States of California, Maryland, New Jersey, New York, Oregon, Rhode Island, Washington, and the Commonwealths of Massachusetts, Pennsylvania and Virginia

September 24, 2019

Via Electronic Transmission

EPA Docket Center (EPA/DC)
Docket ID No. EPA-HQ-OAR-2019-0282
U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Avenue, NW Washington,
DC 20460
a-and-r-Docket@epa.gov

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

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

Dear Administrator Wheeler,

The States of California, Maryland, New Jersey, New York, Oregon, Rhode Island, Washington, and the Commonwealths of Massachusetts, Pennsylvania and Virginia, ("States") respectfully submit these comments on the Environmental Protection Agency's ("EPA") proposed rule titled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," 84 Fed. Reg. 36,304 (July 26, 2019) ("Proposed Rule").

The Proposed Rule seeks to reverse the progress gained by section 112 of the Clean Air Act, 42 U.S.C. § 7412 ("Section 112") in reducing emissions 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. With Section 112, Congress created a systematic regulatory regime to ensure that "major sources" of HAP – sources that emit 10 tons per year of any single HAP or 25 tons per year of any combination of HAP – reduce their emissions to the maximum degree achievable and that those emission reductions would be permanent. Until recently, EPA furthered that intent by requiring any source that seeks 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 citizens, ensure compliance and national uniformity with the mandates of Section 112's federal program.

Now, EPA seeks to unravel that regime by proposing to: (1) "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," 84 Fed. Reg. at 36,304,; and (2) amend the definition of "potential to emit" by removing the requirement for federally enforceable limits, *id*. at 36,306. The Proposed Rule is unlawful for the following reasons:

- EPA lacks the factual data and analysis required by the Clean Air Act to support the proposal, rendering it impossible for the public to meaningfully comment. EPA is abdicating its statutory responsibilities and unlawfully using the Proposed Rule as a vehicle to obtain information and data to support a post hoc justification of its proposal, rather than proposing a rule based on data and analysis of that data, as required by the law.

- The Proposed Rule conflicts with the statutory structure and intent of Section 112 to achieve the maximum degree of reductions in emissions from major sources of HAPs. Under the Proposed Rule, sources will have the legal right to emit up to the major source threshold instead of complying with stringent, technologically-forcing maximum achievable control technology ("MACT") standards.

- The Proposed Rule is arbitrary and capricious for relying on a flawed, incomplete, qualitative analysis that underestimates the emissions impact of the Proposed Rule.

- The Proposed Rule is arbitrary and capricious for allowing major sources to avoid MACT standards and Title V permitting requirements through limits that are not federally enforceable.

EPA admits that it does not know whether emissions will increase due to the Proposed Rule and does not even consider the impact of removing federal enforceability on emissions. The risk of additional burdens from increased HAPs will fall on those who can least bear it as the highest-emitting facilities are located in or near low-income communities and communities of color. The Proposed Rule thereby threatens "the two most important goals of the Clean Air Act program to reduce emissions of [HAPs] . . . : (1) to provide effective, uniform control of the health and environmental risks to surrounding communities posed by emissions of [HAPs] at "major" plant sites nationwide; and (2) to achieve this purpose through the application of MACT controls to sources of [HAPs] at these sites."[1] For these reasons, and as detailed further below, our States strongly oppose the Proposed Rule and respectfully request that EPA withdraw both the Proposed Rule and the underlying memorandum in which it implements. *See* "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" ("Wehrum Memo"), 83 Fed. Reg. 5,543 (Feb. 8, 2018)

[1] Brief submitted by EPA in American Mining Congress, et al., v. EPA, No. 95-1006 (D.C. Cir. 1995), available at 1995 WL 17204788.

I. FACTUAL BACKGROUND

A. The Federal 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." *See* 42 U.S.C. § 7412(b)(2). Initially, Section 112 relied upon EPA's assessment of health risks and costs. But in 1990, dissatisfied with EPA's lack of progress, Congress amended Section 112 to identify and list almost two hundred HAPs and to require mandatory technology-based standards for controlling emission of HAPs from specific categories of stationary sources. *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008); 42 U.S.C § 7412(d).

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 hazardous air pollutant, or 25 tons per year or more of any combination of HAPs. 42 U.S.C. § 7412(a). 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. *See* 42 U.S.C. § 7412(d)(2). These standards for major sources are referred to as "maximum achievable control technology" or "MACT" standards. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 594 (D.C. Cir. 2016). 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). 42 U.S.C. §§ 7661a(a), 7661c(a). Title V permits also usually require additional monitoring, reporting, and recordkeeping requirements in order to ensure compliance. *See* 40 C.F.R. §§ 64.1–64.10.

An area source is "any stationary source of hazardous air pollutants that is not a major source." 42 U.S.C. § 7412(a)(2). Area sources face far fewer requirements and are often not subject to any hazardous air pollutant federal standards at all. When EPA sets standards for area sources, it generally requires less stringent reductions than those required by MACT. 42 U.S.C. § 7412(d)(5). Further, most area sources are not required to obtain title V permits.[2] Because the

[2] Clean Air Act § 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 determination whether to exempt area source categories from title V on a case by case basis as area source standards are promulgated, as provided by 40 C.F.R. § 70.3 (b)(2) ("In the case of nonmajor sources subject to a standard or other requirement under either

(continued…)

level of control required for any specific source depends 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.

B. EPA's "Synthetic Minor Source" Program and the Once In, Always In Policy

EPA has also created, by regulation, a "synthetic minor source 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 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 HAP could establish limits on their potential to emit in order 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"). *See* "Potential to Emit for MACT Standards – Guidance on Timing Issues," from John Seitz, director, Office of Air Quality Planning and Standards, to EPA Regional Air Division Directors (May 16, 1995), https://www.epa.gov/sites/production/files/2018-02/documents/pteguid.pdf (hereinafter "Seitz Memo"). Under the Once In Policy, a facility that is a major source of HAPs as of the effective compliance date of an applicable MACT must continue to comply with that standard permanently, even if that facility later decreases its potential emissions below the major source threshold. Seitz Memo at 5, 9. Similarly, any facility deemed a major source of HAPs under title V is always subject to title V permitting requirements. Seitz Memo at 9. EPA noted that the Once In Policy "follows most naturally from the language and structure of the statute," and prevents facilities from backsliding by "obtaining potential-to-emit limits, escaping applicability of the MACT standard, and increasing emission to the major-source threshold." Seitz Memo at

---

(...continued)
section 111 or section 112 of the Act after July 21, 1992 publication, the Administrator will determine whether to exempt any or all such applicable sources from the requirement to obtain a part 70 permit at the time that the new standard is promulgated."). *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 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).

9. The policy also "ensures that MACT emissions reductions are permanent and that the health and environmental protection provided by MACT standards is not undermined." *Id*. The legal obligations EPA imposed through the Once In Policy remained in effect until EPA withdrew and reversed it in 2018, as discussed *infra* in part C.

