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November 13, 2023

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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).

Docket ID No. EPA-HQ-OAR-2023-0330

Dear Administrator Regan and Mr. Topham:

In November 2020, the Trump Administration deregulated a vast swath of industrial toxic polluters through a rule titled “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” 85 Fed. Reg. 73,854 (November 19, 2020) (“Reclassification Rule”). That Rule allowed the large sources of hazardous air pollutants for which the Clean Air Act prescribes the “maximum achievable control technology” (MACT)—a standard meant to eliminate toxic pollution where-ever feasible, 42 U.S.C. § 7412(d)(2)—to escape those standards and instead emit up to 10 tons per year of any one air toxic or 25 tons per year of combined toxics (even though a pound or less of such toxics are often gravely harmful). The Trump Administration also removed EPA’s long-standing regulatory

requirement that potential-to-emit (PTE) limits used to escape MACT be federally enforceable—a deletion it made without responding to public comments on the pretense that it was a merely ministerial, non-final action.

EPA has now proposed regulations that would: clarify that the reclassifications permitted by the Reclassification Rule are only effective upon submission of the required notification to EPA; add safeguards to ensure that reclassified sources do not increase their emissions; and require that PTE limits used to secure reclassification—but only those PTE limits—be federally enforceable. 88 Fed. Reg. 66,336, 66,342-43 (Sept. 27, 2023).

Earthjustice, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, Sierra Club and Southern Environmental Law Center, for the reasons below, urge EPA to: finalize a rule that prevents sources in the categories necessary to meet section 112(c)(6)'s requirements for sources of the persistent, bioaccumulative pollutants listed in that section, 42 U.S.C. § 7412(c)(6); adopt the proposed safeguards preventing all sources from reclassifying based on “controls” that will increase, rather than decrease, the source’s emissions; require that PTE limits be federally enforceable for reclassified sources, and for all other sources under EPA’s section 112 program; and require that the public receive notice and an opportunity to comment on each PTE limit.

I. EPA Should Finalize a Rule Preventing Sources in the Categories Necessary to Meet the 90 Percent Threshold in 112(c)(6) From Reclassifying and Ensuring that All Sources Do Not Reclassify Based on “Controls” that Increase Emissions.

The rule which EPA’s proposal amends—the Reclassification Rule—is inconsistent with the Clean Air Act. *See* Petition for Reconsideration of “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” 85 Fed. Reg. 73,594 (Nov. 19, 2020) Docket ID No. EPA-HQ-OAR-2019-0282 and for Withdrawal of the Guidance Memorandum titled “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (January 25, 2019) (OAQPS-2020-415) (January 18, 2021) (EPA-HQ-OAR-2019-0282-0659) (“Reconsideration Petition,” Att. 1); Comments of Earthjustice, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club on Proposed Rule: Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,304 (July 26, 2019) (September 24, 2019) (EPA-HQ-OAR-2019-0282-0341) (“Comments,” Att. 2).

If EPA permits reclassification of major sources that have complied with section 112’s MACT standards, 42 U.S.C. § 7412(d)(2), however:

- EPA is obligated to ensure that the sources necessary to satisfy its obligation under section 112(c)(6) of the Act cannot reclassify and thereby avoid being “subject to standards under” section 112(d)(2) or (d)(4), 42 U.S.C. § 7412(c)(6) (Section I.A, *below*);
- The text of the Clean Air Act—and in particular the word “controls” as used in section 112(a)(1) and within the broader context of section 112—demands that EPA prevent major sources from reclassifying based on the adoption of measures that would increase their pollution from their current MACT-compliant levels, 42 U.S.C. § 7412(a)(1) (Section I.B, *below*);
- Sections 112(c)(3), (c)(5) and (d)(5) also support EPA’s proposal to impose a federally enforceable standard on the category of reclassified sources which requires those sources to continue to apply control measures that they have already adopted (Section I.C, *below*); and
- EPA should apply the proposed safeguards to all reclassified sources regardless of when they reclassify, and fully acknowledge the emissions benefits of this rule (Sections I.C and I.D, *below*).

The signatory groups also support EPA’s proposal to make reclassification effective only upon submission of the required notification.

Absent the proposed changes, the Reclassification Rule would permit hundreds of industrial sources to increase their emissions of hazardous air pollutants (HAP)—carcinogenic, neurotoxic, or otherwise dangerous substances that are often harmful even “in very small quantities,” 88 Fed. Reg. at 66,343. EPA’s extraordinarily conservative analysis estimated that the Rule could result in well over 1,000 tons per year of increased toxic emissions in the near-term, from facilities that have controls in place which could prevent (and have, until now, prevented) those emissions. *See* Memorandum from Lisa Conner to MM2A Project Files 3 (August 2020) (EPA-HQ-OAR-2023-0330-0019). Over the long term, as sources adjust, fail to maintain, or abandon their controls and shift to higher-pollutant materials, the emission increases will be much higher. *See* Reconsideration Petition at 34-37; 88 Fed. Reg. at 66,342 (acknowledging “significant concern” that “sources with adjustable controls can obtain PTE limits just below the major source thresholds ... and reduce their control efficiency to reduce operational costs, and subsequently increase emissions”). And the Reclassification Rule, if not amended, would allow sources to escape the monitoring and reporting that might provide affected communities—often of color and lacking wealth—any knowledge of the additional toxics to which they are being exposed. *See* Reconsideration Petition at 26-29; *See, e.g.,* Juan Declet-Barreto, Gretchen T. Goldman, Anita Desikan, Emily Berman, Joshua Goldman, Charise Johnson, Leonard Montenegro & Andrew A. Rosenberg

(2020): Hazardous air pollutant emissions implications under 2018 guidance on Clean Air Act requirements for major sources, *Journal of the Air & Waste Management Association*, DOI: 10.1080/10962247.2020.1735575.

Notably, of the facilities that EPA is aware of that have already reclassified, Draft List of MM2A Reclassifications 9.21.2023 (Sept. 2023) (EPA-HQ-OAR-2023-0330-0038), nearly 80 facilities are in Justice40 census tracts and another nearly 70 facilities are adjacent to Justice40 tracts. *See* Mapping of EPA’s List of Reclassified Facilities and Justice40 Census Tracts (Att. 3). Moreover, EPA’s list reveals that 46 different kinds of sources have reclassified, including chemical manufacturing facilities (subject to the Miscellaneous Organic NESHAP) (10), electric generating units (16), oil and gas (8), and wood furniture facilities (23). *See* Table of Facility Descriptors for Reclassified Sources (Att. 4). EPA’s list of reclassified sources is not exhaustive; as EPA explains in the proposal, EPA has “become aware of some sources that have reclassified and the required reclassification has not been submitted through [EPA’s electronic system].” 88 Fed. Reg. at 66,343.

A. Section 112(c)(6) Obligates EPA to Prevent Sources in Categories It Has Identified to Meet the Statute’s 90 Percent Threshold from Escaping MACT Limits.

EPA’s proposal notes “the special attention Congress paid to specific pollutants in section 112(c)(6) of the Clean Air Act,” and acknowledges that “additional restrictions” may be “warranted for source categories that are subject to MACT standards for the persistent and bioaccumulative HAP listed” by Congress in that section. 88 Fed. Reg. at 66,345. Because the Reclassification Rule eliminates the ability of its past standards to ensure compliance with MACT standards, section 112(c)(6) demands that the Agency adopt the first “possible restriction” listed in the proposal: “one that would prevent any sources” within the categories EPA has “used to reach” the statutory “90 percent threshold for any of the ... section 112(c)(6) HAP from reclassifying from major source status to area source status” (that is, to require sources in those categories to comply with MACT standards regardless of whether their current emissions exceed the major-source threshold). 88 Fed. Reg. 66,345-56.

Section 112(c)(6) states that with respect to seven specified pollutants, EPA “*shall* ... 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 standards under subsection (d)(2) or (d)(4).*” 42 U.S.C. § 7412(c)(6) (emphases added). That provision—by using the word “shall”—imposes an affirmative obligation on EPA, independent of those contained in the remainder of Section 112, to “assur[e]” that a minimum of 90 percent of emissions of “each” pollutant are subject to MACT standards. It allows EPA to over-shoot that mark. *Id.* (requiring standards to govern “not less than” 90 percent of emissions). And section

112(c)(6) specifies that the standards must be MACT limits promulgated “under” the strict standards of section 112(d)(2)—not substitute restrictions adopted under other authorities. *Id.* (there are no health thresholds enabling the use of standards under section 112(d)(4), 42 U.S.C. § 7412(d)(4), for the pollutants listed in section 112(c)(6)).

Section 112(c)(6) creates an independent mandate that “comprises both listing *sources* ... and promulgating *standards*.” *Sierra Club v. EPA*, 699 F.3d 530, 531 (D.C. Cir. 2012). The statute thereby imposes a substantive “duty to issue § 112(c)(6) standards,” and to undertake any “additional source-listing or standard setting” required to reach the 90 percent threshold. *Id.* at 535. As to the sources identified by EPA to satisfy section 112(c)(6), the statute eliminates any prerequisite that EPA make “a finding of health or environmental threat from area sources to determine if such sources need to be included to meet the 90 percent requirement.” 63 Fed. Reg. 17,838, 17,842 (April 10, 1998). And for those sources, section 112(c)(6) also eliminates EPA’s limited discretion to apply non-MACT standards, 42 U.S.C. § 7412(d)(5): Section 112(c)(6) requires EPA “to establish and subject these listed sources to MACT standards, ... even if it would have otherwise had the discretion to apply a less-stringent standard to any area sources on the list.” *Sierra Club v. EPA*, 863 F.3d 834, 835 (D.C. Cir. 2017) (*Sierra Club II*).

