

COMMENTS OF STATES AND CITIES REGARDING EPA'S PROPOSED REVIEW OF  
FINAL RULE CLASSIFICATION OF MAJOR SOURCES AS AREA SOURCES UNDER  
SECTION 112 OF THE CLEAN AIR ACT

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**INTRODUCTION**

The States of California, Connecticut, Maryland, New Jersey, New York, Oregon, Rhode Island, Wisconsin, the Commonwealths of Massachusetts and Pennsylvania, and the City of New York, (“States and Cities”) respectfully submit these comments in response to the Environmental Protection Agency’s (“EPA”) notice of proposed rulemaking titled “Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” 88 Fed. Reg. 66,336 (Sept. 27, 2023) (“Proposed Rule”).

Under Section 112 of the Clean Air Act, 42 U.S.C. § 7412, Congress created a systematic regulatory regime to ensure that “major sources” of hazardous air pollutants (“HAPs”)—pollutants like cyanide and hydrochloric acid that are extremely harmful to human health and the environment, even in small doses—reduce their HAPs emissions to the “maximum degree of reductions in emissions” that EPA determines is “achievable,” which is no less than the level achieved in practice by the lowest-polluting facilities in a particular source category.<sup>1</sup> These standards for major sources are referred to as “maximum achievable control technology” or “MACT” standards.<sup>2</sup> To further that congressional intent, EPA required any source that sought to avoid Section 112 regulatory requirements triggered by emission thresholds to accept federally enforceable limits on a source’s “potential to emit” below that threshold. Those federally enforceable limits, which are enforceable by both EPA and the public, ensure compliance and national uniformity with the mandates of Section 112’s federal program.

However, between 2018 and 2020, EPA unraveled that regime by: (1) allowing a major source to reclassify to area source status at any time by limiting its potential to emit hazardous air pollutants to below the major source thresholds, and (2) amending the definition of “potential to emit” by removing the requirement for federally enforceable limits. The States and Cities and other stakeholders raised significant concerns that EPA’s actions would allow sources to reclassify from major source status to area source status by reducing their emissions just below the major source threshold and then subsequently increasing emissions under less stringent, or nonexistent, area source regulations.<sup>3</sup> The health risks of these increased hazardous air pollutant

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<sup>1</sup> See 42 U.S.C. § 7412(d)(2).

<sup>2</sup> See *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 594 (D.C. Cir. 2016).

<sup>3</sup> “For example, if a major source standard had the effect of reducing emissions of a certain pollutant to 1 ton per year, but there is no corresponding area source standard for the same source category, then a source could take a [potential to emit] limit of 9.9 tons per year for a single HAP... thus increasing its emissions, and reclassify ....” 88 Fed. Reg. at 66,343.

emissions will fall on those who can least bear it, as the highest-emitting facilities are often [or] disproportionately located in or near underserved communities.<sup>4</sup> In recognition of these concerns, the Proposed Rule, if finalized, will require major sources that reclassify to area source status to establish federally enforceable permit conditions that contain safeguards to prevent emission increases above the levels allowed by the major source emission standard that the source was subject to prior to reclassification.

The States and Cities support EPA's proposal to establish federally enforceable permit conditions to preserve the public and EPA's ability to enforce the Clean Air Act and to provide the necessary oversight to prevent increases in emissions of HAPs. We further urge EPA to adopt its first proposed restriction and prohibit any sources subject to a major source standard used to reach EPA's 90 percent threshold for any of the Section 112(c)(6) persistent and bioaccumulative HAPs from reclassifying from major source status to area source status. In light of the special attention Congress paid to these specific pollutants and Section 112(c)(6)'s command that EPA "assure" that 90 percent of these sources are subject to MACT standards, the most protective restrictions are warranted for EPA to meet its statutory obligation.

## BACKGROUND

### I. THE STATUTORY FRAMEWORK FOR REGULATING HAPS UNDER THE CLEAN AIR ACT

Section 112 regulates the emissions of HAPs, defined to include "pollutants that are known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental effects."<sup>5</sup> Initially, Section 112 relied upon EPA's assessment of health risks and costs. But in 1990, dissatisfied with EPA's lack of progress and concerned about these dangerous impacts, Congress amended Section 112 to identify and list almost two hundred HAPs and to require mandatory technology-based standards for controlling the emission of HAPs from specific categories of stationary sources.<sup>6</sup>

Under section 112, the level of control required depends on whether a source is a "major source" or an "area source." Major sources are those that emit, or have "the potential to emit," 10 tons per year or more of any single HAP, or 25 tons per year or more of any combination of

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<sup>4</sup> Underserved communities refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. *See*, Executive Order 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 25, 2021).

<sup>5</sup> *See* 42 U.S.C. § 7412(b)(2).

<sup>6</sup> *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008); 42 U.S.C § 7412(d).