C. EPA's Prior Attempts to Reverse the Once In Policy

On at least two separate occasions before the current proposed rulemaking, EPA sought to withdraw the Once In Policy. In 2007, under then-Acting Assistant Administrator William Wehrum, EPA proposed a rulemaking to allow major sources of HAPs to reclassify as area sources at any time if the source obtained enforceable limits below the major source threshold. 72 Fed. Reg. 69 (Jan 3, 2007). In response, EPA's Regional Administrators voiced "significant concerns about the increases in emissions of hazardous air pollutants that will likely occur from the revisions to the [Once In Policy]." Regional Comments on Draft OIAI Policy Revisions at 2 (Mar. 10, 2006).[3] This concern was echoed by State pollution-control agencies, observing that withdrawing the Seitz Memo would produce a significant increase in emissions of HAPs.[4] Indeed, EPA's responsive analysis suggested that withdrawal of the Seitz Memo could well produce an increase in emissions for certain source categories.[5] EPA took public comment on the proposed rule through May 2007, but ultimately did not finalize it.

Then, on January 25, 2018, William Wehrum, in his second stint as Assistant Administrator at EPA, issued a memorandum which expressly withdrew and superseded the Once In Policy ("the Wehrum Memo"). Like the 2007 proposal, the Wehrum Memo states that a major source may reclassify as an area source at any time by taking an enforceable limit of its

---

[3] *See also* Regional Comments on Draft OIAI Policy Revisions at 3 (Dec. 13, 2005) ("the reductions that were intended to be achieved through the MACT standard would be offset by synthetic minor limits that allow sources to emit HAPs at levels higher than those allowed by the MACT standard."); Regional Comments on Draft OIAI Policy Revisions at 3 (Dec. 13, 2005) ("many sources would take limits less stringent than MACT requirements, if allowed.").

[4] Comments of Minnesota Pollution Control Agency at 2 ("We believe actual emissions of [hazardous air pollutants] will rise under this proposal."); EPA-HQ-OAR-2004-0094-0144, Comments of Pennsylvania Department of Environmental Protection at 2-3 (describing how "EPA's proposed rule allows certain sources to increase harmful emissions of [hazardous air pollutants]"; EPA-HQ-OAR-2004-0094-0074, Comments of Wisconsin Department of Natural Resources at 2 ("It is very likely that emissions will increase as a result of the proposed policy change exactly as stated in the 1995 Seitz Memorandum."); EPA-HQ-OAR-2004-0094-0142, Comments of Oregon Dep't of Envtl. Qual. at 2 ("[T]he major source threshold will become the de facto MACT threshold"); EPA-HQ-OAR-2004-0094-0130, Comments of Illinois Envtl. Prot. Agency at 1 ("The repeal of the [Seitz Memo] will lead to 'backsliding ….'").

[5] *See* Letter from William Wehrum, EPA to Hon. John Dingell, U.S. House of Representatives (March 30, 2007) at 15-18 (describing analysis of one industrial source category that may increase emissions).

PTE below the applicable major source thresholds. Wehrum Memo at 1. The Wehrum Memo asserts that the Once In Policy was "contrary to the plain language" of the Clean Air Act because "Congress placed no temporal limitations on the determination of whether a source emits or has the [potential to emit hazardous air pollutants] in sufficient quantity to qualify as a major source." Wehrum Memo at 3. Several non-governmental organizations and the State of California challenged the Wehrum Memo in the D.C. Circuit and on August 20, 2019, the Court held that the Wehrum Memo was not a final agency action and dismissed the petitions for lack of subject matter jurisdiction.[6] The Court described the Wehrum Memo as "all bark and no bite" because neither EPA nor regulated parties could rely on the guidance in any proceeding, and that any future action premised on the interpretation in the memo would be reviewable in a separate proceeding.

D. EPA's Current Proposal

On July 26, 2019, EPA issued the Proposed Rule "to implement the plain language reading of the statute as discussed in the [Wehrum Memo]," 84 Fed. Reg. at 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." 84 Fed. Reg. at 36,304. The Proposed Rule also seeks to amend 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.

E. 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. RIA at 1-6. In a study after the Wehrum Memo was released in 2018, the Union of Concerned Scientists found the proposed revocation of EPA's Once In Policy could result in an increase of more than 35,000 tons of HAPs per year.[7] While EPA does not quantitatively evaluate the potential emissions impact of its proposed rulemaking, as discussed further *infra*, even the smallest potential increase in HAPs could have substantial impacts on public health because of the acute toxicity of many of these compounds and the proximity of HAP major sources to vulnerable communities.

EPA currently regulates 187 HAPs under Section 112, all of which the agency has determined are "known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental effects." *See* 42 U.S.C.

---

[6] *California Communities Against Toxics v. EPA*, No. 18-1085(L) (D.C. Cir. Aug. 20, 2019).
[7] EPA Decision Increases Hazardous Air Pollution Risk Data Files, Union of Concerned Scientists (April 24, 2018), https://www.ucsusa.org/science-and-democracy/epa-decision-increases-hazardous-air-pollution-risk.

§ 7412(b)(2). Some HAPS, such as chromium, nickel, arsenic, and mercury,[8] are acutely toxic—causing adverse effects after just a single exposure or multiple exposures in a short period of time. Other compounds are toxic only 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 cancer.[9] Hydrochloric acid, one of the HAPs emitted in the highest quantities,[10] 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.[11] 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.[12]

And these harmful health impacts caused by emission of HAPs are not evenly distributed throughout the country. Instead, impacts fall disproportionately on low-income communities and communities of color—communities that already face much higher cumulative pollution burdens than other neighborhoods.[13] 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.[14] Another study from 2016 demonstrated that "toxic outliers," that is, those highest-emitting facilities whose HAP emissions

---

[8] *See, e.g.*, Dose-Response Assessment for Assessing Health Risks Associated With Exposure to Hazardous Air Pollutants, EPA (last visited Sept. 18, 2019), https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.

[9] Health Effects Fact Sheet: Lead Compounds, EPA (Sept. 2011), https://www.epa.gov/sites/production/files/2016-09/documents/lead-compounds.pdf.

[10] UCS Data Files, *supra* note 7.

[11] Health Effects Fact Sheet: Hydrochloric Acid, EPA (Jan. 2000), https://www.epa.gov/sites/production/files/2016-09/documents/hydrochloric-acid.pdf.

[12] Health Effects Fact Sheet: Cyanide Compounds, EPA (Jan. 2000), https://www.epa.gov/sites/production/files/2016-09/documents/cyanide-compounds.pdf.

[13] *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 (April 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).

[14] 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.

far exceed group averages, are disproportionately located in or near low-income communities and communities of color.[15]

Decades of scientific research links disproportionate environmental burdens to race and income, and indicate that the risk of additional burdens from increased HAP emissions resulting from EPA's proposed rulemaking will fall on those communities who can least bear it. The notice of proposed rulemaking does not acknowledge the disproportionate burdens imposed by increased HAP emissions, nor does it assess the differing harms caused by increases in different kinds of HAPs.

II. THE PROPOSED RULE CONTRAVENES THE CLEAN AIR ACT

A. The Proposed Reconsideration Rule Does Not Meet the Requirements of Section 307

Under section 307(d) of the Clean Air Act, the notice of any proposed rulemaking "shall be accompanied by a statement of its basis and purpose" which "shall include a summary of (A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3) ("Section 307(d)"). Further, "[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." *See id*.

The information required under section 307(d) is crucial to the public's ability to understand the purported basis for and meaningfully comment on the Proposed Rule. "In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules." *Connecticut Light & Power Co. v. Nuclear Regulatory Com*., 673 F.2d 525, 530-531 (D.C. Cir. 1982). Courts have found that EPA's failure to make data relating to the basis for its Clean Air Act regulations publicly available made "meaningful comment on the merits of EPA's assertions impossible" and constituted reversible error. *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982); *see also Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-95 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, (in) critical degree, is known only to the agency.")