EPA has purported to satisfy those duties by listing and promulgating standards for a series of source categories that, the Agency concluded, contain the “sources accounting for” 90 percent of the aggregate emissions of each of the seven pollutants listed in section 112(c)(6). 79 Fed. Reg. 74,656, 74,680 (Dec. 16, 2014); 76 Fed. Reg. 15,308 (Mar. 21, 2011); 63 Fed. Reg. at 17,839. *See* Memorandum from Nathan Topham dated February 18, 2011 (EPA-HQ-OAR-2004-5005-0006) (detailing rationale by which EPA determined that “the Agency is satisfying [its] obligation under CAA section 112(c)(6) for all seven HAP”).¹ That list of source categories identifies the categories that EPA must “ensure,” under section 112(c)(6), are “subject to” MACT standards. 42 U.S.C. § 7412(c)(6). *See* “Categories of Sources Whose Emissions of 112(c)(6) HAP Are Subject to 112(d)(2), 112(d)(4), or 129 Standards” (EPA-HQ-OAR-2023-0330-0033) (“112(c)(6) List”). And many of those categories include hundreds of sources that EPA’s cost-analysis forecasts as eligible for reclassification—even as its 112(c)(6) analysis asserts that EPA has ensured that these sources are subject to MACT. *Compare* Memorandum from Eastern Research Group to Eric Goehl et al. (August 2020) (EPA-HQ-OAR-2023-0330-0020) at 32-42 (listing categories and sources that EPA believes likely to achieve cost savings by escaping MACT) *with* 112(c)(6) List. *See also* 79 Fed. Reg. at 74,660

¹ In 2017 the D.C. Circuit rejected EPA’s claim to have issued sufficient standards to satisfy section 112(c)(6). *Sierra Club II*, 863 F.3d at 836. The court held that EPA failed to explain how the 112(c)(6) pollutants POM, HCB, and PCBs are regulated to a MACT level of control by limits on emissions of other pollutants from the sources at issue and remanded the matter to EPA for further proceedings consistent with the opinion. *Id.*

(listing categories with sources whose emissions “EPA is counting towards meeting the EPA’s 90 percent requirement for each section 112(c)(6) HAP”).

EPA lacks the statutory authority—via the Reclassification Rule or otherwise—to exempt sources from MACT standards within the categories it has identified as necessary to satisfy section 112(c)(6)’s mandate. EPA has acknowledged that it cannot allow the sources on its “section 112(c)(6) list” to meet lesser standards—even if they are area sources—because the Agency “need[s] these sources to meet the 90 percent requirement” imposed by section 112(c)(6). 76 Fed. Reg. 15,554, 15,556 (Mar. 21, 2011). Section 112(c)(6) requires EPA to “*ensur[e]*” that the specified sources “are” subject to MACT. 42 U.S.C. § 7412(c)(6) (emphasis added). That command prohibits a regime in which EPA’s listings and standards fail to ensure anything beyond transient compliance with MACT standards.

EPA should therefore confirm that because sources in the categories on its 112(c)(6) List are minimally necessary to satisfy section 112(c)(6)’s independent requirements, the Agency cannot allow those sources to escape MACT standards. And—if EPA retains the Reclassification Rule—it should finalize a rule requiring sources in those categories to continue to comply with MACT standards regardless of whether their post-compliance emissions exceed the major-source threshold. *See* 76 Fed. Reg. at 15,556 (acknowledging that section 112(c)(6) requires as much). Absent that restriction the Reclassification Rule, even with the additional safeguards contained in the present proposal, is flatly inconsistent with section 112(c)(6).

Section 112(c)(6) provides the Agency with independent authority (and an obligation) to adopt this proposed restriction. Having belatedly issued a Reclassification Rule that would otherwise eviscerate its compliance with section 112(c)(6), EPA also has authority (and an obligation) to adopt that restriction as a necessary revision under section 112(d)(6), 42 U.S.C. § 7412(d)(6). *See Louisiana Environmental Action Network v. EPA*, 955 F.3d 1088, 1099 (D.C. Cir. 2020) (Section 112(d)(6) obligates EPA to revise standards to correct “unlawfully omitted” controls). *See also* 42 U.S.C. § 7412(c)(6) (EPA’s standards were meant to accomplish 90 percent control “not later than 10 years after November 15, 1990”). The statutory authority for restricting reclassification for 112(c)(6) sources is, moreover, entirely independent of those supporting EPA’s other proposed safeguards; any restriction on reclassification of sources needed to satisfy section 112(c)(6) is therefore separate and severable from those other proposed safeguards.

The two other section 112(c)(6) restrictions suggested within EPA’s proposal do not satisfy the statute.

First, EPA seeks comment on an option that would only “require sources subject to a major source [standard] to remain subject to the major source [standard] for

emissions of” pollutants listed in section 112(c)(6), “while allowing those sources ... to reclassify and no longer remain subject to the major source [standard]” for all other pollutants. 88 Fed. Reg. at 66,346. But section 112(c)(6) requires EPA to list the “categories and subcategories of sources” responsible for the specified percentage of emissions, then ensure that those sources are “subject to standards under” section 112(d)(2). 42 U.S.C. § 7412(c)(6). As EPA has recognized, under that text sources are only “*selected* on the basis of whether they emit the seven listed HAP.” 63 Fed. Reg. at 17,841 (emphasis added) (Section 112(c)(6) does not instruct EPA to secure “a specific quantitative reduction in emissions for [the] particular HAP” listed in section 112(c)(6)). Having selected and listed the sources necessary to meet Section 112(c)(6)’s mandate, EPA is further obligated to issue standards for all HAP emitted by those sources: Section 112(d)(1) requires EPA to promulgate standards governing all listed HAP emitted by any source “listed for regulation pursuant to subsection (c)”, 42 U.S.C. § 7412(d)(1); *see Nat’l Lime Ass’n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000)—including those listed pursuant to section 112(c)(6).

EPA has the discretion to subject these sources to generally available control technology (GACT), rather than MACT, standards for HAP other than the seven listed in section 112(c)(6). 42 U.S.C. § 7412(d)(5); *Desert Citizens Against Pollution v. EPA*, 699 F.3d 524, 527-28 (D.C. Cir. 2012). But EPA cannot exercise that discretion without “some explanation for why [GACT] standards are more appropriate than MACT standards for [those] sources and types of pollutants,” *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 653 (D.C. Cir. 2016)—a showing that is flatly impossible where, as here, area and major sources are in all important respects “identical.” 88 Fed. Reg. at 66,345. EPA has not provided, and could not provide, a non-arbitrary basis to allow sources in the categories on EPA’s 112(c)(6) List—which have complied with MACT standards for all HAP for years—to “no longer remain subject to the major source [standard]” for all pollutants aside from those listed in section 112(c)(6). 88 Fed. Reg. at 66,346. And EPA could furthermore not readily explain how deregulating those is consistent with Congress’ express goals of “achiev[ing] a substantial reduction in emissions of hazardous air pollutants from area sources and an equivalent reduction in the public health risks associated with such sources including a reduction of not less than 75 per centum in the incidence of cancer attributable to emissions from such sources.” 42 U.S.C. § 7412(k)(1).

Moreover, exempting sources on the 112(c)(6) List from MACT for a subset HAP would be thoroughly impractical given EPA’s reliance on surrogates and the absence of any rule-specific analysis that could support a pollutant-by-pollutant reconciliation of the Reclassification Rule with section 112(c)(6)’s mandate. Given the structure of the standards upon which EPA’s compliance with 112(c)(6) relies, the only workable restriction is one that prevents the listed sources from escaping major-source requirements through reclassification for all pollutants.

Second, EPA requests comment on whether it should “allow [the 112(c)(6)] sources to reclassify” and merely require them to “employ the emission control methods ... required under the major source [standard] requirements” under the additional safeguards contained in this proposal. 88 Fed. Reg. at 66,346. But those safeguards are not issued under section 112(d)(2), 42 U.S.C. § 7412(d)(2). *See* Sections B & C, *below* (addressing basis for proposed safeguards). Section 112(c)(6) demands that EPA ensure that the sources it describes are “subject to standards under subsection (d)(2).” 42 U.S.C. § 7412(c)(6). That requires compliance with the MACT standards established pursuant to section 112(d)(2); subjecting those sources to substitute standards issued under other portions of the statute would not meet EPA’s statutory duty, even if those standards prescribe similar “emission control methods.” 88 Fed. Reg. at 66,346. And if EPA allows sources to avoid HAP-specific limits or to use non-identical units of measure (which it should not, *see below* at pp. 10-11) – or permits states to do so – those substitute standards would, in practice, allow for substantially higher emissions of the HAP listed in section 112(c)(6). *See* 88 Fed. Reg. at 66,345 (soliciting comment on whether limits need to be based on same units of measure and whether PTE limits should apply to specific control measures).

B. EPA Correctly Interprets the Word “Controls” in Section 112(a)(1) to Exclude Measures that Will Produce an Increase in Emissions.

EPA proposes to codify that “any federally enforceable HAP PTE limitations taken by a major source to reclassify to area source status” must either “(1) continue to employ the emission control methods ... required under the major source [standard] requirements;” (2) adopt “control methods prescribed for reclassification under a specific” standard; or (3) require “emission controls that the permitting authority has reviewed and approved as ensuring the emissions of HAP from units or activities previously covered will not increase above the emission standard or level that was acceptable under the major source [standard’s] requirements at the time of reclassification.” 88 Fed. Reg. at 66,345. Those provisions effectively “require a determination that a source reclassifying from major to area source status will not emit beyond what would have been allowed had the source maintained major source status.” *Id.* at 66,343. Absent that requirement, as EPA recognizes, sources could reclassify based on the adoption of “controls” that in actuality “increase emissions” ten-, twenty-fold or more. *Id.*

The proposal thereby correctly adopts the only reasonable understanding of the words “considering controls” in section 112(a)(1)’s definition of the term “major source,” 42 U.S.C. § 7412(a)(1): one that refuses to equate “controls” with measures that will increase the source’s pollution. The plain meaning of the word “control,” in this context, is something that limits or restricts the source’s pollution. *See Control*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/control> (last visited Nov. 11, 2023) (defining “control” as something that “exercise[s] *restraining* or

directing influence,” or which “*reduce[s]* ... incidence or severity”) (emphases added). That dictionary definition is confirmed by the nature of the Clean Air Act’s use of the word “control” throughout. The Act’s Prevention of Significant Deterioration provisions, for example, define a “control technology” as “an emission *limitation* based on the maximum degree of *reduction*” in a source’s pollution. 42 U.S.C. § 7479(3) (emphasis added). In non-attainment areas, “reasonably available control measures” are those that produce “*reductions* in emissions.” 42 U.S.C. § 7502(c)(1) (emphasis added). *See also, e.g.* 42 U.S.C. § 7511a(e)(3)(B) (“control technology” is one that produces “reduction in emissions”). *See South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 902 (D.C. Cir. 2006) (holding that “something designed to *constrain* ozone is a ‘control’” within meaning of Act’s anti-backsliding requirements for attainment areas (emphases added)). And Congress defined “maximum achievable control technology,” in section 112 itself, 42 U.S.C. § 7412(g)(2), as measures that “reduce” or “eliminate” emissions, 42 U.S.C. § 7412(d)(2)(A). *See* 42 U.S.C. § 7412(d)(5) (“Generally available control technologies” are those that “reduce emissions of hazardous air pollutants.”).

