack testing revealed emissions of nearly 800 tpy. Nonetheless, despite nearly two years passing since public commenters first informed Mississippi DEQ of the problem, the facility continues to operate under its state-issued permit and faux VOC PTE limit without any repercussion. Though the PTE limit in that case is a VOC PTE limit, the same problem can easily arise with respect to a HAP limit (and in fact, public commenters demonstrated that the facility's HAP PTE limits are also ineffective, and it's quite possible that the Amite plant's actual HAP emissions also are exceeding the major source threshold).²⁹⁴

C. EPA Must Clarify that a Source Becomes Subject to Major Source MACT Requirements as Though it Had Never Been Constructed if its PTE Limit is Subsequently Relaxed or Eliminated.

A glaring loophole in the existing Part 63 regulations is that at least some sources and states are currently under the impression that a source can have its original PTE limit taken at the time of construction relaxed or eliminated without triggering the requirement to comply with major source MACT requirements that would have otherwise applied to the source when it was built. As a component of

²⁹⁴ Comments on Drax Amite BioEnergy Permit (Attach. 54).

ensuring PTE limit effectiveness, EPA must amend its Part 63 regulations to expressly state that if an area source becomes major due to the relaxation or elimination of a limit taken to restrict a facility's PTE, major source MACT requirements shall apply to the facility as through construction had not commenced.²⁹⁵

The problem caused by the omission of this language from the current Part 63 regulations is illustrated by the application (or, lack of application) of § 112 requirements to the **Enviva Northampton plant in Garysburg, North Carolina**. Because EPA has not promulgated a MACT standard for the wood pellet manufacturing industry, major sources in this category are subject to the “case-by-case” MACT requirements in Clean Air Act § 112(g). As mentioned above, when North Carolina DENR removed the HAP PTE limit that had been included in the initial 2012 construction permit for the Enviva Northampton wood pellet manufacturing plant, DENR declared: “The facility will now be classified as a major source of HAP emissions. This modification does not trigger any new HAP requirements.”²⁹⁶ Thus, though the facility's total HAP emissions following its 2015 elimination of its HAP PTE limit were reported to be 27.8 tpy, the facility was not subject to any HAP control requirements under Clean Air Act § 112.²⁹⁷

D. EPA Must State in Its Regulations That a Consequence of Violating HAP PTE Limits is to Be Subject to Major Source MACT Requirements.

EPA declares that for a PTE limit to be effective, sources must be “cognizant of the consequences of non-compliance.” 84 Fed. Reg. at 36318/3. Yet EPA's notice is oddly silent regarding what should be the most critical consequence of a violation: application of the major source MACT standard. Given that the Clean Air § 112(a)(1) defines a “major source” as one that “emits, or has the potential to emit” HAP at or above the major source threshold, a source that actually emits at or above that threshold plainly has the “potential” to do so and its PTE limit cannot be considered “effective.” EPA should explicitly state in its regulations that the consequence of violating a PTE limit is the requirement to comply with the applicable MACT requirements—in addition to an appropriate penalty for violating the PTE limit.

²⁹⁵ This provision would be the equivalent of the “source obligation rule” in federal NSR regulations at 40 C.F.R. § 52.21(r)(4).

²⁹⁶ Air Permit Review for 2015 Enviva Pellets Northampton Permit (Permit Issue Date Oct. 12, 2015), at 4 (Attach. 46).

²⁹⁷ *Id.*

E. EPA Must Strengthen and Supplement the Effectiveness Criteria that it Proposes in its Notice.

In addition to the need to add the effectiveness criteria (and associated requirements) described above, EPA needs to strengthen and supplement the effectiveness criteria that it proposed in its notice as follows:

1. Authority to Establish Limits (Comment C-21)

EPA proposes to require that HAP PTE limits “identify the legal authority under which the HAP PTE limits are being issued.” 84 Fed. Reg. at 3618/2. According to EPA, the purpose of this requirement would be to ensure “that the issued HAP PTE limits are required by law and legally binding on the source and not merely voluntary.” *Id.* We agree that the PTE limit must identify the legal authority upon which it is issued. In addition, we urge EPA to require that a PTE limit taken to avoid MACT applicability be specifically identified as such in order to be considered in determining whether the source is major for purposes of CAA § 112. This appears to be a more significant problem with PTE limits than the possibility that a state might lack authority to establish a limit. For example, sometimes a facility takes a limit that is identified as enabling it to avoid only NSR applicability when it also is intended to enable the source to avoid MACT applicability. If a state fails to identify the fact that a limit is designed to avoid MACT applicability, then a member of the public may not be aware of that purpose or know to evaluate whether the limit is effective for that purpose when commenting on a permit. Furthermore, identification of a limit as a MACT avoidance condition makes it clear that exceedance of that limit results not only in liability for violating the limit, but also liability for violating CAA § 112.

2. Legal Authority to Enforce the PTE Limits (Comment C-22, 23)

EPA’s second proposed effectiveness criteria is that “the regulatory authority issuing the limits must also have the authority to enforce the limits.” 84 Fed. Reg. at 36318/3. While we agree that this criteria is important and should be included, we are unaware of a PTE limit ever having been issued by an entity that lacks legal authority to enforce it. As discussed above, the real problem is with PTE limits that cannot be enforced by EPA and the public. State-only or local-only enforcement authority alone is insufficient to impose a credible risk of enforcement and therefore, ensure compliance with the HAP PTE limits.