Here, it is impossible for the public to meaningfully comment on the Proposed Rule as EPA repeatedly references uncertainties and absences of information, and in numerous instances seeks not just public comment regarding the Proposed Rule, but also data and information to

[15] 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.

support the very amendments EPA has proposed.[16] In fact, EPA appears to be using the Proposed Rule improperly to *gather* data to support its preferred result,[17] instead of following the Clean Air Act's prescribed procedure for rulemaking, wherein EPA would first assemble data supporting any proposed action and make it available for public comment through a proposal. But EPA should not take this procedural shortcut and by doing so, it makes the Proposed Rule procedurally unsound. Indeed, EPA possesses the valuable tool of section 114 that allows it to request any information from an emission source that it deems reasonable for determining that source's compliance, investigating a potential violation, or developing or modifying regulations. 42 U.S.C. § 7414(a).

To the extent EPA gathers any supportive data in response to its flawed Proposed Rule, the public will not have any opportunity to comment on that data, undermining the entire purpose of notice and comment and violating the Clean Air Act's clear requirements. *See Small Refiner*, 705 F.2d at 549-50 ("EPA must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment."). EPA cannot short-circuit the public notice-and-comment process; thus, if EPA receives information that it ultimately relies upon for the final rule, EPA must make that information available to the public for comment before finalizing the rule.

B. The Proposed Rule Conflicts with the Text, Structure, and Purpose of Section 112

EPA asserts that the Proposed Rule implements the "plain language reading" of Section 112 by allowing a major source to reclassify as an area source at any time by limiting its PTE to below the major source threshold. 84 Fed. Reg. 36,309-36,310. But the Proposed Rule conflicts with the text, statutory structure, and purpose of Section 112 to achieve the maximum degree of reductions in emissions from major sources of HAPs that are based on the best available control technologies and thus fails at step one of the *Chevron* analysis. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

1. The Text of Section 112 Does Not Support EPA's Proposal Regarding Reclassification

EPA bases its "plain language" interpretation entirely on the definitions in Section 112(a), because the definition of major source lacks any deadline or other language specifying when a major source can reclassify as an area source. 84 Fed. Reg. 36,309-36,310. EPA asserts that "Congress has spoken by defining 'major source' without any temporal limitation" and "EPA's plain language reading honors that unambiguous choice." *Id*. at 36,312. But the silence on reclassification in Section 112(a) (Definitions) does not unambiguously support EPA's purported plain language meaning to allow major source reclassification at any time. Courts

[16] 83 Fed. Reg. at 52,065-52,081.
[17] *See, e.g.*, 84 Fed. Reg. at 36,333-5 (Requests for Comment C-3, C-25, C-40, C-55, C-59).

have repeatedly held that statutory silence does not compel whatever interpretation suits the agency's fancy, but rather silence injects ambiguity if the plain meaning is not clear.[18] Furthermore, EPA certainly is aware of this judicial treatment of silence, as EPA itself argues that silence creates ambiguity in another proposed rulemaking contemporaneous to the Proposed Rule.[19]

Further, Section 112(a) cannot be read in isolation but must be read in conjunction with the operative provisions of Section 112. *See Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 317-18 (2014). By allowing major sources of HAPs to reclassify as area sources, major sources have the legal right, under Section 112, to increase emissions to just below the major source threshold of 10 tons per year of any individual HAP or 25 tons per year combined HAPs. Thus, EPA relies on an argument that renders the statutory terms of Section 112 legally meaningless. Section 112(d)(2) states that EPA:

> [S]hall 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 the Administrator . . . determines is achievable . . . through application of measures, processes, methods, systems or techniques including, but not limited to, measures which (A) reduce the volume of, *or eliminate emissions* of, such pollutants through process changes, substitution of materials or other modification[.]

---

[18] *See, e.g.*, *New York v. U.S. EPA*, 413 F.3d 3, 22 (D.C. Cir. 2005) (finding silence as to the calculation methodology in the Clean Air Act's definition of "increases" to create ambiguity); *see also, e.g.*, *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1085-87 (D.C. Cir. 1996) (rejecting challenge arguing that silence in the Clean Air Act's definition of "new" compelled a certain interpretation); *Cyan, Inc. v. Beaver Cty. Employees Retirement Fund*, 138 S.Ct. 1061, 1069 (2018) ("The statute says what it says—or perhaps better put here, does not say what it does not say."); *Jawad v. Gates*, 832 F.3d 364, 370 (D.C. Cir. 2016) ("We will not read a phrase into the statute when Congress has left it out. [] Where, as here, the statutory text is clear, the plain meaning of legislation should be conclusive unless it compels an odd result.") (cleaned up); *Cummings v. Dept. of the Navy*, 279 F.3d 1051, 1055 (D.C. Cir. 2002) ("Congressional enactments are better evidence of legislative intent than is congressional silence. . . '[A]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.'[]") (citation omitted).

[19] 84 Fed. Reg. at 39,249 ("The United States Court of Appeals for the District of Columbia Circuit has recognized that the CAA 'is silent on how to calculate such 'increases' in emissions.'[] Thus, the question of how to determine whether a physical change or change in method of operation 'increases' emissions is ambiguous.") (quoting *New York v. U.S. EPA*, 413 F.3d at 22).

42 U.S.C. § 7412(d)(2) (emphasis added). Under the Proposal, EPA could never require a "prohibition" of HAPs because sources have a legal right to emit up to the major source threshold. The Proposal thus runs counter to Section 112's "maximum degree of reduction" and "prohibition" commands and effectively erases Section 112(d)(2)'s "prohibition" language from the statute.

The Proposed Rule is also inconsistent with Section 112's requirement that MACT standards require emission reductions to the maximum level achievable, and no less than the level achieved in practice by the lowest-emitting sources. *See* 42 U.S.C. §§ 7412(d)(2) & (3). Section 112 further requires EPA to review and revise "as necessary" the various emission standards at least once every 8 years, demonstrating Congressional intent to address technological updates and further reduce emissions to the greatest extent possible. Under the Proposed Rule, major sources can limit their emission reductions to the major source threshold rather than the "emission control that is achieved in practice by the best controlled similar source" (for new sources) and the average emission limitations achieved by the best performing sources (for existing sources). *Id*. The Proposed Rule in effect creates a MACT ceiling of 9.9 tons per year/24.9 tons per year, undermining the "MACT floor" that "ensures that all HAPs sources 'at least clean up their emission to the level that their best performing peers have shown can be achieved.'" *U.S. Sugar Corp. v. EPA,* 830 F.3d 579, 594 (D.C. Cir. 2016) (quoting *Sierra Club v. EPA*, 353 F.3d 976, 980 (D.C. Cir. 2004). Accordingly, the Proposed Rule creates a self-defeating approach that runs afoul of the statutory construction of Section 112.