The word “control” in section 112(a)(1) consequently can only include features of the source that serve to *decrease* its pollution. A change that serves to *increase* the source’s pollution—to relax previously existing constraints on emissions—falls squarely outside the meaning of the term: It is not a “control” that EPA is permitted to “consider” in assessing whether a “stationary source or group of stationary sources ... has the potential to emit, considering controls, in the aggregate, 10 tons per year” of one HAP or “25 tons per year” of combined HAP. 42 U.S.C. § 7412(a)(1). EPA’s regulations reflect that understanding.² They require EPA to calculate a source’s potential to emit as “the maximum capacity of a stationary source to emit a pollutant under its physical and operational design,” modified only by “operational *limitation[s]*... and *restrictions*” adopted by the source. 40 C.F.R. § 63.2 (emphases added). That definition precludes consideration of measures that are not directed towards reducing the source’s future emissions. This interpretation conforms with EPA’s definition of “control” under other statutory provisions. *See also* 40 C.F.R. § 51.100(r) (defining “transportation control measure” as “any measure that is directed towards *reducing* emissions ... from transportation sources” (emphasis added)).

Consequently, a source currently subject to MACT that requests reclassification relying on “controls” must demonstrate that these controls will not increase its emissions. And the baseline from which to measure that increase—given the Reclassification Rule’s insistence that the major-source definition operates always in the present tense—is the source’s current, MACT-compliant emissions. *See* 88 Fed. Reg. at 66,343-44 (describing EPA’s conclusion that the “lack of a temporal

² EPA’s regulatory interpretation that a control must limit or restrict is correct. The commenting groups do not all agree with EPA’s understanding that operational limits alone can limit a source’s PTE.

limitation” in the definition of a major source requires EPA to continuously assess major source status “at any time”). If the source wants to reclassify based on the consideration of purported “controls” that reduce the source’s potential to emit under section 112(a)(1), it must demonstrate that these methods, devices, or operational steps are in fact “controls”—that they will not produce an increase in the source’s future emissions. For example, an owner seeking to reclassify a source based upon its installation of a thermal oxidizer and an associated PTE limit must demonstrate that the oxidizer and PTE limits will in fact function as a “control”—that is, that they will not produce an increase in any HAP emissions going forward. If the source cannot make that demonstration, section 112(a)(1) does not allow EPA to consider the thermal oxidizer and PTE limit—or any other device, operational step, or production method—when measuring the source’s potential to emit. It must (as the proposal would) assess that source’s maximum capacity to emit without them and treat it as major.³

The proposed regulation therefore properly interprets and applies the words “considering controls” in section 112(a)(1). 88 Fed. Reg. at 66,344 (for purposes of reclassification, the only “controls” that are determinative are those that will not increase pollution). The broader statutory context and structure confirm that common-sense insistence that the word “control” excludes measures that increase pollution. It would be wholly perverse to interpret EPA’s obligation to “consider controls” in section 112(a)(1) to nullify the effect of the maximum-achievable controls that are the centerpiece of section 112 as a whole. 42 U.S.C. § 7412(d)(2). That is especially so given Congress’s clear indication that the controls required by section 112 should, where possible, “eliminate emissions”—something that the statute could not accomplish if every source subject to MACT could elect instead to emit up to 10 tons of any pollutant (or 25 tons combined). EPA’s understanding of the text is further underscored by the statutory structure, which only provides for a residual risk analysis addressing sources subject to major-source standards. 42 U.S.C. § 7412(f)(2). That analysis would provide no meaningful protection against harm to public health if the sources it excludes—reclassified sources—could increase their emissions by tons per year.

We also urge EPA to require reclassified sources to continue to comply with HAP-specific limits. 88 Fed. Reg. at 66,345. Sources should not be allowed to characterize as “controls” measures that would produce an increase in *any* HAP. And many of the regulated toxics are, as EPA’s proposal notes, harmful in extraordinarily small quantities, 88 Fed. Reg. at 66,343, as reflected by the statutory command to impose standards on all HAP emitted by any major source, 42 U.S.C. § 7412(d)(1). See 57 Fed. Reg. 61,970, 61,980-81 (Dec. 29, 1992)

³ That text provides no obstacle to the reclassification of a “natural” minor—one whose maximum-capacity emissions are below the major source threshold without the need to consider any controls. 88 Fed. Reg. at 66,345 (requesting comment on “whether it is appropriate to differentiate between reclassified synthetic minor and true minor sources”).

(describing “high risk” air toxics for which “high risks of adverse public effects may be associated with exposure to small quantities”). Some of those HAP are listed in section 112(c)(6)—and must be subject to MACT standards according to the requirements of that section. 42 U.S.C. § 7412(c)(6). But others are not. Aggregate limits, even just for sources outside the scope of 112(c)(6), would allow for dangerous increases in toxics that are only ever emitted in very small quantities—increases of which affected communities would have no knowledge. Industrial polluters should not be permitted to undertake those increases, especially when they have the means in place to prevent them and have been doing so for years.

C. EPA’s Proposed Safeguards Are Also Required by Sections 112(c)(3), 112(c)(5), 112(d)(5) and 112(h).

The safeguards proposed as paragraph 40 C.F.R. § 63.1(c)(6)(iv), 88 Fed. Reg. at 66,345, also implement the authorities and obligations provided by sections 112(c)(3), 112(d)(5) and 112(h) of the Clean Air Act, 42 U.S.C. §§ 7412(c)(3), (d)(5) & (h). (They do not, however, satisfy the independent requirements of section 112(c)(6), 42 U.S.C. § 7412(c)(6) as noted above at pp. 6-7). The Reclassification Rule (assuming its legality) effectively creates a new group of area sources—sources that are demonstrably capable of meeting MACT standards and are in all respects identical to major sources save the adoption of pollution controls. The Clean Air Act poses three questions as to those reclassified sources, none of which the Agency has answered to date: (1) Do those reclassified sources “present[] a threat of adverse effects to human health or the environment,” 42 U.S.C. § 7412(c)(3); (2) Is there a reasonable basis for EPA to relieve those sources from the default statutory obligation to comply with MACT standards promulgated under section 112(d)(2), 42 U.S.C. § 7412(d)(5); and (3) If so, what standards based on “generally available control technologies” or “management practices” should govern them instead, *id.*

EPA has not addressed any of those statutory provisions with regard to reclassified sources.⁴ The proposal, if finalized, would fill that necessary gap (as EPA should make clear) by acknowledging the threat posed by reclassified sources and subjecting them to a generally-available work-practice standard. The Clean Air Act obligates EPA to list any category or subcategory of area sources, if that

⁴ Its past standards—promulgated before the Reclassification Rule—assumed that any sources complying with major-source standards would continue to comply—in other words, that there would be no nominally “area sources” fully capable of complying with MACT. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants (NESHAP): Surface Coatings of Miscellaneous Metal Parts and Products—Summary of Public Comments and Responses at 48 (“[F]or purposes of determining applicability of the Miscellaneous Metal Parts and Products NESHAPS, a facility would need to achieve area source status ... prior to the compliance dat[e].”); Municipal Solid Waste Landfills : Background Information Document for National Standards for Hazardous Air Pollutants, Public Comments and Responses at 17 (noting that “once in, always in” interpretation applies to standards generally, and refusing to modify when issuing specific rule).

category “presents a threat of adverse effects to human health or the environment” either “individually or in the aggregate.” 42 U.S.C. § 7412(c)(3). The reclassified sources governed by the rule are all sources which—if uncontrolled—emit air toxics in quantities above the threshold specified by Congress to identify such a threat to health and the environment. *See* 42 U.S.C. § 7412(f)(2) (requiring residual risk assessment for sources subject standards under 112(d)). These sources have previously been listed for regulation for that reason; and they are functionally “identical” to the other sources in major-source categories. 88 Fed. Reg. at 66,345. Accordingly, reclassified sources—those listed for and subjected to regulation as major sources but nominally eligible to become area sources under the Reclassification Rule—are a “category or subcategory of area sources” that present a threat to health and the environment which EPA “shall list” for regulation. EPA should clarify that it is doing so under section 112(c)(3) and 112(c)(5), 42 U.S.C. §§ 7412(c)(3) & (5) (permitting EPA to list additional categories).

Section 112(d)(5) requires EPA to subject this category of reclassified sources to MACT or to “elect to promulgate standards or requirements” for those sources “which provide for the use of generally available control technologies or management practices.” 42 U.S.C. § 7412(d)(5) (describing GACT standards). EPA has elected not to require reclassified sources to meet MACT standards, 85 Fed. Reg. 73,882—a choice with which we disagree. *See* Comments 11-14.⁵ But having made that election, the safeguards EPA would implement in the proposed 40 C.F.R. § 63.1(c)(6)(iv) clearly meet the statutory definition of an alternative GACT standard: they require sources merely to continue to operate as they have in the past, so necessarily provide for the use of technologies and measures that are “generally available” to reclassified sources. 42 U.S.C. § 7412(d)(5). GACT standards may be “work practice” or “operational” standards where, as here, a single numeric standard is infeasible. 42 U.S.C. § 7412(h). And GACT standards must be federally enforceable—as the proposed safeguards would be. 88 Fed. Reg. at 66,346.

EPA’s proposed safeguards are consequently authorized (and required) not only by the text of section 112(a)(1), but also by the sections 112(c)(3), (c)(5), (d)(5) and (h). 42 U.S.C. §§ 7412(c)(3), (c)(5), (d)(5) & (h). EPA should, in its final rule, clarify that additional basis for the proposed regulatory amendments. As the proposal notes, the Reclassification Rule, absent those amendments, would subject sources that are “identical” in all technical respects to drastically “different emissions

⁵ Reclassified sources have no features upon which EPA could justify the need for an alternative standard. *See U.S. Sugar Corp.*, 830 F.3d at 652 (requiring EPA to provide “some explanation for why GACT standards are more appropriate” than MACT standards for “those sources and types of pollutants”); 77 Fed. Reg. 9,304, 9,438 (Feb. 16, 2012) (acknowledging that “the standards for area source[s] ... should reflect MACT” where “similar HAP emissions and control technologies” are available and “there is no essential difference between area source[s] and major source[s] ... with respect to emissions of HAP”). For those reasons, EPA should require reclassified sources to continue to meet the MACT standards.

requirements” for the same pollutants. 88 Fed. Reg. at 66,345. That would be inconsistent with both Section 112 and basic rationality.