HAPs.<sup>7</sup> Section 112 requires EPA to establish standards for major sources that result in the “maximum degree of reductions in emissions” that EPA determines is “achievable,” which is no less than the level achieved in practice by the lowest-polluting facilities in a particular source category.<sup>8</sup> These standards for major sources are referred to as “maximum achievable control technology” or “MACT” standards.<sup>9</sup>

Even after EPA designates source categories and sets “specific, strict pollution control requirements on both new and existing sources of HAPs,” *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008), it must review the MACT standards at least every eight years and “tak[e] into account developments in practices, processes, and control technologies.”<sup>10</sup> If necessary to protect public health or prevent an adverse environmental effect, taking into consideration its review of the standards and developments in technology and practices, EPA must promulgate more stringent standards for specific source categories.<sup>11</sup> In addition to meeting MACT standards, major sources of HAPs must obtain operating permits known as Title V permits, which combine all federally enforceable requirements applicable to a facility with respect to all air emissions (*i.e.*, both hazardous air pollutants and non-hazardous air pollutants).<sup>12</sup> Title V permits also usually require additional monitoring, reporting, and recordkeeping requirements to ensure compliance.<sup>13</sup>

An area source is “any stationary source of hazardous air pollutants that is not a major source.”<sup>14</sup> Area sources are subject to far fewer requirements and are rarely subject to any federal HAP standards at all. When EPA sets standards for area sources, it generally requires less stringent reductions than those required by MACT.<sup>15</sup> Further, most area sources are not required to obtain Title V permits.<sup>16</sup> Because the level of control required for any specific source depends

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<sup>7</sup> 42 U.S.C. § 7412(a).

<sup>8</sup> *See id.* § 7412(d)(2).

<sup>9</sup> *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 594 (D.C. Cir. 2016).

<sup>10</sup> 42 U.S.C. § 7412(d)(6).

<sup>11</sup> *Id.* § 7412(f)(2)(A).

<sup>12</sup> *Id.* §§ 7661a(a), 7661c(a).

<sup>13</sup> *See* 40 C.F.R. §§ 64.1–64.10.

<sup>14</sup> 42 U.S.C. § 7412(a)(2).

<sup>15</sup> *Id.* § 7412(d)(5).

<sup>16</sup> Clean Air Act Section 502(a) allows EPA to exempt certain sources from Title V if compliance would be “impracticable, infeasible, or unnecessarily burdensome on source categories.” Beginning in the late 1990s, EPA issued a series of guidance memoranda indicating it intended to exempt a number of HAP area source categories from Title V. *See, e.g.*, Steven J. Hitte, Title V Applicability of One-Time Reporting Provisions for Nonmajor Sources (April 19, 1999), <https://www.epa.gov/sites/production/files/2015-08/documents/potamis.pdf>. EPA’s current practice is to make a case-by-case determination whether to exempt area source categories from Title V as area source standards are promulgated, as provided by 40 C.F.R. § 70.3 (b)(2). *See* Exemption of Certain Area Sources From Title V Operating Permit Programs, 70 Fed. Reg. 75,320 (2005). EPA has frequently chosen to exempt area source categories from

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on whether that source is a “major source” or an “area source,” any attempt to change a source’s designation is likely to affect emissions of HAPs.

## II. EPA’S REGULATORY HISTORY REGARDING HAPS

EPA has also created a “synthetic minor” regulatory program for HAPs that allows some major sources to be classified as area sources if the source agrees to federally enforceable limits on its potential to emit (“PTE”) that keep emissions below the major source threshold. Given the “importance of potential to emit to determining the applicability of [MACT] standards and other requirements,” 59 Fed. Reg. 12,408, 12,410-11 (March 16, 1994), questions arose as to when major sources of HAPs could establish limits on their potential to emit to avoid compliance with MACT.

On May 16, 1995, EPA issued a memorandum titled “Potential to Emit for MACT Standards—Guidance on Timing Issues,” commonly referred to as the “Once In, Always In Policy” (“Once In Policy”).<sup>17</sup> Under the Once In Policy, a facility that is a major source of HAPs as of the effective compliance date of an applicable MACT standard must continue to comply with that standard permanently, even if that facility later decreases its potential emissions below the major source threshold.<sup>18</sup> Similarly, any facility deemed a major source of HAPs under Title V is always subject to Title V permitting requirements.<sup>19</sup> The Once In Policy aimed to prevent sources from reclassifying from major source status to area source status by reducing their emissions just below the major source threshold and then subsequently increasing emissions—and thus backsliding—under less stringent, or nonexistent, area source regulations.