2. Congress Intended Section 112 to Ensure that Major Sources Reduce Emissions to the Maximum Level Achievable

The structure of Section 112 reflects Congressional intent to reduce overall emissions of HAPs, with a focus on reducing emissions from major sources to the maximum level achievable. Section 112 sets forth a methodical regulatory scheme that begins with Congress creating, in the statute itself, an initial list of HAPs then imposing a deadline for EPA to identify categories and subcategories of major and area sources. 42 U.S.C. §§ 7412(b)(1), (c)(1), (c)(3), (c)(6). To ensure that once a source category is listed it could not easily be removed, Congress placed strict limits on the ability to delist source categories. 42 U.S.C. § 7412(c)(9)(B)(ii).[20] Section 112 further requires EPA to set technology-forcing control standards for major sources of HAPs 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

[20] EPA "may delete [a] source category" from the statutorily-required list only if it determines that "emissions from no source ... exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source." 42 U.S.C. § 7412(c)(9)(B)(ii); *see also New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008) (Section 112 explicitly "restrict[s] the opportunities for EPA and others to intervene in the regulation of HAP sources.").

particular source category ("MACT" standards).[21] *See* 42 U.S.C. § 7412(d)(2). 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." 42 U.S.C. § 7412(d)(6). 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. 42 U.S.C. § 7412(f)(2)(A).

The legislative history of Section 112 further supports that the intent of the statute was to reduce major source emissions to the maximum achievable level.[22] Rather than continue to rely on EPA's assessments of health risks and costs in regulation of air pollutants, Congress turned to mandatory and technology-based standards for reducing air pollution and set forth a framework that would establish emissions standards "based on the maximum reduction in emissions which can be achieved by application of best available control technology… the principal focus of activity under section 112." S. Rep. No. 101-228, at 133 (1989), *as reprinted in* A Legislative History of The Clean Air Act Amendments of 1990 (1993) ("Leg. Hist."), 8473; accord H.R. Rep. No. 101-490, at 327, Leg. Hist. 3351.

In the Proposal, however, EPA ignores both the structure and purpose of Section 112 and replaces this sequential regulatory regime with an interpretation that is both unreasonable and unsupported. Contrary to law, EPA has not adequately explained why it believes its interpretation of Section 112 is reasonable. *See Humane Soc. v. Kempthorne*, 579 F.Supp.2d 7 (2008). As part of explaining its new interpretation of Section 112, EPA must provide a "'reasonable' explanation of how [its] interpretation serves the statute's objectives" and why its construction of the statute is "permissible." *Id.* at 13 (internal citations omitted). "Reasonableness" does not simply mean an explanation of EPA's position in general, but rather an explanation of how its interpretation of the statute is compatible with the policy goals and objectives of Congress when it enacted the statute. *Id.* (internal citations omitted). Here, EPA provides not an explanation, but instead a conclusory assertion, simply stating that its interpretation is not expressly prohibited by the definitions in Section 112. EPA fails entirely to explain how its proposed interpretation of the statute furthers, or is even consistent with, the goals of the statute—which, in fact, it could not because its interpretation undermines such goals, making it subject to challenge and vacatur.

---

[21] These standards for major sources are referred to as "maximum achievable control technology" or "MACT" standards. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 594 (D.C. Cir. 2016).

[22] Indeed, the 1990 revisions to Section 112 have been described as establishing "aggressive new program for the regulation of hazardous air pollutants." The Hon. Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1721, 1758 (1991).

III. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS BECAUSE IT LACKS FACTUAL SUPPORT AND FAILS TO GRAPPLE WITH AN IMPORTANT ASPECT OF THE PROBLEM

As the Supreme Court has explained, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The requirement is satisfied "when the agency's explanation is clear enough that its 'path may reasonably be discerned.'" *Id*. (citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 286 (1974)); *see also Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."). "But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino*, 136 S. Ct. at 2125. Further, an agency's action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C.Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43)).

A. EPA Has Not Adequately Addressed the Problem of Emissions Increases Resulting From the Proposed Rule

EPA's longstanding position – as reflected by the Once In Policy and the requirement of federally enforceable PTE limits – has been that regulatory measures are necessary to prevent sources of HAPs from increasing emissions. Now, EPA seeks to reverse more than two decades of this legal position without explaining how it intends to ensure that emissions reductions from major sources are permanent, "and that the health and environmental protection provided by MACT standards is not undermined." Seitz Memo at 9. Indeed, EPA's emissions analysis is critically and obviously flawed and EPA's reliance on such an analysis is arbitrary and capricious. EPA makes sweeping generalizations based on a small and very limited subset of facilities and fails to account for the analytical weaknesses of this reliance on such a small dataset. EPA also fails to consider future implications of the Proposed Rule on even the dataset it relies on. Finally, EPA showcases the weakness of its reliance on the current analysis by actively seeking additional data.

First, EPA analyzes *only 34 facilities* from several self-selected source categories, most of which come from a single category. 84 Fed. Reg. at 36,329. To put this extremely small number in context, EPA analyzed less than 0.5% of the facilities subject to major source MACT standards in the United States. By comparison, when Congress wanted EPA to make a *fair* assessment of the emissions behaviors of existing sources, it required EPA to analyze the top 12% of sources. 42 U.S.C. § 112(d)(3)(A). Moreover, EPA evaluated only those facilities that sought immediate reclassification, not facilities that have yet to reclassify. 84 Fed. Reg. at 36,329-36,332. EPA uses this very small and self-selected dataset to argue (without objective support) that emissions will decrease overall from this rule because three of the 34 sources will

decrease their emissions as a result of reclassification. 84 Fed. Reg. 36,331. But this nonrepresentative and unduly small sample size fails to support any generalizations about large-scale implications and behavior. The three sources EPA relies on to extrapolate consequences to all sources comprise a mere 0.1% of the dataset analyzed, and EPA has not suggested any reason that this 0.1% of sources is a representative sample.[23] Rather, these three sources appear to be uniquely situated and their emission reductions are based on circumstances that are not common to most major sources that might seek to reclassify. Further, EPA has no reasonable basis to conclude that any emissions decrease is causally related to reclassification. EPA does not show that reclassification itself is *causing* emissions reductions. At best, of its self-selected dataset of 34 sources, EPA relies on a weak correlation for emissions reductions in less than 9% of the sources—and these sources had either unique or unclear circumstances providing for those reductions. This correlation is simply that: a correlation. Moreover, to the extent that this sample is representative – which we believe it is not – it tends to show that more than 91% of sources *do not reduce emissions* in conjunction with reclassification.

Second, EPA does not show—or even attempt to show—that the very limited reductions by three sources correlated to reclassification is greater than the reductions in emissions that would result from future risk and technology review processes under Section 112(d)(6). For example, EPA does not state whether there are area source standards for these sources, whether these sources will remain subject to title V, and whether risk and technology review is scheduled for either the three sources or the five categories included in EPA's analysis. In fact, it is likely that any emissions reductions attributable to the availability of reclassification (EPA has not established any such causal relationship to date) will be smaller in the long-term than future reductions that follow Section 112(d)(6) review and revision, because the reclassified sources will no longer be subject to the revised limitations on emissions. Thus, to the extent that any current reductions may be attributable to the availability of reclassification, the net effect is small or possibly negative, and at the expense of much larger reductions in the future.[24]

Finally, EPA showcases that its analysis is speculative by seeking the underlying data necessary to support the Proposed Rule. 84 Fed. Reg. at 36,336 (Request for Comment C-59 seeks "data and analysis on the number and type of major sources that may reclassify from major source to area source status and whether the HAP emissions from those sources will decrease or increase or stay the same"); *see also id.* at 36,334 (Request for comment C-39; C-54; C-57). While EPA should always be willing to accept additional information and data during notice and comment periods, EPA's specific request for data to support its desired policy reflects awareness that its current dataset is insufficient.

---

[23] Indeed, the extremely small size of the sample combined with the generalization EPA seeks to draw from it belie any actual reliance one could place on the analysis.