D. EPA Should Make Its Safeguards Applicable to All Reclassified Sources and Require Compliance No More Than One Year Following Publication.

EPA should apply its proposed safeguards to all reclassified sources. There is no meaningful legal or practical difference between sources that reclassified after EPA first permitted sources to reclassify (in its January 2018 Wehrum memo), and those that reclassify after EPA’s proposal is finalized. Legally, the statutory basis for EPA’s proposal applies equally to all reclassified sources. Section 112 expressly requires EPA to make and apply necessary revisions to its standards, and to apply those revisions to all sources. 42 U.S.C. § 7412(d)(6). EPA has successfully insisted that the Wehrum memo did “not have a single direct and appreciable legal consequence.” *California Communities Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019). It cannot therefore provide a basis for sources to avoid the requirements that EPA would impose here. And the Agency made clear immediately following issuance of the Reclassification Rule that it would be reviewing that Rule, preventing any claim that reliance interests bar EPA from adjusting the Rule’s requirements.

The sources that have already reclassified have all demonstrated their ability to maintain emissions at MACT levels. The regulated industries have consistently stated that reclassification will produce no meaningful changes in their operations. *See* 85 Fed. Reg. at 73,869 (industry commenters averred “that there is no reason to believe that facility owners or operators would cease to properly operate their add-on control devices,” and “have significant disincentives to alter their control measures to increase emissions” after reclassification). EPA concluded when it finalized the Reclassification Rule that all of the sources that reclassified prior to that Rule could produce “no potential emissions increase.” 85 Fed. Reg. at 73,882. Roughly “200 facilities” have now reclassified but EPA does not suggest that those facilities have increased emissions or altered their controls or operations in a manner that could be irreversible in the near term. 88 Fed. Reg. at 66,349. The proposed safeguards should, consequently, be applicable to all reclassified sources, regardless of whether they reclassify before or after finalization of this rule.

The Clean Air Act requires that section 112 regulations be applicable “as expeditiously as practicable,” and no later than 3 years after they become effective. 42 U.S.C. § 7412(i)(3)(A). EPA proposes to require sources that reclassify following the effective date of its final safeguards to meet those safeguards before reclassification, in keeping with that standard. But it also proposes to allow sources that reclassified “prior to the effective date” of the final rule to delay compliance for “three years.” 88 Fed. Reg. at 66,348. EPA does not, and cannot, reconcile that

three-year delay with the Act's requirement of expeditious compliance. 42 U.S.C § 7412(i)(3)(A). EPA's proposed safeguards require only the adoption of federally enforceable limits with which each reclassified source has already demonstrated its ability to comply. The most expeditious practicable compliance with that requirement should take no more than the few months needed to secure the necessary permits. EPA should require compliance no later than eighteen months after publication of its final rule.

E. EPA Should Fully Acknowledge the Emissions Benefits of the Safeguards.

EPA's proposal correctly concludes that the Reclassification Rule, with the added safeguards, will impose only minor costs on source-owners: "the costs of preparing and reviewing a source's application for area source status." 88 Fed. Reg. at 66,349 (also noting that these will be offset by savings associated with avoiding major-source monitoring and reporting requirements). EPA previously assessed those costs, *id.*, and the proposed safeguards do not affect that prior assessment. EPA assumed when it issued the Reclassification Rule that the "costs of emission control equipment (e.g., add-on controls), process changes, and formulations associated with major source [standards] were ... sunk costs," and so those costs "were not included in [EPA's] cost savings estimates" for the Reclassification Rule. Memo from Eastern Research Group to Eric Goehl et al (August 2020) (EPA-Q-OAR-2023-0330-0020) at 9. EPA's estimated costs-savings—recordkeeping, reporting, monitoring and other costs necessary for compliance with major-source requirements—should remain in place, reduced only by the costs associated with continued compliance for sources on its 112(c)(6) List and with the monitoring and reporting necessary to meet non-annual, non-aggregate PTE limits. *Id.*

EPA should, however, more fully acknowledge the emissions reductions that will result from the addition of its proposed safeguards. The analysis prepared to support its Reclassification Rule indicated that absent the changes proposed in this rule, the Rule could produce an increase of 919 to 1,258 tons per year of combined HAP.⁶ The nature of the harm caused by air toxics may prevent EPA from characterizing the benefits of that reduced pollution in dollar terms. 81 Fed. Reg. 24,420, 24,432 (Apr. 25, 2016) (acknowledging the lack of "the tools to quantify and monetize benefits attributable to reductions in HAP emissions" from any specific source category). They nevertheless represent a significant benefit—especially given the clear value placed by Congress on eliminating the harms they produce. *See id.* at 24,424 (noting "Congress' determination that HAP emissions are inherently harmful" and Congress' "instruction ... to protect the most sensitive populations from those harms"). EPA should fully acknowledge the benefits, in qualitative terms, of preventing those harms.

⁶ That is likely an underestimate. *See* Reconsideration Petition 34-37.

In addition, EPA has sufficient information—having permitted reclassification for several years—to decisively reject its prior speculation that eliminating emission-control obligations might somehow induce source-owners to reduce their pollution. *See* 85 Fed. Reg. at 73,877 (describing “125-percent alternative scenario” in which sources voluntarily “opt to further reduce emissions” in order to reclassify). That speculation never had any plausible basis; the absence of any empirical evidence supporting it after nearly six years of available reclassification makes it wholly unreasonable.

II. EPA Must Make All HAP PTE Limits Federally Enforceable and Subject to Public Notice and Comment.

We strongly support EPA’s proposal to require federal enforceability for HAP limits taken by reclassifying sources. As set forth below, the Clean Air Act’s language, structure, and purpose supports requiring that any limit under Clean Air Act section 112 be federally enforceable. Furthermore, federal enforceability—which has traditionally encompassed not only the ability of frontline communities and EPA to enforce limits, but also the opportunity for public participation in the establishment of limits for individual sources—is essential to ensuring that HAP limits are accurate and effective. Finally, for those area sources that are otherwise major for purposes of Clean Air Act Title V, requiring HAP limits to be federally enforceable ensures that these limits will be included in Title V permits and subject to Title V’s monitoring, recordkeeping, reporting, and compliance certification requirements, which Congress expressly adopted for the purpose of improving facility compliance with applicable emission limits.

For these same reasons, *we urge EPA to go further and act now to require that all HAP PTE limits taken under Clean Air Act § 112 be federally enforceable and subject to public notice and comment prior to issuance.* To achieve this, EPA simply needs to formally end its interim regime and restore the “federally enforceable” requirement to the definition of “potential to emit” in 40 C.F.R. § 63.2—language that the Trump Administration’s 2020 action unlawfully removed. There is no reason “to maintain interim revisions introduced to the general definition [of “potential to emit”]” by the 2020 rule and to delay taking final action on federal enforceability for all HAP PTE limits until EPA is ready to act on PTE limits for sources seeking to avoid applicability of New Source Review (NSR), Prevention of Significant Deterioration (PSD), or Title V requirements. 88 Fed. Reg. at 66,346, 66,348. While it is also important that these other types of PTE limits be federally enforceable, the time to restore federal enforceability for HAP PTE limits is now. Immediate action is warranted not only due to the highly toxic nature of HAPs, but also because EPA already took comment on requiring federal enforceability for HAP PTE limits back in 2019 and is thus free to finalize a rule now without additional public comment. And of course, a pending petition for review in the D.C. Circuit challenges the Trump Administration’s unlawful 2020

removal of the federal enforceability requirement from §63.2’s “potential to emit” definition. Final action responding to public comment and restoring the federal enforceability requirement for all HAP PTE limits would resolve the federal enforceability issues raised in that pending petition.

Importantly, EPA must recognize that its 2020 removal of the federal enforceability requirement from §63.2’s “potential to emit” definition has significant legal and practical consequences. While EPA guidance has long allowed a state to issue HAP PTE limits that are enforceable only by the state, the regulatory language requiring federal enforceability remained intact and in effect until EPA’s 2020 action. Thus, as demonstrated by the attached SELC survey, federal enforceability for HAP PTE limits has been the norm across the country. *SELC’s survey reveals that every state in the nation has recently issued a Clean Air Act Title V operating permit with a federally enforceable HAP PTE limit.* (Appendix A). Undoubtedly, state agencies and industry representatives are watching EPA to see if it will stick with the Trump Administration’s 2020 rule before removing the federal/public enforceability requirement from state programs and permits.

As explained below, allowing states to issue “state-only” enforceable HAP limits substantially impairs the ability of frontline communities to protect themselves from exposure to highly dangerous HAP emissions. Given the ever-increasing evidence that communities of color and low-wealth communities bear a disproportionate air pollution burden, it is incomprehensible that EPA would fail to ensure that these communities have public notice of and an ability to comment on HAP PTE limits that allow facilities to avoid most of the Act’s HAP control requirements. Likewise, there is no reason for EPA to deny frontline communities the ability to enforce against HAP limit violators, and to strip away its own authority to enforce limits and object to inadequate limits in response to a community’s request for EPA intervention. EPA should be doing everything it can to support public involvement in the development and enforcement of HAP PTE limits, not upholding misguided rules that allow these limits to be issued in secret and eliminate mechanisms for public and EPA oversight.

A. Federal Enforceability is Critical to Making HAP PTE Limits Effective—and the Clean Air Act’s Plain Language and Structure Show That Congress Intended for HAP PTE Limits to be Federally Enforceable.

In its September 2023 proposal, EPA declares that “ensuring that more entities can bring an enforcement action if a source violates a PTE limit, *i.e.*, EPA, States, Tribes, local government agencies, and citizen groups, will make the limit more effective in controlling HAP emissions.” 88 Fed. Reg. at 66,346. Certainly, the more entities that can enforce against a violator, the more likely an enforcement action will be brought. In fact, front-line state enforcement agencies are more likely to

resist pressure from regulated entities to overlook violations if they can point out that EPA or citizens may enforce if the state fails to act. Logically, increased risk of enforcement leads to increased compliance.