For over two decades, EPA operated under the Once In Policy to ensure that major sources of HAPs maintained their emission reductions over time. But on January 25, 2018, EPA issued a memorandum that expressly withdrew and superseded the Once In Policy (the “Wehrum Memo”). The Wehrum Memo states that a major source may reclassify as an area source at any time by taking an enforceable limit of its PTE below the applicable major source thresholds.<sup>20</sup>

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Title V. *See, e.g.*, 74 Fed. Reg. at 69,197 (2009) (40 CFR 63 Subpart 6V, chemical preparations manufacturing); 74 Fed. Reg. at 63,239 (2009) (40 CFR Part 63 Subpart 7A, asphalt processing and asphalt roofing manufacturing); 73 Fed. Reg. at 78,640 (2008) (40 CFR Part 63 Subpart 6Y, ferroalloys production); 72 Fed. Reg. at 73,185 (2007) (40 CFR Part 63 Subpart 6R, clay ceramics manufacturing); 72 Fed. Reg. at 38,868 (40 CFR Part 63 Subpart 6N, chromium compounds); 72 Fed. Reg. at 38,871 (2007) (40 CFR Part 63 Subpart 6O, flexible polyurethane foam production and fabrication).

<sup>17</sup> *See*, John S. Seitz, *Potential to Emit for MACT Standards – Guidance on Timing Issues*, (May 16, 1995), <https://www.epa.gov/sites/production/files/2018-02/documents/pteguid.pdf> (hereinafter “Seitz Memo”).

<sup>18</sup> Seitz Memo at 5, 9.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> Wehrum Memo at 1. Several non-governmental organizations and the State of California challenged the Wehrum Memo in the D.C. Circuit. *See California Communities Against Toxics*

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On July 26, 2019, EPA issued a proposed rule “to implement the plain language reading of the statute as discussed in the [Wehrum Memo],” 84 Fed. Reg. 36,304, 36,309, and “provide that a major source can reclassify to area source status at any time by limiting its potential to emit hazardous air pollutants to below the major source thresholds,” *id.* at 36,304. The rule also amended the definition of “potential to emit” by removing the requirement for federally enforceable PTE limits and requiring instead that limits “meet the proposed effectiveness criteria of being legally and practically enforceable,” 84 Fed. Reg. at 36,306. Many of the States and Cities submitted comments opposing the proposed rule and on November 19, 2020, EPA finalized the rule (hereinafter referred to as “2020 Rule”).<sup>21</sup>

On January 20, 2021, President Biden issued Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” which directed EPA to review, *inter alia*, the 2020 Rule and to determine whether it should be revised or rescinded as appropriate and consistent with applicable law.

### **III. THE SERIOUS AND DISPROPORTIONATE IMPACTS ON PUBLIC HEALTH FROM HAP EMISSIONS**

EPA estimates there are currently 7,920 major sources of HAPs potentially subject to the proposed rulemaking.<sup>22</sup> While EPA does not quantitatively evaluate the potential emissions impact of its proposed rulemaking, even the smallest potential increase in HAPs could have substantial impacts on public health because of the acute toxicity of many of these compounds, the persistent and bioaccumulative properties of certain HAPs, and the proximity of HAP major sources to underserved communities.

EPA currently regulates 187 HAPs under Section 112, all of which are “known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental effects.”<sup>23</sup> Some HAPS, such as chromium, nickel, arsenic, and mercury,<sup>24</sup> are acutely toxic—causing adverse effects after just a single exposure or multiple exposures in a short period of time. Other compounds are toxic through chronic exposure over a long period of time. For example, lead compounds emitted by the metal industry (such as lead smelters and iron and steel producers) are chronically toxic and bioaccumulate in the blood and bones of people exposed, which can slow cognitive development in children, severely damage the brain and kidneys, cause reproductive effects, and may, in large doses, increase the risk of

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*v. EPA*, No. 18-1085(L) (D.C. Cir. Aug. 20, 2019) (holding that the Wehrum Memo was not a final agency action and dismissing the petitions for lack of subject matter jurisdiction).

<sup>21</sup> Several states and non-governmental organizations challenged the 2020 Rule in the D.C. Circuit. *See California Communities Against Toxics, et al., v. U.S. EPA*, Case No. 21-1024. The case is currently in abeyance as EPA reconsiders the rule.

<sup>22</sup> Regulatory Impact Analysis for the 2020 Rule at 1-6.

<sup>23</sup> *See* 42 U.S.C. § 7412(b)(2).