[24] EPA's proposed revisions to PTE further complicate this issue and make it less likely that any reduction in emissions attributable to reclassification will be minor, at best, and net negative in the long term, see section IV, *infra*.

In 2007, EPA justified reversal by stating that it was "unlikely" that emissions would rise as a result of a reclassification approach. One reason advanced by EPA for this view was that "Over the next three years, EPA is required to develop area source standards for approximately 50 additional categories. While the level at which those standards will be set is not known at this time, the standards will reflect at least generally available control technology and some may be set at MACT-based levels, which would mean that many sources could be required to maintain their current emission levels." 72 Fed. Reg. at 72. EPA provides no evidence in the current Proposed Rule whether this hypothesis was borne out by events that occurred between 2007 and 2010. And if it was not borne out by reality, it appears that EPA is now arbitrarily taking the same position without acknowledging that some facts it previously said were relevant in the 2007 proposal have turned out not to support the agency's position. Indeed, very few standards have MACT-equivalent area-source standards and even fewer designate those standards as MACT so as to subject the sources to residual-risk analysis.

In this Proposed Rule, EPA does not address its prior analysis that withdrawal of the Once In Policy could result in increased HAP emissions. Instead, EPA blithely concludes, without sufficient evidence, that its rule *might* incentivize HAP reduction. *See infra* at III.B.

B. EPA Does Not Have An Adequate Basis to Conclude that the Proposed Rule Will Incentivize Reductions in HAPs

EPA concludes, without support, that the Proposed Rule will incentivize reductions in HAPs. EPA admits this conclusion is speculative, stating in its Regulatory Impact Analysis that it is "uncertain as to the magnitude, direction, and distribution" of the potential changes in HAP emissions. Regulatory Impact Analysis for the Proposed Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act (May 2019) ("RIA") at 5-1. Instead, EPA relies on conclusory statements that the Once In Policy "created a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce HAP emissions further." 84 Fed. Reg. at 36,309.

But EPA fails to provide any data to determine how many sources may be incentivized to implement further technological controls or, more importantly, how many sources may avoid MACT obligations to increase emissions of HAPs because, as EPA admits, it does not have this information. Further, EPA has not explained how providing incentives to reduce potential to emit will achieve the same maximum achievable reductions as the MACT standard, and provide the same protection for public health and the environment. EPA admits in the RIA that the proposed rule "may potentially result in both emission reductions and increases from a broad array of existing sources," that EPA is "unable to quantify the changes in emissions across these sources" and that EPA cannot "simulate the change in air quality [or] characterize the impact of these changes to human health." RIA at 5-1.

EPA's conclusion that its Proposed Rule will incentivize reduction in HAP emissions is therefore baseless and lends further support that the Proposed Rule is arbitrary and capricious. Without evidence of impacts to HAP increase and reductions, which EPA admittedly does not

have, EPA does not have a basis, adequate or otherwise, to conclude that the Proposed Rule will result in reductions to HAP emissions.

C. EPA Fails to Consider Other Important Aspects of the Problem

The Proposed Rule also raises several problems of reliance, enforceability, and public participation that EPA fails to address in its analysis.

First, EPA incorrectly assumes that it can rely on enforceable limits to ensure the effectiveness of its regulation. However, it simultaneously weakens those limits by removing the requirement of federal enforceability thus increasing the risk of noncompliance. Second, EPA fails to analyze the effect its rule would have on public notification. EPA's proposed rule has many significant impacts on public notification associated with Section 112. These include, without limitation, excusing a source from monitoring and reporting requirements, and allowing a source to be exempt from the results of future risk and technology review. For example, EPA suggests that if a source took PTE limits equivalent to the current MACT standards, such PTE limits could be sufficient to support reclassification. 84 Fed. Reg. at 36,317. This interpretation would allow the source all of the benefits of reclassification, including excusing it from monitoring and reporting requirements, as well as stricter standards that may arise from risk and technology review going forward. Third, EPA faces a potential retroactivity problem that it has not analyzed or addressed in its proposed rulemaking. This problem is highlighted by EPA's failure to consider the implications of backsliding by sources formerly classified as "major" on EPA's statutorily-mandated health assessments. Indeed, there is potential that sources could seek to evade liability for violating major source standards before reclassification by arguing that they were improperly prohibited from reclassifying, and as a result, the major source standards never applied to them.

For these reasons and those detailed above, EPA has failed to provide the level of analysis necessary to support reasoned decision-making and the Proposed Rule must be withdrawn in its entirety as arbitrary and capricious.

IV. BY ARBITRARILY AND CAPRICIOUSLY REMOVING THE REQUIREMENT OF FEDERAL ENFORCEABILITY, EPA HAS ABDICATED ITS MANDATE TO ENSURE NATIONAL UNIFORMITY

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. *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). This reflects the reality that a source's "actual emissions" (e.g. what comes out of a

smokestack[25]) and theoretical maximum emissions (e.g. what could come out of the smokestack 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. And rather than take a facility operator's word that it will reliably use its control devices or limit its operations, EPA has in the past required the imposition of federally enforceable[26] conditions limiting a source's operation to those constraints to define the source's regulatory potential to emit or "PTE."[27] Federally enforceable limits are defined as those limits that are enforceable by both EPA and citizens (through the Clean Air Act's citizen suit provision). *Id.* at 2. This "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." *Id.* 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 agencies through EPA-approved state operating permit programs or otherwise included in an EPA-approved State Implementation Plan. 40 C.F.R. § 63.2. Key to the 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. *Id.*

EPA now proposes to remove the requirement for federal enforceability when setting the PTE for HAPs by modifying the definition for PTE currently found in the Code of Federal Regulations.[28] 84 Fed. Reg. at 36,314. As explained in more detail in parts IV.A and B, *infra*, EPA makes two primary claims in support of this proposed change—both of which are arbitrary and capricious, and neither of which find support in the record before the agency. First, EPA claims it "has no reason to believe, and does not anticipate" that sources will cease operating their control devices and hence increase emissions as a result of this proposal, without

---

[25] 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.")

[26] 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.

[27] Potential to emit is currently defined as "[T]he 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.

[28] *See* 40 C.F.R. § 63.2.

acknowledging the financial incentives to reduce usage of expensive control devices. 84 Fed. Reg. at 36,320. But EPA has collected insufficient data and included no explanation to support this economically irrational conclusion. Second, EPA claims removing the requirement of federal enforceability is in response to a 1995 D.C. Circuit decision, and that its proposal is "consistent" with this decision. 84 Fed. Reg. at 36,317-8 (discussing *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995)). However, EPA has ignored the substance of the D.C. Circuit's opinion and instead used this court decision to circumvent the legal analysis required to change longstanding agency interpretation.

In short, EPA has hamstrung its ability to enforce limitations on a source's emissions, placed blind faith in regulated entities that they will keep their control devices on, and failed to provide any rational basis for making this change. And in doing so, EPA has quantified neither how many sources it might lose enforcement authority over nor any potential increases in hazardous pollutant emissions, nor has the agency characterized possible adverse impacts to public health.

A. EPA Has Arbitrarily and Capriciously Failed to Collect Sufficient Evidence, Failed to Adequately Consider Even the Minimal Evidence Before It, and Drawn Conclusions Unsupported by Evidence in the Record

Agencies are required to provide a "satisfactory explanation" for their decisions and make a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. Their explanation should not "run[] counter to the evidence before the agency." *Id.* at 43. Here, EPA has considered insufficient data to provide a satisfactory explanation for its conclusion that removing the requirement of federal enforceability will not increase emissions, and what evidence EPA *does* provide contradicts its own conclusions—clear indicators of an arbitrary and capricious decisionmaking process. To support its bare conclusion that EPA "has no reason to believe, and does not anticipate" that sources will cease operating their control devices when a source is reclassified with non-federally enforceable PTE limits, EPA cites only two sources of authority. 84 Fed. Reg. at 36,320 & n.33, 34.