That said, Congress did not leave it up to EPA to decide whether EPA and citizen enforcement makes emission limits “more effective.” Rather, Congress made EPA and citizen enforcement a central part of the Clean Air Act’s overall structure for assuring facility compliance with Clean Air Act limits.

First, the Clean Air Act plainly authorizes both EPA and the public to enforce emission limits under Clean Air Act section 112. Specifically, Clean Air Act § 113(b)(2) authorizes EPA to bring an action in federal district court for any violation of “any other requirement or prohibition” under the Act. “[A]ny other” refers to violations other than violations under 113(b)(1), which are violations of the “applicable implementation plan,” as defined in section 302(q), or of a permit. The word “any” in 113(b)(2) is expansive and therefore unambiguously includes HAP emission limits set under Clean Air Act § 112. Likewise, the Clean Air Act’s citizen suit provision in section 304 unambiguously authorizes citizen enforcement of HAP PTE limits set pursuant to Clean Air Act § 112. Section 304(a)(1) provides a cause of action in federal district court for a violation of any “emission standard or limitation under this Act.” Section 304(f) defines “emission standard or limitation under this Act” for purposes of section 304 to include “any requirement under section ... 112 (without regard to whether such requirement is expressed as an emission standard or otherwise).”

Second, Congress could not have authorized EPA and the public to enforce requirements arising under section 112 in federal court unless the federal district court would have jurisdiction over such actions. Federal district courts have jurisdiction in nine instances specified in Article III, section 2 of the U.S. Constitution. The only instance that applies to all citizen suits under section 304 is subject matter jurisdiction.⁷ Thus, a citizen suit under section 304 or an EPA action under section 113 must “aris[e] under . . . the laws of the United States.” Therefore, an action in federal district court to enforce “any requirement under section 112” of the Act must arise under federal law. In short, under the Clean Air Act, any requirement under section 112 is federally enforceable.

Finally, a HAP PTE limit taken by a source to qualify as an area source instead of a major source under Clean Air Act § 112 constitutes a “requirement under section 112” for purposes of Clean Air Act § 304(f) and a “requirement or

⁷ Congress plainly did not intend to limit citizen suits to those arising from diversity jurisdiction. *See* Clean Air Act § 304(a) (“The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation.”). Likewise, jurisdiction over actions to which the U.S. is a party does not help, since EPA is usually not a party in citizen suits.

prohibition” under the Act as referred to in Clean Air Act § 113(b)(2). It is undisputed that provisions limiting a facility’s “potential to emit considering controls” must be enforceable, meaning that the limit is a “requirement” with respect to which a facility must comply. *See* 40 C.F.R. § 63.2 (in determining a facility’s “potential to emit” hazardous air pollutants, “[a]ny physical or operational limitation on the capacity of the stationary source to emit a pollutant ... shall be treated as part of its design if the limitation or the effect it would have on emissions is enforceable.”). And a HAP PTE limit is plainly a limit that is taken “under section 112” because the purpose of the limit is to delineate between whether a facility is a major source or an area source under section 112. Importantly, regardless of which category a source falls under, EPA has jurisdiction to regulate both: a facility that takes a HAP PTE limit simply places itself into a category for which EPA has discretion over whether to require MACT compliance or instead to require only “generally available” control technology.

In sum, the plain language and structure of the Clean Air Act requires that HAP PTE limits issued under § 112 be federally enforceable. EPA may object that it cannot defend making HAP PTE limits federally enforceable based on the Clean Air Act’s plain language and structure because the D.C. Circuit already decided in *National Mining Association v. U.S. EPA*, 59 F.3d 1351 (D.C. Cir. 1995), that the statute is ambiguous regarding the need for federal enforceability. But due to the record and briefing in that case, the D.C. Circuit had no occasion to decide whether the plain language of the Act requires federal enforceability. Specifically, the Court explained that in defending its decision to require HAP PTE limits to be federally enforceable, EPA argued: “[S]ince the word ‘controls’ is not defined in the statute, it was open to EPA under *Chevron* to define the term, and it has done so reasonably.” *Id.* at 1362. Thus, EPA focused entirely on the purportedly ambiguous “considering controls” language in § 112(a)(1) and did not raise the argument that the plain language of sections 113 and 304 require that HAP PTE limits be federally enforceable. As a result, the D.C. Circuit did not consider whether, when read together, the structure and language of sections 112, 113, and 304 require that HAP limits be federally enforceable. At a minimum, EPA should argue that requiring HAP PTE limits to be federally enforceable is consistent with the best reading of these statutory provisions.

B. To Ensure that HAP PTE Limits are Effective at Restricting Facility Emissions to Below the Major Source Threshold, the Limits Must be Federally Enforceable and Issued Only After Public Notice and an Opportunity for Public Comment.

Even if the Clean Air Act is ambiguous regarding federal enforceability, experience implementing HAP PTE limits following the D.C. Circuit’s 1995 *National Mining Association* decision shows that federal enforceability and public

participation in the establishment of limits is critically important to ensuring that limits are accurate and effective.

1. The Ability of Citizen Groups to Sue HAP Limit Violators Plays an Important Role in Ensuring that Sources Comply with their Limits.

As noted above, the possibility that citizen groups or EPA might enforce against a HAP limit violator makes it more likely that facilities will comply with their limits and that state agencies will hold violators accountable for their violations. Thus, totaling the number of EPA and citizen suit enforcement actions does not serve to demonstrate the value of making HAP limits federally enforceable. It is often the case that citizen groups first seek to obtain a facility's compliance with applicable requirements through permitting or by filing complaints with the relevant state agency. But the fact that citizen groups can elevate their concerns to EPA and can bring their own enforcement actions increases the likelihood that non-litigation advocacy will be successful. If that advocacy doesn't work, citizen groups need to be able to ask EPA to intervene or bring their own citizen suit enforcement action.

An example of when citizen enforcement of a HAP PTE limit was needed as a backstop to ineffective government enforcement is Sierra Club's 2020 enforcement action against Woodville Pellets, an industrial-scale wood pellet manufacturer in Texas. Prior to bringing their enforcement action, Sierra Club, Environmental Integrity Project, and other environmental organizations worked for years advocating for the State of Texas to require Woodville Pellets to install controls needed to bring its HAP emissions down to below the major source HAP threshold. Though the state eventually issued a construction permit to Woodville Pellets authorizing installation of the controls, the permit did not put Woodville Pellets on a deadline to install the controls, and many months after the construction permit's issuance, Woodville Pellets had not made any progress in getting the controls installed. Moreover, though Woodville Pellets' federally enforceable permits included 10 and 25 tpy MACT-avoidance limits, the company continued emitting above that level without consequences.

In 2020, Sierra Club, represented by Environmental Integrity Project, filed a Clean Air Act citizen suit in the U.S. District Court for the Eastern District of Texas alleging, among other things, that Woodville Pellets was exceeding the federally enforceable 10 and 25 tpy MACT avoidance limits set forth in the facility's permits. *Sierra Club v. Woodville Pellets, LLC*, No. 9:20-cv-00178-MJT-ZJH, 2021 WL 8315042 (E.D.Tex. Apr. 2, 2021) (Att. 5). The citizen suit, including the HAP claims, resulted in a successful Consent Decree (CD) that established a firm deadline for the facility to install the controls necessary for the facility to achieve compliance with the HAP PTE limits. The CD also entailed substantial penalties and a Supplemental Environmental Project that continues to fund residential energy and

weatherization work for low- and middle-income households in the Woodville community. Had the PTE limits not been federally enforceable, Sierra Club would not have been able to bring the claims for violation of the HAP PTE limits.

In contrast, citizen groups were unable to enforce the HAP PTE limit applicable to Enviva Southampton's wood pellet manufacturing facility in Virginia. After reviewing the facility's permitting files, the citizen groups concluded that Enviva Southampton was almost certainly exceeding the HAP major source threshold. In particular, unlike similar-sized wood pellet plants, which at least utilized a regenerative thermal oxidizer to control HAP and VOCs from their wood dryers, Enviva Southampton was not operating any VOC or organic HAP controls. Using data that was readily available to Enviva Southampton, the citizen groups calculated that the facility emitted at least 46 tons of total HAPs, including 21.2 tons of methanol and 16.5 tons of formaldehyde. Environmental Integrity Project, *Dirty Deception: How the Wood Biomass Industry Skirts the Clean Air Act*, at 22 (Apr. 26, 2018)⁸ (Att. 6). Unfortunately, though the facility's Clean Air Act permit included HAP PTE limits of 24.1 tpy for total HAPs and 9.9 tons for any single HAP, the permit explicitly listed these limits as "state-only" enforceable. Advocates were therefore barred from bringing a Clean Air Act citizen suit against the facility, despite being convinced that such a suit would succeed on the merits. Although public pressure ultimately resulted in the facility installing the requisite pollution controls, Virginia authorities never penalized the company for its HAP PTE limit violations.

In its September 2023 proposal, EPA notes that some states have state citizen suit provisions and announces that it "is seeking comment on the prevalence and effectiveness of citizen suit provisions in state and local enforceable HAP PTE limiting programs." 88 Fed. Reg. at 66,346. While we have not undertaken our own comprehensive review of state citizen suit provisions, EPA's notice cites to a recent law journal article indicating that only 17 states have general citizen suit statutes, leaving entire swaths of the country without such statutes. *Id.*, n. 23 (citing to P. Flynn & M. Barsa, *State Citizen Suits, Standing, and the Underutilization of State Environmental Law*, 52 *Envtl. L. Rep.* 10473 (June 2022)). Several of the states with such statutes are less populated states such as Alaska, North Dakota, Hawaii, and Wyoming, and some of the state citizen suit provisions have apparently never been utilized. And of course, state citizen suit provisions do absolutely nothing to empower EPA to enforce HAP PTE limits. Thus, EPA cannot possibly rely on the existence of a smattering of state citizen suit statutes as the basis for concluding that federal enforceability is unnecessary for ensuring that facilities comply with their HAP PTE limits.

⁸ Available at <https://environmentalintegrity.org/reports/dirty-deception/>.

2. Federal Enforceability Aids in Ensuring that PTE Limits are Accurate and Enforceable as a Practical Matter by Providing EPA with the Opportunity to Object to Defective Limits via the Title V Permitting Process

Experience shows that EPA oversight is critical to ensuring that sources are subject to effective PTE limits. By requiring that HAP PTE limits be federally enforceable, EPA not only ensures that both EPA and citizen groups can enforce those limits, but also that, at least for sources that are subject to the Title V operating permit program, EPA will have an opportunity to object to defective HAP limits via the Title V permitting process.