<sup>24</sup> *See, e.g.*, Dose-Response Assessment for Assessing Health Risks Associated With Exposure to Hazardous Air Pollutants, EPA, <https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants>.

cancer.<sup>25</sup> Hydrochloric acid, one of the HAPs emitted in the highest quantities,<sup>26</sup> is used in a variety of industrial applications and is corrosive to eyes, skin, mucous membranes, esophagus, and stomach, and can be acutely toxic at high enough exposure levels.<sup>27</sup> Cyanide, commonly used in chemical production, electroplating, and metal treatment, is acutely toxic to people and inhalation exposure can result in headaches, nausea, and even death while chronic exposure has long-term negative effects on the central nervous system, cardiovascular system, and respiratory system.<sup>28</sup>

These and other harmful health impacts caused by the emission of HAPs are not evenly distributed throughout the country. Instead, impacts fall disproportionately on underserved communities—communities that already face much higher cumulative pollution burdens than other neighborhoods.<sup>29</sup> For example, a study published in February 2018 on disproportionate pollution burdens in schools found that ambient levels of HAPs like lead, mercury, and cyanide compounds were considerably higher in schools with higher percentages of students of color than at schools with majority white students.<sup>30</sup> Another study from 2016 demonstrated that “toxic outliers,” that is, facilities with HAP emissions that far exceed group averages, are disproportionately located in or near low-income communities and communities of color.<sup>31</sup>

Decades of scientific research link disproportionate environmental burdens to race and income, and indicate that the risk of additional burdens from increased HAP emissions resulting from the 2020 Rule will fall on those communities who can least bear it.

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<sup>25</sup> Health Effects Fact Sheet: Lead Compounds, EPA (Sept. 2011),

<https://www.epa.gov/sites/production/files/2016-09/documents/lead-compounds.pdf>.

<sup>26</sup> EPA Decision Increases Hazardous Air Pollution Risk Data Files, Union of Concerned Scientists (April 24, 2018), <https://www.ucsusa.org/resources/epa-decision-increases-air-pollution-risk>.

<sup>27</sup> Health Effects Fact Sheet: Hydrochloric Acid, EPA (Jan. 2000),

<https://www.epa.gov/sites/production/files/2016-09/documents/hydrochloric-acid.pdf>.

<sup>28</sup> Health Effects Fact Sheet: Cyanide Compounds, EPA (Jan. 2000),

<https://www.epa.gov/sites/production/files/2016-09/documents/cyanide-compounds.pdf>.

<sup>29</sup> See, e.g., Mikati, I., et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108(4) Am. J. Pub. Health 480-485 (Apr. 2018),

<https://www.ncbi.nlm.nih.gov/pubmed/29470121> (finding low-income communities had a 1.35x higher pollution burden than the overall population, communities of color had a 1.28x higher burden, and Black communities specifically had a 1.54x higher burden); see also, e.g., Stewart, J. et al., *Environmental Justice and Health Effects of Urban Air Pollution*, 107 J. of the Nat'l Med. Ass'n 50-58 (Feb. 2015).

<sup>30</sup> Sara E. Grinkeski & Timothy W. Collins, *Geographic and social disparities in exposure to air neurotoxicants at U.S. public schools*, 161 Env. Research 580-587 (Feb. 2018),

<https://www.sciencedirect.com/science/article/pii/S0013935117317188>.

<sup>31</sup> Collins, M. et al., *Linking 'toxic outliers' to environmental justice communities*, 2016 Environ. Res. Letters 11:015004, <https://iopscience.iop.org/article/10.1088/1748-9326/11/1/015004>.

## DISCUSSION

The Proposed Rule, if finalized, will amend the 2020 Rule by: (1) adding safeguards to ensure that reclassified sources cannot increase their emissions as a result of reclassification; (2) requiring that emission limits for reclassified sources be federally enforceable; and (3) updating electronic reporting requirements for sources that reclassify from major to area sources. The Proposed Rule further states that reclassification is only effective upon issuance of a permit with federally enforceable conditions and notification to EPA. The proposed requirements would apply to all sources that choose to reclassify, including any sources that have already reclassified since January 25, 2018. EPA is further seeking comment on whether additional restrictions are necessary for source categories that are subject to MACT standards for the seven persistent and bioaccumulative air toxics listed under Section 112(c)(6) of the Clean Air Act.

To ensure that reclassified sources<sup>32</sup> cannot increase their emissions, the States and Cities support safeguards including, but not limited to, federally enforceable permit conditions to preserve the public and EPA's ability to enforce the Clean Air Act, thereby providing the oversight necessary to avoid increases in HAPs. We further urge EPA to take the most protective action proposed by prohibiting reclassification for sources subject to a MACT standard for any of the seven persistent and bioaccumulative air toxics listed under Section 112(c)(6) of the Clean Air Act. Given Congress's special attention to these specific pollutants and Section 112(c)(6)'s command that EPA "assure" that 90 percent of these sources are subject to MACT standards, the most stringent restrictions are warranted for EPA to meet its statutory obligation.