First, EPA cites to a 1995 EPA guidance memorandum,[29] and specifically, to an attachment to this memorandum. *Id.* at n.33. The referenced attachment, entitled "Guidance on Enforceability Requirements for Limiting the Potential to Emit through SIP and § 112 Rules and General Permits," provides a number of options for states looking to create PTE limitations. However, *every single one of these options* requires that the limitation be federally enforceable—exactly the requirement EPA now proposes to remove. Indeed, this memorandum—that EPA cites to support its conclusion that using non-federally enforceable PTE limits will not increase emissions—emphasizes that EPA was "reiterat[ing] its position that controls and limitations used

[29] Seitz & Heuvelen (Jan. 1995), *supra*.

to limit a source's potential to emit *must be federally enforceable*."[30] EPA provides no rationalization for why a guidance memorandum explaining why federal enforceability is an "*essential element*" [31] of establishing a source's PTE supports the removal of federal enforceability.

Second, EPA cites to its Emissions Analysis Technical Support Document ("Emissions TSD") accompanying the notice of proposed rulemaking. 84 Fed. Reg. at 36,320 & n.34. The Emissions TSD contains an illustrative assessment of emission impacts based on narrative descriptions of the 34 sources that have reclassified from major to area source status since issuance of the Wehrum Memo in January 2018.[32] Based on these illustrations, EPA concludes "sources that reclassify to area source status would, in most cases, achieve and maintain area source status by operating the emission controls or continuing to implement the practices they used to comply with the major source NESHAPS requirements." 34 Fed. Reg. at 36,330. But EPA fails to acknowledge that these 34 reclassifications all occurred before the current rulemaking proposed removing the requirement for federal enforceability. For many of the reclassified area sources included in EPA's Emissions TSD, local permitting agencies imposed federally enforceable PTE limits.[33] EPA fails to analyze the impact removing the requirement of federal enforceability might have on source compliance and actual emissions in future reclassifications under the proposed rule; instead concluding that the illustrative analysis is sufficient to demonstrate its proposed rulemaking will not increase emissions.

This failure to address reduced enforcement on reclassified sources is only amplified by the fact that many of these sources will drop out of the title V program and no longer be subject to this program's stringent monitoring, recordkeeping, and public notice requirements. EPA proposes requiring electronic notification to EPA when a source reclassifies, 84 Fed. Reg. at 36,322, but this is not a substitute for title V's public notice requirements, which ensure not only that neighboring communities are directly informed whenever a source modifies its operations and potentially increases its emissions,[34] but also ensures members of the public are able to challenge permitting decisions.[35] EPA also acknowledges the importance of monitoring, recordkeeping, and reporting in ensuring compliance with NESHAPS standards,[36] and

---

[30] *Id.* at Attachment 4, p.5 (emphasis added).
[31] *Id.* at 2 (emphasis added).
[32] MM2A Proposal Technical Support Memo Emissions Analysis Final, Docket ID: EPA-HQ-OAR-2019-0282-0180 (May 2019) (hereafter "Emissions TSD") at 2.
[33] *See, e.g.*, Emissions TSD at 9, 33, 41, 62, 70, 74.
[34] 40 C.F.R. § 70.7(h) contains extensive requirements for public participation in the title V permitting process, including notice to affected communities and opportunities for public comment and public hearing for all permit proceedings other than minor permit modifications.
[35] 40 C.F.R. § 70.8(d) provides for public petitions to EPA to object to title V permits and permit modifications proposed by state permitting authorities.
[36] 84 Fed. Reg. at 36,319-20 ("The MRR requirements associated with the HAP PTE limits enable EPA to carry out the provisions of CAA section 112 to ensure that sources are complying

(continued…)

acknowledges that its Proposed Rule is likely to result in reclassified HAP sources dropping out of the title V program.[37] But EPA fails to address why it believes removing federal enforceability is the appropriate response to reclassified sources losing the requirement to monitor and report their emissions. EPA also fails to address the potential impacts on emissions dropping out of the title V program may have.

As noted in comments submitted to EPA in response to its previous attempt to rescind the Once In, Always In policy in 2007, reduced enforcement changes the compliance calculus for facilities and is likely to result in widespread noncompliance and increased emissions.[38] EPA was also reminded even more recently of the importance of adequate enforcement to ensure NESHAPS sources operate control devices by the D.C. Circuit in 2016, which pointed out that "just because facilities are obligated to use the control technology does not mean they will always do so." *Sugar Corp.*, 830 F.3d at 651 (faulting EPA for its failure to justify exempting from title V HAP area source boilers that take a synthetic minor PTE limit). Removing the requirement for federally enforceable limits on PTE and allowing sources to drop out of title V unquestionably reduces the level of enforcement. EPA acknowledges in the notice of proposed rulemaking that "in the past, the EPA held the view that it could be certain that only programs reviewed and approved by the EPA had adequate procedures for issuance of effective PTE limits." 84 Fed. Reg. 36317 n.25. EPA does not explain why it no longer holds this view.

EPA has contravened *State Farm*'s directive that agencies must make a "rational connection between the facts found and the choice made" and avoid conclusions that "run[] counter to the evidence before the agency." *State Farm*, 463 U.S. at 42-43. Instead, the lone two sources EPA cites for its conclusion that removing federal enforceability will not increase emissions have no rational connection to the agency's conclusion, and indeed seem to point towards the opposite conclusion. The EPA guidance memorandum contradicts the very proposition for which EPA cites it for, since it is premised on the imposition of federally

---

(…continued)
with the appropriate requirements with respect to HAP emissions. . . . Appropriate MRR requirements serve to assure that the source is continuously complying with HAP PTE limits and any associated requirements as required by the CAA, as well as to identify when a source is not in compliance in a timely fashion so as to avoid long periods of non-compliance.")

[37] 84 Fed. Reg. at 36,323 ("A major source that reclassifies to area source will no longer be subject to NESHAP requirements applicable to a major source. The major source requirements to which the source would no longer be subject to may include, but are not limited to, CAM [Compliance Assurance Monitoring] and title V requirements[.]"); *id.* at 36,325 n.46 ("Some sources that switch to area source status may, as an area source, may no longer be subject to title V permit requirements. . .").

[38] *See, e.g.*, Institute of Clean Air Companies Comment Letter, Docket ID: EPA-HQ-OAR-2004-0094-0172 (Oct. 18, 2007) at 13-14 (describing a case study from California in which more than 50% of rich burn stationary engines that passed their annual source test were found out of compliance during unannounced spot checks).

enforceable conditions to limit PTE. And the Emissions TSD merely demonstrates the desperate need for further information collection before finalizing this Proposed Rule.

B. EPA Has Arbitrarily and Capriciously Changed Longstanding Agency Precedent Without Adequate Explanation

While administrative agencies may change their positions over time, they are required to acknowledge and explain such changes. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In particular, agencies "must show that there are good reasons for the new policy" and that "the new policy is permissible under the statute." *Id.* Here, EPA has done neither. Not only has EPA failed to put forward a *permissible* interpretation of the Clean Air Act justifying the removal of federal enforceability, it has failed to put forward *any explanation at all* for why their new interpretation comports with the Clean Air Act.[39] EPA has also utterly failed to provide good reasons supporting its new policy to remove the requirement of federal enforceability.