At present, most state-issued HAP PTE limits appear to be federally enforceable. Thus, if a source is subject to the requirement to obtain an operating permit under Clean Air Act Title V, the source's HAP PTE limit is an "applicable requirements" with respect to which the source's Title V permit must assure compliance. 40 C.F.R. § 70.2. An important aspect of Title V permitting is that all initial and renewal permits, and significant permit modifications must be (1) subject to public comment, *id.* § 70.7(h), and (2) issued only after EPA is given 45 days to review a proposed permit and object to the permit's issuance if it fails to satisfy Clean Air Act requirements. *Id.* § 70.8(a),(c). If EPA does not object to a permit on its own accord, any person may petition EPA to object to a permit. *Id.* § 70.8(d). EPA posts its orders in response to Title V petitions online at <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>.

As EPA's own Office of Inspector General (OIG) concluded in a July 2021 report, EPA needs to conduct *more* oversight of synthetic minor permitting to ensure that limits are enforceable. U.S. EPA, Office of Inspector General, "EPA Should Conduct More Oversight of Synthetic-Minor-Source Permitting to Assure Permits Adhere to EPA Guidance," Report No. 21-P-0175 (July 8, 2021) ("2021 OIG Report").⁹ Without the opportunity to review and object to defective limits via the Title V permit program, EPA's ability to require states to correct defective HAP PTE limits will be minimal. While EPA could engage in informal review of state-only limits, there is no mechanism whereby EPA can simply object to a state-only limit and insist that the deficiencies be corrected. EPA can and does do exactly that with respect to federally enforceable HAP PTE limits that appear in Title V permits. As shown on the table below, EPA has objected to state-proposed Title V permits due to ineffective HAP PTE limits on numerous occasions.

⁹ Available at www.epaig.gov/sites/default/files/documents/2021-07/epaig_20210708-21-p-0175.pdf.

Examples of EPA Objections to Ineffective HAP PTE Limits in Title V Permits

EPA Order	State	PTE Limit Deficiency
<p><i>In the Matter of Plains Marketing LP, et al.</i>, Order on Petition Nos. IV-2023-1 & IV-2023-3 (Sept. 18, 2023), www.epa.gov/system/files/documents/2023-09/plains-marketing-et-al.-order-09-18-2023.pdf</p>	Alabama	Monitoring, reporting, and recordkeeping requirements associated with HAP PTE limits deficient because permit failed to identify method for demonstrating compliance.
<p><i>In the Matter of U.S. Steel Corp., Clairton Coke Works</i>, Order on Petition Nos. III-2023-5 and III-2023-6 (Sept. 18, 2023), www.epa.gov/system/files/documents/2023-10/us-steel-clairton-order-9-18-23.pdf</p>	Pennsylvania	Permit record unclear whether the permit contains testing and monitoring sufficient to assure compliance with hourly and annual PTE limits for benzene, HCl, and naphthalene.
<p><i>In the Matter of Cash Creek Generation, LLC</i>, Order on Petition No. IV-2010-4 (June 22, 2012), www.epa.gov/sites/default/files/2015-08/documents/cashcreek_response2010.pdf</p>	Kentucky	Calculation for HAP PTE limit compliance demonstration insufficient because did not appear to include flaring emissions associated with operations other than standby and startup.
<p><i>In the Matter of Hu Honua Bioenergy Facility</i>, Order on Petition No. IX-2011-1 (Feb. 7, 2014), www.epa.gov/sites/default/files/2015-08/documents/hu_honua_decision2011.pdf</p>	Hawaii	HAP PTE limits not enforceable as practical matter because permit did not specify how emissions would be determined, and it was unclear whether all actual individual and total HAP emissions would be considered.
<p><i>In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-</i></p>	New York	Objected to state's failure to provide a new public comment opportunity after state

<p><i>Masada Oxydol, LLC</i>, Order on Petition No. II-2000-07 (May 2, 2001), www.epa.gov/sites/default/files/2015-08/documents/masada_decision2000.pdf</p>		<p>fundamentally altered the facility's approach to limiting PTE.</p>
<p><i>In the Matter of Motiva Enterprises, LLC</i>, Order on Petition No. II-2002-05 (Sept. 24, 2004), www.epa.gov/sites/default/files/2015-08/documents/motiva_decision2002.pdf</p>	<p>New York</p>	<p>HAP PTE limit insufficient because permit fails to establish relationship between gasoline throughput limit and compliance with the HAP limit; required emission calculations and technical basis did not appear in permit record.</p> <p>Limit phrased in unenforceable language.</p>
<p><i>In the Matter of Piedmont Green Power</i>, Order on Petition No. IV-2015-2 (Dec. 13, 2016), www.epa.gov/sites/default/files/2016-12/documents/piedmont_response2015.pdf</p>	<p>Georgia</p>	<p>HAP PTE limit unenforceable as a practical matter; requirement to utilize clean cellulosic biomass was critical to compliance, but permit lacked adequate fuel testing, monitoring, and reporting requirements.</p> <p>Permit failed to specify which HAP other than HCl needed to be included in emissions calculations and did not identify a method for determining monthly emissions of each HAP.</p>
<p><i>In the Matter of Kentucky Syngas, LLC</i>, Order on Petition No. IV-2010-9 (June 22, 2012), www.epa.gov/sites/default/files/2015-08/documents/kentuckysyngas_response2010.pdf</p>	<p>Kentucky</p>	<p>PTE limits for VOCs, methanol, and H₂S/TRS unenforceable as a practical matter.</p> <ul style="list-style-type: none"> -Failed to demonstrate that limits account for all facility emissions -No methodology for ensuring compliance

		<p>Insufficient limits on gas flaring.</p> <p>HAP PTE limit unenforceable because relied on unenforceable methanol limit.</p>
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The above objection orders demonstrate that states have continued to draft ineffective PTE limits despite EPA’s issuance of guidance more than two decades ago explaining how to make PTE limits enforceable. *See* 88 Fed. Reg. at 66,348, n.28 (identifying longstanding PTE guidance documents). Furthermore, because Title V petition orders are only issued in response to a public petition, the above orders most certainly represent only the tip of the iceberg in terms of the total number of sources subject to ineffective PTE limits.

It is important to recognize that the PTE limit deficiencies identified in these orders are not mere oversights by state permitting authorities. Rather, because a Title V petition can only be based on issues that were raised with reasonable specificity in comments to the permitting authority on the draft permit, 40 C.F.R. § 70.8(d), all EPA objections listed on the above table were issued under circumstances where the state permitting authority had already been alerted by the public to the inadequacy of the source’s PTE limits and the state refused to take corrective action. ***Without EPA’s involvement, public efforts to address the deficiencies in these PTE limits would have failed.***

Aside from the opportunity to object to defective HAP limits in response to citizen petitions, EPA also has the authority to object on its own accord during the requisite 45-day EPA review period. 40 C.F.R. § 70.8(c). It is unclear whether EPA has been exercising that authority since EPA permit objections that are made independently by the agency rather than in response to a petition are not posted in EPA’s online Title V Petition Database. Given the OIG’s finding that EPA needs to improve its oversight of synthetic minor permitting (2021 OIG Report, *supra* at 21), EPA can and should be using this highly effective oversight tool. Restoring the federal enforceability requirement for all HAP PTE limits is essential to ensuring that this tool remains available to EPA in the future.

Title V’s public participation and EPA review and objection requirements do not apply to state-only requirements. 40 C.F.R. § 70.6(b)(2). Thus, if EPA fails to restore the language in 40 C.F.R. § 63.2 requiring PTE limits to be federally enforceable, it is likely that EPA will lose the opportunity to object to defective HAP PTE limits via the Title V process. Though all states currently have the capability of issuing federally enforceable HAP limits, and all states continue to identify at least some HAP limits as federally enforceable requirements in Title V permits, if the Biden

Administration fails to restore the federal enforceability requirement, states almost certainly will face increased industry pressure to eliminate federal enforceability. After all, companies always want to minimize risk, and eliminating federal enforceability both reduces the likelihood that a company will be sued over a HAP limit violation and removes the possibility that EPA will object to their Title V permit based on HAP limit deficiencies. ***Thus, eliminating federal enforceability will almost certainly result in an increase in ineffective PTE limits.***

3. Public Notice of and an Opportunity for Public Comment on Proposed HAP PTE Limits for Individual Sources is Critical to Ensuring That Limits are Accurate and Enforceable.

EPA solicits comment on “whether the EPA should require, as an additional condition of reclassification, that every permit containing the provisions required in this proposal used to reclassify from a major source of HAP to an area source of HAP should undergo an individual public notice and comment period.” 88 Fed. Reg. at 66,347. Absolutely, yes, public participation in the establishment of individual HAP PTE limits is critical to ensuring their effectiveness. Providing the public with only an opportunity to comment on a state’s *program* rather than on *individual permit limits* would be insufficient. As the 2021 OIG Report made clear, rules and guidance alone are insufficient to ensure that PTE limits actually result in facility emissions staying below the major source threshold. *See, e.g.,* 2021 OIG Report at 36, *supra* at 21 (recommending that EPA develop and implement a synthetic minor oversight plan that includes review of individual permits).

Public notice and federal enforceability are closely linked because in the past, EPA has stated that public participation is a component of federal enforceability. 84 Fed. Reg. 36,304, 36,321 n.35 (July 26, 2019). In fact, the definition of “federally enforceable” in 40 C.F.R. § 63.2 provides that when an operating permit is used to establish a federally enforceable limit, the permit can be issued “only after adequate and timely notice and opportunity to comment for EPA and the public.” Furthermore, as discussed above, any federally enforceable Clean Air Act requirement must be addressed by a source’s Title V permit, and Title V requires an opportunity for public participation in permit issuance and permit modifications.

It is important to recognize that it is the ***combination*** of public notice and comment, EPA oversight, and the possibility of citizen or EPA enforcement that serves to ensure HAP PTE limit effectiveness. Here’s why:

- 1) Public notice and the opportunity to comment on individual permit limits is the only way that the public is likely to learn that a facility is taking a HAP PTE limit to avoid applicability of federal HAP control requirements.