### I. EPA MUST RETAIN FEDERAL ENFORCEABILITY FOR PTE LIMITATIONS

EPA has long required that if a source wishes to avoid federal regulatory requirements triggered by certain emission thresholds, the source must accept federally enforceable conditions on its potential to emit that restrict its emissions below that threshold.<sup>33</sup> Federally enforceable limits are defined as those limits that are enforceable by both EPA and the public (through the Clean Air Act's citizen suit provision).<sup>34</sup> This requirement "provide[s] the public with credible assurances" that sources are not "avoiding applicable requirements of the [Clean Air] Act" and "ensure[s] that the requirements of the [Clean Air] Act are uniformly implemented throughout the nation."<sup>35</sup> Federally enforceable limits include emission standards established pursuant to the Clean Air Act, as well as limitations and conditions imposed by state and local permitting

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<sup>32</sup> The States and Cities support EPA's proposal to require safeguards and permit restrictions for synthetic minor sources, but not extend this requirement to true minor sources that have made permanent process or material changes to reduce their PTE.

<sup>33</sup> See, e.g., John S. Seitz and Robert I. Van Heuvelen, *EPA Guidance Memorandum, Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act* (Jan. 25, 1995).

<sup>34</sup> A federally enforceable limitation is one that is "enforceable by the Administrator and citizens under the [Clean Air] Act or that are enforceable under other statutes administered by the Administrator." 40 C.F.R. § 63.2.

<sup>35</sup> Seitz and Van Heuvelen, *supra*, *EPA Guidance Memorandum* at 2-3.

agencies through EPA-approved state operating permit programs or otherwise included in an EPA-approved State Implementation Plan.<sup>36</sup>

A key concept of federal enforceability is that such limitations and conditions either flow directly from the Clean Air Act or have been reviewed and approved by EPA to be sufficiently stringent, permanent, quantifiable, and enforceable as a practical matter. This reflects the reality that a source's "actual emissions"<sup>37</sup> and theoretical maximum emissions (*e.g.*, emissions if no control devices or other operational constraints were in place) may well be quite different. Operators would prefer that their emissions for purposes of determining applicable regulatory requirements reflect their actual emissions, rather than a hypothetical worst-case scenario. However, avoiding that worst-case scenario means regular and reliable operation of a control device or other operational limits. Rather than trust that a facility operator will reliably use its control devices or limit its operations, EPA has previously imposed federally enforceable conditions limiting a source's operation to define the source's regulatory PTE.<sup>38</sup>

Thus, EPA's current proposal to codify that any PTE limitation taken by a major source to reclassify as an area source must be federally enforceable is consistent with Section 112 and EPA's longstanding interpretation and position:

The Agency continues to believe that, if sources may avoid the requirements of a Federal air pollution control program by relying on State or local limitations, it is essential to the integrity of the National air toxics program that such limitations be actually and effectively implemented. Thus, Federal enforceability is both necessary and appropriate to ensure that such limitations and reductions are actually incorporated into a source's design and followed in practice. Further, Federal enforceability is needed to back up State and local enforcement efforts and to provide incentive to source operators to ensure adequate compliance.<sup>39</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> 40 C.F.R. § 63.71 ("Actual emissions means the actual rate of emissions of a pollutant, but does not include excess emissions from a malfunction, or startups and shutdowns associated with a malfunction. Actual emissions shall be calculated using the source's actual operating rates, and types of materials processed, stored, or combusted during the selected time period.")

<sup>38</sup> Prior to the 2020 Rule, "potential to emit" was defined as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable." 40 C.F.R. § 63.2.

<sup>39</sup> *NESHAPS for Source Categories: General Provisions*, EPA, 59 Fed. Reg. 12,408, 12,414 (Mar. 16, 1994); *see also Requirements for the Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, EPA, 54 Fed. Reg. (continued...)



Indeed, there is a substantial body of case law demonstrating that federal enforceability is a key component of the Clean Air Act. Appellate courts around the country have repeatedly held that Congress intentionally crafted the Clean Air Act's system of cooperative federalism to work with the strong backstop of federal enforceability. In *United States v. Marine Shale Processors*, the Fifth Circuit upheld EPA's authority to enforce a procedurally flawed state permit against a facility because it had been issued "pursuant to" the state's permitting authority under the Clean Air Act.<sup>40</sup> The court deferred to EPA's determination that it could enforce the procedurally flawed permit because the regulatory phrase "pursuant to" referred to "not the procedure, but to the authority under which the state issued the permit."<sup>41</sup> In so holding, the court relied on "the broad enforcement powers Congress intended to confer upon EPA."<sup>42</sup> The court found that denying EPA enforcement authority over the permit would contravene the Clean Air Act's statutory scheme, noting that "Congress gave the United States the power to enforce state air permits in part in order to prevent a destructive race among states to attract industry by adopting the least stringent emissions-limits" and that the Clean Air Act reflects Congress' determination "that state enforcement would not always be sufficient to ensure attainment of [Clean Air Act] ambient air standards."<sup>43</sup> Soundly rejecting the facility's arguments to the contrary, the court noted that federal enforceability was crucial to the Clean Air Act's statutory scheme because without it, "a source [could] operate[] under and violate[] a permit that no authority, state or federal, can enforce."<sup>44</sup>