3. Practical Enforceability

The “practical enforceability” criteria proposed by EPA, though incomplete, is important to ensuring the effectiveness of PTE limits and should be incorporated into Part 63. It is not at all uncommon for a state to issue an ineffective “PTE limit” that consists only of a general requirement that the source keep its HAP emissions below 10 tpy of any individual HAP or 25 tpy of total HAP, without any

additional enforceable limitations designed to keep HAP emissions below these thresholds.²⁹⁸ As EPA recognizes in the proposal,²⁹⁹ and as at least one federal district court has concluded,³⁰⁰ such “blanket” restrictions on annual HAP emissions – without some mechanism to ensure the source actually maintains emissions below these thresholds – are not practically enforceable and are therefore not valid means of limiting PTE. We support inclusion of “practical enforceability in the Part 63 regulations as a required criterion for limits intended to be relied upon in calculating a facility’s PTE.

We also urge EPA to expressly include the requirement set forth in its 1989 PTE guidance that a PTE limit “must contain a production or operational limitation in addition to the emission limitation in cases where the emission limitation does not reflect the maximum emissions of the source operating at full design capacity without pollution control equipment.”³⁰¹ For example, EPA’s 1989 guidance explained that “[w]hen permits require add-on controls operated at a specified efficiency level, permit writers should include, so that the operating efficiency condition is enforceable as a practical matter, those operating parameters and assumptions which the permitting agency depended upon to determine that the control equipment would have a given efficiency.”³⁰² Furthermore, EPA’s 1989 guidance emphasized that such production or operating parameters must be “independently” enforceable.³⁰³ While the language in EPA’s proposal comes close to incorporating this requirement when describing the requirement for technical accuracy (84 Fed. Reg. at 36,319/1), the language in the final rule must be clearer. It is not uncommon that state permitting authorities fail to include in permits enforceable conditions needed to ensure that key PTE calculation assumptions are valid, such as the combustion temperature needed to achieve the required control efficiency. We urge EPA to include clear language in its final rule explaining that all assumptions regarding a facility’s potential emissions that are not inherent to the facility design be incorporated into the facility’s PTE limit as enforceable requirements accompanied by adequate monitoring, recordkeeping, and reporting.

²⁹⁸ See Comments on Amite BioEnergy permit dated Aug. 14, 2017, at 9-10 (Attach. 54); Draft Amite BioEnergy Title V permit at 14, 16 (Attach. 67).

²⁹⁹ 84 Fed. Reg. at 36,317.

³⁰⁰ *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1133 (D. Colo. 1987) (holding that “blanket restrictions on actual emissions” are not “properly considered in the calculation of a source’s potential to emit” because, among other reasons, such limitations are “virtually impossible to verify or enforce” and would allow sources to “virtually wipe away the entire PSD program because a carefully worded permit . . . would completely exempt any source from PSD review.”).

³⁰¹ Terrell E. Hunt and John S. Seitz, U.S. EPA, “Limiting Potential to Emit in New Source Permitting” (June 13, 1989), at 5-6.

³⁰² *Id.* at 7.

³⁰³ *Id.* at 6.

We also urge EPA to expressly state in its final rulemaking that for a PTE limit to be relied on in calculating a facility's potential to emit for purposes of determining MACT applicability, it must be included in a final permit or rule. As shown above in our discussion of the Enviva Greenwood plant in South Carolina, states and sources sometimes seek to rely on commitments made by a source in its permit application rather than in the source's permit. Indeed, as also explained above, Mississippi authorized the AED Copenhaw plant to commence construction based on supposedly "enforceable" PTE limits in its permit application despite the fact that the state had not yet issued a final (or even draft) permit authorizing the source's construction. This is inappropriate. Permit application commitments are almost never written in enforceable terms, and permit applications can be difficult to access by the public and federal regulators. EPA should put a stop to this unlawful practice.

Another important addition that EPA needs to make to its practical enforceability language is a requirement that where a PTE limit is based on an operational or production restriction, the facility must periodically perform source tests to verify that the restriction actually correlates with emissions that are below the major source threshold. As demonstrated above, applicants sometimes substantially underestimate the facility's potential emissions prior to construction. In the case of the wood pellet industry, most new sources accepted production limits in order to qualify as area/minor sources. Subsequent testing throughout the industry demonstrated that these production limits were far too high to keep emissions below major source thresholds. Yet many facilities had no requirement in their permits to periodically test their emissions and confirm the technical accuracy of their PTE limits. Thus, facilities operated for years before the emission exceedances were confirmed (and even then, these exceedances typically were not uncovered and addressed until public commenters brought the problem to the states' attention).

Finally, we urge EPA to expressly instruct that a technically accurate and practicably enforceable PTE limit must account for emissions from startup, shutdown, and malfunction. Often, facility emissions are higher during these periods, yet the monitoring and compliance demonstration method associated with the facility's PTE limits fails to account for emissions during these periods.³⁰⁴ To ensure that a facility's emissions are actually below the major source threshold, it is important to make states aware that an effective PTE limit must account for, and include monitoring of, all of the facility's emissions.

³⁰⁴ See, e.g., *In the Matter of Cash Creek Generation, LLC*, 2012 EPA CAA Title V LEXIS 5, 46-60 (June 22, 2012).

VI. CONCLUSION

For all of the above reasons, EPA should not finalize the elements of the proposed rule regarding reclassification of major sources, and should not finalize the elements of the rule that address potential to emit unless it first addresses the above-described issues.

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