- 2) If a HAP PTE limit is federally enforceable, the public has recourse if a state fails to address their concerns regarding the effectiveness of a HAP PTE limit; they can bring an enforcement action, they can ask EPA to bring an enforcement action, and they can ask EPA to object to a defective limit. Without those possibilities, public comments are much less likely to persuade state regulators to correct HAP limit deficiencies or take action to address noncompliance.
- 3) Because EPA typically does not independently review HAP PTE limits, public comments and petitions have historically been the way that EPA has become aware of deficient PTE limits.

If the public does not have an opportunity to comment on individual HAP PTE limits, the oversight system breaks down.

The advocacy examples below demonstrate how public notice and the opportunity to comment on individual HAP PTE limits serves to ensure that these limits effectively restrict facility emissions. In each of these examples, advocates were able to achieve the desired improvements in PTE limits without EPA intervention. But the lack of EPA intervention should not be interpreted to mean that EPA's oversight is unnecessary. First, of course, citizen group resources are limited and increased EPA oversight of individual PTE limits undoubtedly would uncover many more examples of defective limits. Second, as discussed above, when HAP PTE limits are federally enforceable, both states and sources know that citizen groups can bring their concerns to EPA, and that possibility makes citizen input at the state level more powerful.

a. Louisiana Green Fuels: Public Comments Achieve Necessary Stack Testing for HAP PTE Limit Enforceability

Louisiana Green Fuels (LGF) is a proposed trees-to-biofuels refinery—the first of its kind at the scale—with an estimated cost exceeding \$2.5 billion. The Advocate, “Louisiana Green Fuels to apply for \$1.6 billion federal 'clean energy' loan” (Mar. 8, 2023).¹⁰ The facility will operate an 85 MW wood-fired boiler as well as four rotary dryers with a capacity of 665,760 dry tons per year, all to convert 1 million tons of trees into 840,000 barrels of diesel and naphtha per year. Environmental Integrity Project, Comments on the Proposed Synthetic Minor Air Permit for Louisiana Green Fuels, at 1 (Jul. 13, 2023) (Att. 7). The industrial rotary dryers would be substantially similar to those at other wood products facilities, like particleboard and wood pellet plants, but without the VOC and organic HAP controls these facilities typically use (e.g., regenerative thermal oxidizers or “RTOs”). Despite the size of the facility and lack of VOC and organic HAP controls, LGF claimed the facility would be a synthetic minor source of VOCs and a synthetic area source of

¹⁰ Available at https://www.theadvocate.com/baton_rouge/news/business/louisiana-green-fuels-up-for-16-billion-clean-energy-loan/article_6a77f89a-bdd8-11ed-8cdd-279a2b1788df.html.

HAPs, with a PTE of 91 tons of VOCs (and the relevant major source PSD threshold was 100 tpy) and 23.9 tons of total HAPs, respectively. In 2023, LDEQ issued a draft construction and SIP operating permit that incorporated these VOC and HAP PTE limits. *Id.*

In public comments on LGF’s draft permit advocates argued that LGF was massively underestimating both VOC and organic HAP emissions. *Id.* at 2. For example, AP-42 emission factors for comparable wood dryers showed the facility would emit more than 1,000 tons of VOCs per year and hundreds of tons of organic HAPs. *Id.* at 6. Shockingly, LGF based its remarkably low emission estimates for VOCs and organic HAPs on a single laboratory test of a single *gram* of wood. *Id.* at 3.

Despite the large scale of the facility, the closeness between LGF’s emissions estimates and the major source thresholds, and the dubious basis for LGF’s emissions quantifications, Louisiana DEQ did not initially propose any monitoring such as periodic stack testing to make the PTE limits enforceable. Simply put, had the permit been issued as drafted, LDEQ, the public, and EPA would never know whether the facility was complying with the PTE limits.

Although Louisiana DEQ did not fully agree with advocates arguments that the facility would be a major source of HAPs, it did agree to revise the permit to at least require stack testing for the most significant wood-product HAPs, which should help render the PTE limits enforceable. Louisiana DEQ, Response to Comments and Notification of Final Permit Action for Louisiana Green Fuels, LLC, at 4 (Sep. 19, 2023) (Att. 8). Without this opportunity to provide public comments on the draft permit, however, the permit LDEQ had drafted would have been deeply flawed.

b. Telfair Forest Products (Georgia): Federal Enforceability Allows Opportunity to Comment on Attempts to Circumvent Control Requirements

This wood pellet and wood shavings plant is currently subject to PTE limits for both PSD and MACT avoidance, including a facility-wide 249 tpy VOC PTE limit and 10/25 tpy MACT avoidance limits. Southern Environmental Law Center, *et al.*, Public Comments on Air Permit Application No. 780227 for Telfair Forest Products, at 1 (Sep. 29, 2023) (Att. 9). The facility, however, has recently applied for permission to eliminate or substantially relax its PTE limit for VOCs and undertake “one-time-doubling.”¹¹ If allowed to do so, the facility would double its PTE for

¹¹ One-time-doubling is an interpretation of the Clean Air Act and EPA’s rules that allows for true minor sources to become major sources without undergoing PSD. Specifically, the definition of a “Major Modification” under the PSD rules states that a major modification that would trigger PSD occurs when a major source makes certain physical or operational changes that increase emissions

VOCs to 498 tpy without ever having undergone PSD permitting. We believe this use of one-time-doubling is improper under the so-called Source Obligation rule found at 40 CFR 52.21(r)(4), which requires PSD whenever a source relaxes existing PTE limits and becomes a major source (in other words, the Source Obligation rule essentially means only true minor sources can undertake one-time-doubling). We also believe that by doubling the facility's VOC emissions, it is almost certain that the facility will become a major source of HAPs, and that the draft permit's HAP PTE limits are deficient.

Critically, because these limits are federally enforceable and incorporated into the facility's Title V permit, Telfair's attempt to relax these limits will be subject to public notice and comment and EPA review through Title V's significant modification procedures. If these limits were instead designated state-only enforceable, Georgia or other states facing a similar situation could likely relax or delete them without allowing for public notice and comment. And, perhaps just as critically, the relaxation/removal of these state-only PTE limits would also evade EPA review through the Title V EPA review and petition procedures.

c. Enviva Northampton Plant in North Carolina

The Enviva Northampton facility, also in North Carolina, was initially permitted as a synthetic minor source subject to PTE limits for VOC and HAP, including both operating restrictions and an emission limit of 249 tpy. Comments on Draft Title V Permit for Enviva Pellets Northampton, LLC, at 2 (Oct. 20, 2017) (Att. 10). In 2015, however, just two years after commencing operations, the facility requested and the state granted an unlawful permit modification allowing the source to become a major source of VOCs and HAPs without complying with major source MACT and PSD requirements. *Id.* Specifically, though the 2015 modification removed the facility's HAP PTE limits and made the facility "major" (North Carolina DENR estimated that the new HAP emissions would be 27.8 tpy), the facility was not required to comply with MACT because EPA has not promulgated a MACT standard for this sector, and the facility had already been allowed to construct without undergoing the case-by-case MACT assessment required for new sources pursuant to Clean Air Act § 112(g). Air Permit Review for 2015 Enviva Pellets Northampton, LLC (Permit Issue Date Oct. 12, 2015) at 4 (Att. 11) ("The facility will now be classified as a major source of HAP emissions. This modification does not trigger any new HAP requirements."). The 2015 permit revision also greatly increased the VOC PTE limit for PSD purposes using a dubious application of the "one-time doubling" policy, which enabled the facility to continue to avoid PSD so long as it kept its VOC emissions below 456.4 tpy, greatly exceeding the applicable

beyond the relevant thresholds. 40 C.F.R. § 52.21(b)(2)(i). Through this definition, one-time-doubling allows true minor sources to make modifications that increase emissions beyond the major source threshold without applying PSD. As discussed herein, however, the Source Obligation Rule at 40 C.F.R. § 52.21(r)(4) prohibits the use of this technique for synthetic minor sources.

250 tpy major source threshold for this source category. *Id.* at 3 (“The proposed [PSD] avoidance limit is baseline (207.4) plus 249 or 456.4 tons per consecutive 12-month period.”).

Notably, neither the initial construction permit nor the 2015 modification—eliminating or severely relaxing all PTE limits—were subject to public notice or comment. The first-ever opportunity for public comment on the Enviva Northampton plant occurred nearly five years after issuance of the facility’s construction permit, when North Carolina DENR proposed to issue the facility a Title V operating permit in 2017. DENR received extensive public comments on the facility’s Title V permit from an array of commenters. Comments on Draft Title V Permit for Enviva Pellets Northampton, LLC (Oct. 20, 2017) (Att. 10). The commenters pointed out that North Carolina’s 2015 decision to allow the facility to nearly double its emissions without undergoing PSD contravened the “Source Obligation Rule” in the federal PSD regulations at 40 C.F.R. 52.21(r)(4), which is incorporated into North Carolina’s Clean Air Act state implementation plan. That provision provides that “[w]hen a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification to emit a pollutant ... then the provisions of [North Carolina’s PSD regulations] shall apply to the source or modification as though construction had not yet begun on the source or modification.” NC SIP Rule 15A NCAC 2D.¹² The commenters further alleged that the facility had underestimated its HAP emissions in its initial application, and that the facility’s actual HAP emissions had exceeded the major source threshold ever since construction. Thus, the facility should have been required to undergo case-by-case MACT at the outset.

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

d. Enviva Hamlet Plant in North Carolina

In 2018, the North Carolina Department of Natural Resources (DENR) announced a public comment period on the draft “synthetic minor” permit for Enviva Hamlet, a wood pellet plant in North Carolina. A coalition of public interest organizations commented that the permit omitted production or operating limits on a key unit. Comments on the Draft Air Quality Permit for Enviva Pellets Hamlet, at 2 (Nov. 15, 2018) (Att. 12). The company’s application had estimated that the particular unit would process no more than 85% of the entire facility’s throughput, but was in fact capable of processing up to 100%. *Id.* The commenters argued that

¹² The most recent version of North Carolina’s PSD regulations includes the same language but in a different place: 15A NCAC 2D. 0530(k).

the facility's PTE limit was ineffective because the permit failed to restrict the unit's production to 85% of facility throughput as assumed, and calculating PTE at the maximum processing rate for the unit resulted in facility-wide PTE that exceeded the major source PSD threshold. *Id.* In addition, the commenters argued that the facility-wide wood pellet production limit was too high to ensure that emissions remained below the major source threshold and that Enviva either needed to accept a lower production limit or install additional pollution controls. After DENR rejected their concerns, the commenters petitioned for a contested case hearing before North Carolina's Office of Administrative Hearings. Prior to the hearing, the organizations reached a settlement agreement with Enviva and DENR requiring that the permit be revised to include the 85% throughput limit, require the facility install additional controls, and require the facility to perform appropriate monitoring to verify its compliance with these new requirements. Enviva Hamlet Plant Settlement Agreement, at 2 (June 2, 2019) (Att. 13).