In *United States v. Ford Motor Company*, the Sixth Circuit likewise took a broad view of Congress' intent in the Clean Air Act to provide a strong backstop of federal enforceability.<sup>45</sup> In this case, the court upheld EPA's authority to enforce Michigan's State Implementation Plan ("SIP") even though a state court decision purported to invalidate portions of the SIP on technical grounds.<sup>46</sup> While the court noted that "the Clean Air Act contemplates very significant participation in air pollution control by state air pollution control agencies," the court found it "equally clear that the final authority is vested in the United States Environmental Protection Agency and the courts of the United States."<sup>47</sup> Quoting the Supreme Court, the Sixth Circuit noted that the 1970 Clean Air Act amendments demonstrated Congressional intent to "sharply increase[] federal authority and responsibility in the continuing effort to combat air pollution."<sup>48</sup> In recognizing EPA's authority to act as a federal backstop to state enforcement, the court noted

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27, 274, 27,277 (June 28, 1989) (noting importance of federal enforceability for "the specific goal of using national enforcement to ensure that the requirements of the Act are uniformly implemented throughout the nation").

<sup>40</sup> 81 F.3d 1329, 1354 (5th Cir. 1996).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1355.

<sup>44</sup> *Id.*

<sup>45</sup> 814 F.2d 1099 (6th Cir. 1987).

<sup>46</sup> *Id.* at 1101.

<sup>47</sup> *Id.* at 1102.

<sup>48</sup> *Id.* (quoting *Train v. NRDC*, 421 U.S. 60, 64 (1975)).

Congress clearly intended to avoid the race to the bottom that would ensue with scattershot state enforcement:

The 50 states of this union compete intensely with one another for industry. As Congress has recognized, if state control of ambient air emissions were final, in short order, major shifts of smoke stack industries to states with the most lenient pure air standards would inevitably take place. Absent final authority in United States EPA, the attainment goals of the Clean Air Act would prove ephemeral.<sup>49</sup>

Thus, like the Fifth Circuit, the Sixth Circuit found that congressional intent in the Clean Air Act clearly supported the strong backstop of federal enforceability to promote national uniformity and avoid the potential “race to the bottom” that could occur with sole reliance on state enforcement.

Another important aspect of federal enforceability is the availability of public enforcement through the Clean Air Act’s citizen suit provision—an enforcement avenue that may not be present in non-federally enforceable state laws.<sup>50</sup> As the Second Circuit has noted, “citizen suits play an important role in the [Clean Air] Act’s enforcement scheme. [] The citizen suit provisions were designed not only to ‘motivate government agencies’ to take action themselves, [] but also to make citizens partners in the enforcement of the Act’s provisions. [] Citizens serve ‘as a supplemental and effective assurance that the Act [is] implemented and enforced.’”<sup>51</sup> In *Weiler*, the court upheld the right to bring a citizen suit against a facility alleged to be in violation of the Clean Air Act for failing to obtain a major source pre-construction permit, even though the relevant state permitting authority did not believe the facility to be in violation.<sup>52</sup> The court found that parallel mechanisms of enforcement were key to the Clean Air Act’s enforcement scheme, noting that the court “fail[ed] to understand how the very existence of alternative enforcement mechanisms evinces congressional intent to prohibit use of section 304(a)(3) citizen suits[.]”<sup>53</sup> The court further noted that even the availability of EPA to sue on its own was not a sufficient substitute for a citizen suit, as “viewing such an enforcement mechanism as a substitute for a citizen’s suit would undermine the very purpose of the *citizen’s* right to sue.”<sup>54</sup>

While the cases cited above involved Clean Air Act provisions regarding criteria pollutants, the need for federal enforceability in order to avoid a “race to the bottom” and

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<sup>49</sup> *Id.*

<sup>50</sup> See e.g., *NESHAPS for Source Categories: General Provisions*, EPA, 59 Fed. Reg. 12,408, 12,414 (March 16, 1994) (“Federal enforceability also enables citizen enforcement under section 304 of the Act”).

<sup>51</sup> *Weiler v. Chatham Forest Products, Inc.*, 392 F.3d 532, 536 (2d Cir. 2004) (citations omitted).

<sup>52</sup> *Id.* at 538.

<sup>53</sup> *Id.* at 537.