EPA appears to base its decision to change its interpretation on the 1995 D.C. Circuit case *National Mining Association v. EPA*, 59 F.3d 1351 (1995), noting that the court "remanded, but did not vacate, the definition of 'potential to emit' found in 40 CFR 63.2."[40] But this decision did not dictate that EPA remove the requirement of federal enforceability from the definition of PTE. Rather, the D.C. Circuit found that this interpretation was not *mandated* by the Clean Air Act's language directing EPA to calculate the amount of HAPs a stationary source "emits or has the potential to emit considering controls," Clean Air Act § 112(a)(1), and instructed EPA to adequately explain why requiring federal enforceability was a *permissible* interpretation of the phrase PTE "considering controls." The court noted that it was "certainly permissible for EPA to have refused to take into account ineffective controls (indeed, it is likely that a contrary interpretation would be impermissible)," *National Mining,* 59 F.3d at 1363, and went on to note that EPA's asserted objectives to avoid administrative burden and ensure uniform enforcement "are not illegitimate agency objectives," *id.* at 1364. The court merely held that a sufficient explanation for why these objectives justified EPA's interpretation was "not evident" on the record before it. *National Mining,* 59 F.3d at 1364.

But in this proposed rulemaking, EPA seems to imply that a new interpretation was necessitated by the D.C. Circuit's decision and proposes a new interpretation with entirely new objectives, without consideration of its prior stated objectives, and without consideration of either the Clean Air Act's overall statutory framework or specific directive to calculate PTE "considering controls." At various points in the NPRM, EPA states that it is proposing to remove federal enforceability in order to "facilitate. . . effective HAP PTE limits,"[41] to "achieve

---

[39] *See* 84 Fed. Reg. 36,313-4 (discussing the "federal enforceability" requirement with no mention of how EPA's new interpretation comports with the language of the Clean Air Act).
[40] 84 Fed. Reg. at 36,317.
[41] 84 Fed. Reg. at 36,314 ("These proposed amendments will facilitate such effective HAP PTE limits to be issued by the EPA and by state, local, and tribal regulatory agencies.").

a clear and simple implementation process to motivate area sources to maintain reduced HAP emissions,"[42] to "ensure that sources of HAP comply with CAA requirements,"[43] and to "[a]void[] unreasonable burden on industry or states."[44] EPA fails to explain why its prior stated objectives to avoid administrative burden on EPA and to ensure national uniformity in enforcement no longer apply or were even considered.

Also unmentioned in the NPRM is the substantial body of case law demonstrating EPA's strong interests in federal enforceability as a key component of the Clean Air Act's scheme—interests that clearly would meet the D.C. Circuit's direction in *National Mining* to provide an explanation for the necessity of federal enforceability. Courts of Appeal 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. 81 F.3d 1329, 1354 (5th Cir. 1996). 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." *Id.* In so holding, the court relied on "the broad enforcement powers Congress intended to confer upon EPA." *Id.* 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 CAA ambient air standards." *Id.* at 1355. 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." *Id.*

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. *U.S. v. Ford Motor Co.*, 814 F.2d 1099 (6th Cir. 1987). 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. *Id.* at 1101. 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." *Id.* at 1102. Quoting the United States Supreme Court, the Sixth Circuit noted that the

[42] 84 Fed. Reg. at 36,318.
[43] *Id.*
[44] *Id.*

1970 Clean Air Act amendments demonstrated Congressional intent to "sharply increase[] federal authority and responsibility in the continuing effort to combat air pollution." *Id.* (quoting *Train v. NRDC*, 421 U.S. 60, 64 (1975)). In recognizing EPA's authority to act as a federal backstop to state enforcement, the court noted 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.

Id. Thus, like the Fifth Circuit, the Sixth Circuit found Congressional intent in the Clean Air Act clearly supported the strong backstop of federal enforceability in order to promote national uniformity and avoid the potential race to the bottom sole reliance on state enforcement might engender.

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. 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.'" *Weiler v. Chatham Forest Products, Inc.*, 392 F.3d 532, 536 (2nd Cir. 2004) (citations omitted). 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. *Id.* at 538. 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[.]" *Id.* at 537. 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." *Id.* at 538.

Finally, EPA's proposed change clearly runs afoul of the D.C. Circuit's case law holding that EPA may not abdicate its own enforcement responsibilities in favor of inadequate state enforcement. In *New York v. EPA*, the D.C. Circuit considered a number of deregulatory actions proposed by the George W. Bush administration. 413 F.3d 3 (2005). In particular, the court rejected EPA's proposal to reduce monitoring and recordkeeping requirements for non-major sources because the proposed change would prevent EPA from ensuring sources actually remained below the major source threshold, thereby undermining enforcement authority. *Id.* at

34. EPA argued that state permitting programs would catch potential violations, thereby rendering EPA's prior monitoring and recordkeeping requirements redundant. *Id.* But the court rejected this reasoning, finding that "reliance on state programs to establish minimum recordkeeping and reporting standards means that states unwilling to impose stricter rules are free to retain the [EPA's less restrictive] approach—a prospect we find unacceptable given our concerns with EPA's explanation of the methodology's enforceability." *Id.* at 35.

While the cases cited above involved Clean Air Act provisions regarding criteria pollutants, the concerns supporting federal enforceability in order to avoid a "race to the bottom" and provide a federal backstop to inadequate state programs are only more important in the context of HAPs, as EPA previously argued in *National Mining*.[45] State air toxics programs are typically not federally enforceable, because they are not required to be submitted as part of SIPs since there is no equivalent to the NAAQS for HAPs. 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 NESHAPS 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. 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

[45] *National Mining*, 59 F.3d at 1365-6 ("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)).").

> incentive to source operators to ensure adequate compliance. Federal enforceability also enables citizen enforcement under section 304 of the Act.[46]

In this proposed rulemaking, EPA has utterly failed to grapple with the importance of federal enforceability in the Clean Air Act's statutory scheme generally, let alone with respect to its increased importance in the specific context of regulating emission of HAPs. Instead, EPA merely notes that it believes leaving enforcement up to state and local permitting programs suffices because these programs are "structurally similar to their federally enforceable counterparts."[47] Such a bare conclusion, unsupported by any analysis or data, directly contravenes EPA's prior position on the issue, as well as decades of case law pointing to Congressional intent that EPA's federal enforcement authority act as a backstop to inadequate state permitting programs. EPA's failure to meaningfully address the many factors supporting its prior policy, and failure to put forward new factors in support of its new position, clearly fails the D.C. Circuit's directive that changes in agency position must be supported by "good reasons." *FCC v. Fox*, 556 U.S. at 515.

V. EPA FAILS ITS REGULATORY REVIEW

A. The Proposed Rule Has Unanalyzed Federalism Implications Contrary to the Requirements of Executive Order 13132

Executive Order 13132 limits EPA's ability to promulgate certain rules and policies that have federalism implications. A policy has federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on

---

[46] *NESHAPS for Source Categories: General Provisions*, EPA, 59 Fed. Reg. 12,408, 12,414 (March 16, 1994); *see also Requirements for the Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, EPA*, 54 Fed. Reg. 27, 274, 27,277 (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").

[47] 84 Fed. Reg. at 36,317-8 ("Our experience shows that while many states have programs for issuing HAP PTE limits that have been reviewed by the EPA and become federally enforceable through the EPA's approval (e.g., CAA section 112(l)/40 CFR 63.91 programs to limit HAP PTE, federally enforceable state operating permit (FESOP), or title V permitting programs), many state and local agencies also implement programs that have the proper legal authority but are not subject to the EPA's review either because the programs reflect state-only initiatives or are not otherwise required under other CAA provisions (e.g. state permitting programs for air toxics). These state-only or local-only programs are implemented in coordination with federally approved programs and share infrastructure and resources, as well as program management and personnel, and create HAP PTE limits that are structurally similar to their federally enforceable counterparts.").

the distribution of power and responsibilities among the various levels of government." 64 Fed. Reg. 43,255. Section 6 of Executive Order 13132 specifically requires some consultation with the states on rulemaking that has federalism implications. 64 Fed. Reg. at 43,257-43,258.

As described in more detail, *supra*, the proposed rulemaking has a substantial direct effect on California and other states. Rather than analyze these implications or consult with the affected states as required under Executive Order 13132, here, EPA states, without analysis or explanation:

> This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

84 Fed. Reg. at 36,335. EPA fails to actually analyze the information available before making broad statements in support of its desired policy outcome. By doing so, EPA seeks to excuse itself from the necessary consultation with the states that are very much affected by EPA's proposed rule. EPA's failure to consult with the affected states and failure to adequately—or actually—analyze whether its proposed rule has federalism implications is yet another shortcoming in the proposed rule.

B. EPA Failed to Analyze the Potential for that the Proposed Rule Could Disproportionately Affect Children Through Increased HAPs, in Violation of Executive Order 13045

Executive Order 13045 applies to rules that are economically significant under Executive Order 12866 that also "concern[s] an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children." 62 Fed. Reg. 19,885. An "environmental health risk or safety risk' is one that is "attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breath, . . . and the products we use or are exposed to)." 62 Fed. Reg. 19,885. When EPA promulgates an economically significant rule that concerns an environmental health or safety risk to children, EPA must evaluate the "environmental health or safety effects of the planned regulation on children" and "explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency." 62 Fed. Reg. 19,887.

Here, EPA admits that the proposed rule is an economically significant rule under Executive Order 12866. 84 Fed. Reg. at 36,335. However, EPA argues that because the proposed rule "does not establish an environmental standard intended to mitigate health or safety risks," it is "not subject to Executive Order 13045." 84 Fed. Reg. 36,336. This is because EPA cannot argue with a straight face that a proposed rule about emissions of hazardous air pollutants does not "concern" an environmental safety risk that may disproportionately affect children. So instead, EPA creates a preposterous reading of Executive Order 13045 to avoid analyzing the

impacts of its proposed rule and hazardous air pollutants on the health and safety of children. This narrow reading of Executive Order twists the term "concern" to mean "establish an environmental standard," contrary to the plain meaning of the word concern. Such a forced and twisted interpretation is an improper attempt by EPA to avoid its responsibilities under Executive Order 13045.

C. EPA Failed to Analyze the Effect of the Proposed Rule on Minority and Low-Income Populations, in Violation of Executive Order 12898

Executive Order 12898 is intended to focus attention on the human health and environmental effects of federal actions on communities comprised of minority and low-income individuals, to ensure that those communities are achieving environmental protection in the same manner as other communities. 59 Fed. Reg. 7,629. The Executive Order directs federal agencies to "identify[] and address[] . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations" in the United States and its territories. 59 Fed. Reg. 7,629.

Here, EPA argues that the proposed rule is not subject to analysis under Executive Order 12898 "because it does not establish an environmental health or safety standard." 84 Fed. Reg. at 36,336. But nowhere in Executive Order 12898 is establishment of an environmental health or safety standard identified as the *only* agency action to which the Executive Order applies. Indeed, the Executive Order broadly instructs federal agencies to identify and address all human health and environmental effects that have a disproportionate impact on low-income or minority populations and to make environmental justice part of the agency's mission. 59 Fed. Reg. 7,629. EPA's conclusory statement that because it is not establishing a specific type of standard, it need not pay attention to whether its proposed rule disproportionately impacts low-income and minority communities flies in the face of the text and purpose of Executive Order 12898 and is an improper attempt by EPA to avoid its necessary regulatory requirements. EPA's failure to evaluate the environmental justice implications of its proposed rulemaking is particularly concerning given the likely disproportionate impacts increased HAP emissions will have on low-income communities and communities of color, as discussed in section I.E., *supra*.

VI. CONCLUSION

The Proposed Rule violates the mandate of Section 112's federal program to reduce emissions of HAPs by providing effective, uniform control of the health and environmental risks to surrounding communities posed by HAP emissions from major sources through the application of maximum achievable control technology standards. For these reasons, the States strongly oppose EPA's Proposed Rule and respectfully request that EPA not finalize the Proposed Rule and withdraw the Wehrum Memo.

Sincerely,

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
ATTORNEY GENERAL
DAVID A. ZONANA
Supervising Deputy Attorney General
KAVITA LESSER
Deputy Attorney General
JONATHAN WIENER
Deputy Attorney General

/s/ Meredith Hankins
MEREDITH HANKINS
KELLY WELCHANS
Deputy Attorneys General
Office of the Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, California 90013
Tel: (213) 269-6177
Email: Meredith.Hankins@doj.ca.gov

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
ATTORNEY GENERAL

/s/ Roberta R. James
ROBERTA R. JAMES
Assistant Attorney General
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, MD 21230
(410) 537-3748

JOHN B. HOWARD, JR.
JOSHUA M. SEGAL
STEVEN J. GOLDSTEIN
Special Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6300

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
ATTORNEY GENERAL

/s/ Aaron A. Love
AARON A. LOVE
CHLOE GOGO
Deputy Attorneys General
New Jersey Division of Law
25 Market Street
Trenton, NJ 08625
(609) 376-2762
aaron.love@law.njoag.gov

FOR THE STATE OF NEW YORK

LETITIA JAMES
ATTORNEY GENERAL
MICHAEL J. MYERS
Senior Counsel for Air Pollution and
Climate Change Litigation

/s/ Brian Lusignan
BRIAN LUSIGNAN
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2400

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, OR 97301-4096
(503) 947-4593

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
ATTORNEY GENERAL

/s/ Gregory S. Schultz
GREGORY S. SCHULTZ
Special Assistant Attorney General
Office of the Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400
gschultz@riag.ri.gov

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
ATTORNEY GENERAL

/s/ Emily C. Nelson
EMILY C. NELSON
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, Washington 98504
(360) 586-4607
emily.nelson@atg.wa.gov

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL

/s/ Carol Iancu
CAROL IANCU
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2428
carol.iancu@mass.gov

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
ATTORNEY GENERAL

/s/ Michael J. Fischer
MICHAEL J. FISCHER
Chief Deputy Attorney General
ANN R. JOHNSTON
Senior Deputy Attorney General
Office of Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
(215) 560-2171

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
ATTORNEY GENERAL
DONALD D. ANDERSON
Deputy Attorney General
PAUL KUGELMAN, JR.
Senior Assistant Attorney General
Chief, Environmental Section

/s/ Caitlin C. G. O'Dwyer
CAITLIN C. G. O'DWYER
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
202 North 9th Street
Richmond, Virginia 23219
(804) 786-1780
godwyer@oag.state.va.us

Encl.