<sup>54</sup> *Id.* at 538.

provide a federal backstop to inadequate state programs is even *more* acute in the context of HAPs, as EPA previously argued in *National Mining*.<sup>55</sup> State air toxics programs are typically not otherwise federally enforceable, because they are not required to be submitted as part of federally enforceable SIPs. The requirement for PTE limits to be federally enforceable is thus critically important in the context of HAPs, since it is likely that any state programs regulating HAPs have never been evaluated by EPA as part of the SIP process. EPA previously recognized this problem, as it explained in the preamble to a 1994 final rulemaking:

In the context of implementing the air toxics program under amended section 112, the purposes of the Federal enforceability requirements are as follows: (1) To make certain that limits on a source's capacity are, in fact, part of its physical and operational design, and that any claimed limitations will be observed; (2) to ensure that an entity with strong enforcement capability (i.e., the Federal government) has legal and practical means to make sure that such commitments are actually carried out; and (3) to support the goal of the Act that the EPA should be able to enforce all relevant features of the air toxics program as developed pursuant to section 112.<sup>56</sup>

Decades of case law point to congressional intent that EPA's federal enforcement authority act as a backstop to state permitting programs. These judicial decisions along with EPA's prior position on the issue demonstrate that federal enforceability is a critical component of the Clean Air Act, and thus, EPA has good reasons for including that requirement in the Proposed Rule.<sup>57</sup>

## **II. EPA SHOULD ENSURE THAT SECTION 112(C)(6) SOURCES REMAIN SUBJECT TO MACT**

The States and Cities urge EPA to take the most protective action proposed by prohibiting reclassification for sources subject to a MACT standard for any of the seven persistent and bioaccumulative<sup>58</sup> HAPs listed under Section 112(c)(6) of the Clean Air Act. A stated, Section

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<sup>55</sup> *National Mining*, 59 F.3d at 1365-66 (“As for national uniformity, the government contends that ‘one of Congress’ driving concerns in amending the hazardous air pollutants provision in the Act in 1990 was to remedy the haphazard state of air toxic regulations.... The states’ approaches to regulation varied widely,’ creating ‘a patchwork of differing standards’ (citing H.R. Rep. No. 490(I), 101st Cong., 2d Sess. 232 (1990)).”).

<sup>56</sup> *NESHAPS for Source Categories: General Provisions*, EPA, 59 Fed. Reg. 12,408, 12,414 (Mar. 16, 1994).

<sup>57</sup> *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>58</sup> These pollutants are especially harmful to human health and the environment because they do not break down in the environment but bioaccumulate in biota, increasing in concentration as they progress up the food chain. *See* S. Rep. No. 101-228, at 154-55 (1989), reprinted in 5

*(continued...)*

112 generally requires MACT standards only for “major” sources of HAPs and less-stringent standards for area sources. However, with respect to persistent and bioaccumulative HAPs enumerated in Section 112(c)(6), Congress crafted an exception. Notably, Section 112(c)(6) mandates that for “alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,4,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator *shall*, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to [MACT] standards . . . .”<sup>59</sup> EPA’s obligation under Section 112(c)(6) “comprises both listing *sources* . . . and promulgating *standards*.” *Sierra Club v. EPA*, 699 F.3d 530, 531 (D.C. Cir. 2012) (emphasis in original).

Indeed, under Section 112(c)(6), “Congress required EPA . . . to regulate emissions of [these] seven specific hazardous air pollutants more stringently than the statute required for pollutants in general.”<sup>60</sup> EPA is “further required to establish and subject these listed sources to MACT standards . . . even if it would have otherwise had discretion to apply a less-stringent standard to any area sources on the list.”<sup>61</sup> Therefore, EPA is statutorily obligated to adopt its first proposed restriction, that is, “one that would prevent any sources subject to a major source NESHAP used to reach the EPA’s 90 percent threshold for any of the CAA section 112(c)(6) HAP from reclassifying from major source status to area source status.”<sup>62</sup>

Congress singled out this specific category of particularly hazardous pollutants for special treatment under Section 112(c)(6) by requiring EPA to “assure” that all sources listed – whether they are major sources or area sources – are subject to MACT standards. Thus, in order to meet Section 112(c)(6)’s clear statutory command, EPA should ensure that sources in those categories that are subject to MACT standards for the persistent and bioaccumulative HAPs listed pursuant to Section 112(c)(6) are subject to MACT standards regardless of their classification as major or area sources.

## CONCLUSION

For these reasons, the States and Cities support federally enforceable permit conditions to prevent emission increases after reclassification, and we urge EPA to adopt the most stringent restrictions to ensure that major sources of persistent and bioaccumulative HAPs listed under Section 112(c)(6) of the Clean Air Act cannot change their classification status to avoid applicable MACT standards.

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Comm. on Env’t and Pub. Works, 103rd Cong., A Legislative History of the Clean Air Act Amendments of 1990 at 8494-95 (1993).

<sup>59</sup> 42 U.S.C. § 7412(c)(6) (emphasis added).

<sup>60</sup> *Sierra Club v. EPA*, 863 F.3d 834, 835 (D.C. Cir. 2017).

<sup>61</sup> *Id.*

<sup>62</sup> 88 Fed. Reg. at 66,346.

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Sincerely,

FOR THE STATE OF CALIFORNIA

ROB BONTA  
ATTORNEY GENERAL

/s/ Kavita Lesser

KAVITA LESSER  
Deputy Attorney General  
DENNIS BECK  
Supervising Deputy Attorney General  
Office of the Attorney General  
300 S. Spring Street, Suite 1702  
Los Angeles, California 90013  
Tel: (213) 269-6605  
Email: [Kavita.Lesser@doj.ca.gov](mailto:Kavita.Lesser@doj.ca.gov)

FOR THE STATE OF CONNECTICUT

WILLIAM TONG  
ATTORNEY GENERAL

/s/ Kaelah M. Smith

KAELAH M. SMITH  
Assistant Attorney General  
165 Capitol Avenue  
Hartford, CT 06106  
(860) 808-5250  
[kaelah.smith@ct.gov](mailto:kaelah.smith@ct.gov)

FOR THE STATE OF MARYLAND

ANTHONY G. BROWN  
ATTORNEY GENERAL

/s/ Steven J. Goldstein

STEVEN J. GOLDSTEIN  
Special Assistant Attorney General  
Office of the Attorney General  
200 Saint Paul Place  
Baltimore, MD 21202  
410-576-6414  
[sgoldstein@oag.state.md.us](mailto:sgoldstein@oag.state.md.us)

FOR THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN  
ATTORNEY GENERAL

/s/ Lisa J. Morelli

LISA J. MORELLI  
Deputy Attorney General  
New Jersey Division of Law  
25 Market Street  
Trenton, New Jersey 08625  
Tel: (609) 376-2740  
Email: [Lisa.Morelli@law.njoag.gov](mailto:Lisa.Morelli@law.njoag.gov)

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FOR THE STATE OF NEW YORK

LETITIA JAMES  
ATTORNEY GENERAL

/s/ Michael J. Myers

MICHAEL J. MYERS  
Senior Counsel  
GAVIN G. MCCABE  
ASHLEY M. GREGOR  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 776-2382  
michael.myers@ag.ny.gov

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM  
ATTORNEY GENERAL

/s/ Paul Garrahan

PAUL GARRAHAN  
Attorney-in-Charge  
STEVE NOVICK  
Special Assistant Attorney General  
Natural Resources Section  
Oregon Department of Justice  
1162 Court Street NE  
Salem, Oregon 97301-4096  
(503) 947-4540  
Paul.Garrahan@doj.state.or.us  
Steve.Novick@doj.state.or.us

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA  
ATTORNEY GENERAL

/s/ Alison B. Hoffman

ALISON B. HOFFMAN  
Assistant Attorney General  
Chief, Environment and Energy Unit  
Rhode Island Office of the Attorney General  
150 South Main Street  
Providence, RI 02903  
Phone: (401) 274-4400 ext 2116  
Email: ahoffman@riag.ri.gov

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL  
ATTORNEY GENERAL

/s/ Bradley J. Motl

BRADLEY J. MOTL  
Assistant Attorney General  
Wisconsin Department of Justice  
Post Office Box 7857  
Madison, WI 53707-7857  
(608) 267-0505  
[motlbj@doj.state.wi.us](mailto:motlbj@doj.state.wi.us)

FOR THE COMMONWEALTH OF  
MASSACHUSETTS

ANDREA JOY CAMPBELL  
ATTORNEY GENERAL

/s/ Tracy L. Triplett

TRACY L. TRIPLETT  
Assistant Attorney General  
Environmental Protection Division  
One Ashburton Place, 18th Floor  
Boston, MA 02108  
(617) 963-2431  
[tracy.triplett@mass.gov](mailto:tracy.triplett@mass.gov)

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FOR THE COMMONWEALTH OF  
PENNSYLVANIA

MICHELLE A. HENRY  
ATTORNEY GENERAL

*/s/ Ann R. Johnston*

ANN R. JOHNSTON  
Assistant Chief Deputy Attorney General  
Office of the Attorney General  
Civil Environmental Enforcement Unit  
Strawberry Square, 14th Floor  
Harrisburg, PA 17120  
717-497-3678  
[ajohnston@attorneygeneral.gov](mailto:ajohnston@attorneygeneral.gov)

FOR THE CITY OF NEW YORK

HON. SYLVIA O. HINDS-RADIX  
CORPORATION COUNSEL

*/s/ Alice R. Baker*

ALICE R. BAKER  
Senior Counsel  
New York City Law Department  
100 Church Street New York, NY 10007  
(212) 356-2314  
[albaker@law.nyc.gov](mailto:albaker@law.nyc.gov)