C. Federal Enforceability and Public Notice and Comment is Needed to Enable Frontline Communities to Participate in Environmental Decision-Making and Advocate for Environmental Justice.

As EPA has declared in multitudes of documents and forums, efforts to achieve environmental justice must include the meaningful involvement and fair treatment of impacted communities in environmental decision-making (e.g., effective notice, access to accurate information, an opportunity to provide input and receive a reasoned response, a fair opportunity to challenge an adverse decision, and non-discrimination in intent and effect). It is hard to imagine a circumstance that calls out for meaningful involvement more than a state's decision to allow a facility to escape federal control requirements for its most toxic pollutants by voluntarily accepting a limit on its operations. If it turns out that the limit is inaccurate (the operations limit doesn't accurately reflect the facility's HAP emissions), or that the limit is not written in a way that is enforceable as a practical matter (e.g., insufficient monitoring or the limit is not written in a way that can be measured effectively), the frontline community may be subjected to high exposure to extremely toxic air pollution without even knowing it.

As shown by the examples above, it is not uncommon for sources and states to miscalculate a facility's HAP emissions or for a state to issue a HAP PTE limit with insufficient monitoring, recordkeeping, or reporting. As EPA is well aware, there are thousands of facilities across the country that avoid federal HAP control requirements by accepting HAP PTE limits. EPA cannot possibly review all proposed HAP PTE limits. On the other hand, residents of a frontline community that bears the brunt of a facility's toxic emissions have a strong interest in ensuring that the facility eliminates those emissions or, if elimination is infeasible, at least reduces them to the maximum degree achievable. If that facility seeks to avoid HAP control requirements by taking a PTE limit, EPA must ensure that the

community receives notice of the proposed limit and an opportunity to challenge it, as well as the opportunity to enforce against the facility if it subsequently violates that limit. In addition, EPA must leave the door open for EPA to bring enforcement itself if the community uncovers violations and asks for EPA's assistance.

In August 2022, EPA declared: “Th[e] legacy of environmental injustice represents a systemic deficit in public health and environmental protection. Finding solutions is not only the right thing to do; it is also our collective obligation.” U.S. EPA, Interim Environmental Justice and Civil Rights in Permitting, Frequently Asked Questions.¹³ Restoring federal enforceability for HAP PTE limits that enable a facility to avoid the requirement to reduce toxic air emissions by the maximum degree achievable is exactly the type of action EPA needs to be taking to help address environmental justice. Frontline communities cannot stand up for their right to receive the Clean Air Act's benefits if they don't even know that their state agency is allowing a facility to escape federal control requirements. Simply by restoring the word “federally” to the definition of “potential to emit” in 40 C.F.R. § 63.2, EPA could at least give frontline communities a fighting chance to protect their health and well-being by ensuring that facilities classified as “area” sources actually reduce their HAP emissions to area source levels.

D. EPA Can and Should Restore Federal Enforceability for All HAP PTE Limits Now, Without Waiting Until EPA is Ready to Act on PTE Limits Under Other Clean Air Act Programs.

EPA explains in its September 2023 proposal that when it solicited comment on federal enforceability in 2019, a primary concern raised by stakeholders involved “interactions and effects of the proposed amendments with other CAA programs, including Prevention of Significant Deterioration (PSD), New Source Review (NSR), State Implementation Plan (SIP), and title V operating permits ...” 88 Fed. Reg. at 66,342. Thus, EPA explains that its 2023 proposal addresses only PTE limits for reclassified sources, and that there will be “future rulemaking or guidance on the definition of PTE across affected programs.” 88 Fed. Reg. at 66,348. We strongly disagree with this approach. It is critical that EPA take action to restore federal enforceability for HAP limits under 40 C.F.R. part 63 *now*, without waiting until it is ready to act on PTE limits issued under other Clean Air Act programs.

1. The Time to Restore Federal Enforceability for All HAP Limits is Now, While the 2020 Part 63 Revisions Are Under EPA Review.

First, though we strongly encourage EPA to require that all PTE limits for all Clean Air Act programs be federally enforceable, the 2020 rule under EPA's review

¹³ Available at www.epa.gov/system/files/documents/2022-08/EJ%20and%20CR%20in%20PERMITTING%20FAQs%20508%20compliant.pdf.

specifically eliminated federal enforceability for HAP PTE limits under 40 C.F.R. § 63.2, so the time to restore to federal enforceability requirement to that rule is now, while that rule is under review. As explained above, *EPA's 2020 rule unlawfully removed the federal enforceability requirement from § 63.2 illegally without responding to public comment*, and this specific rule change is the subject of a petition for review in the D.C. Circuit. While we hope that EPA will restore federal enforceability for other types of PTE limits, uncertainty over how EPA intends to proceed with respect to Clean Air Act programs does not justify EPA's failure to restore federal enforceability to 40 C.F.R. § 63.2 now.

2. EPA Can Immediately Restore Language in 40 C.F.R. § 63.2 Requiring All HAP Limits to be Federally Enforceable Without an Additional Public Comment Period.

Second, unlike the Title V, NSR, and PSD rules, the question of whether federal enforceability is needed for HAP limits under 40 C.F.R. part 63 has already been put out for public comment. Thus, EPA can lawfully take final action restoring federal enforceability for HAP PTE limits without soliciting additional comment.

While EPA's September 2023 proposal does not solicit comment on whether *all* HAP PTE limits should be federally enforceable, EPA did solicit comment on this issue in 2019, when EPA proposed to amend the definition of "potential to emit" in 40 C.F.R. § 63.2 to remove the requirement that limits on emissions be federally enforceable. 84 Fed. Reg. 36,304, 36,306 (July 26, 2019). Specifically, EPA asked "whether to be effective, the EPA and/or citizens through the enforcement authorities in the [Clean Air Act] must also have the authority to enforce the HAP [potential-to-emit] limits that are being used to avoid a Federal requirement." 84 Fed. Reg. at 36,318. As EPA acknowledges in its September 2023 proposal, 88 Fed. Reg. at 66,342, though EPA subsequently removed the federal enforceability language from 40 C.F.R. § 63.2 in 2020, EPA deemed that action "ministerial" and contended that it was not final agency action. 85 Fed. Reg. 73,854, 73,876 (Nov. 19, 2020) (declaring, "this revision is not the EPA's final decision and should not be read to suggest that the EPA is leaning towards or away from any particular final action on this aspect of the proposal."). Furthermore, EPA explained that it "is continuing to consider the comments received ... [and] intends to take final action on this aspect of the ... proposal in a separate final action at a later date," and expressly qualified its removal of federal enforceability as an interim regime that would end when that final action occurred. *Id.*

Accordingly, there is no reason why EPA cannot move forward in restoring federal enforceability requirement to 40 C.F.R. § 63.2 for HAP PTE limits now and promulgate federal enforceability requirements for the Title V, NSR, and PSD programs later.

3. The Health and Environmental Risks of Exposure to Even Relatively Small Amounts of HAP Makes EPA Action Restoring Federal Enforceability for HAP PTE Limits Especially Urgent.

The highly toxic nature of hazardous air pollutants makes the need for EPA to restore federal enforceability for HAP limits especially urgent. The same concerns that underlie EPA's proposal to require HAP limits for reclassified sources also hold true for HAP limits taken by sources before they become subject to a major source HAP standard. Under both circumstances, the sources are emitting air pollutants that are highly toxic and dangerous to public health and the environment. Even small increases may pose a risk. And HAP are especially dangerous for frontline communities that are most at risk of serious health consequences resulting from HAP emissions from facilities that are supposed to be keeping their HAP emissions beneath the major source threshold. Thus, it is especially important that all HAP PTE limits be enforceable by frontline communities who have the most at stake. Furthermore, these communities must be able to turn to EPA for help in ensuring that HAP PTE limits are effective and that sources are complying with their limits. Given EPA's admission in the September 2023 proposal that "[h]azardous air pollutants pose public health risks at levels well below the major source thresholds (10/25 TPY), at times in very small quantities," EPA must restore federal enforceability for HAP PTE limits without further delay. 88 Fed. Reg. at 66,343.

4. Prompt EPA Action Restoring the Federal Enforceability Requirement to 40 C.F.R. § 63.2's "Potential to Emit" Definition is Needed to Remedy the Unlawfulness of EPA's 2020 Action, Which is the Subject of a Pending Petition for Review in the D.C. Circuit.

Finally, EPA should take immediate action to restore federal enforceability for all HAP PTE limits because EPA's 2020 removal of this requirement from 40 C.F.R. § 63.2 was flatly unlawful and is the subject of a petition for judicial review pending in the D.C. Circuit.

In its September 2023 proposal, EPA continues to insist that its 2020 removal of the "federally enforceable" component of § 63.2's "potential to emit" definition without responding to public comment was lawful because it qualified as a "ministerial" change. 88 Fed. Reg. at 66,342. Contrary to EPA's contention, the Trump Administration's removal of this regulatory language without following requisite public-notice-and-comment procedures was flatly unlawful. It is incumbent on EPA to act now to remedy its unlawful action by restoring the federal enforceability requirement to § 63.2's "potential to emit" definition.

In proposing to remove the federal enforceability language from § 63.2 in 2019, EPA determined that this action is subject to the provisions of Clean Air Act §

307(d). 85 Fed. Reg. at 73,884. Pursuant to § 307(d)(6)(B), a promulgated rule “shall ... be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.” In response to EPA’s request for comment on its proposed elimination of the regulatory requirement that HAP PTE limits be federally enforceable, EPA received “significant comments from many stakeholders.” 85 Fed. Reg. at 73,876. In particular, Petitioners and others submitted extensive comments detailing why eliminating the federal enforceability requirement for HAP PTE limits would be unlawful and arbitrary. *See, e.g.*, Joint Env’tl. Pet’rs Comments [Docket I.D. EPA-HQ-OAR-2019-0282-0343]; Comments by Air Law for All, Ltd. [Docket I.D. EPA-HQ-OA-2019-0282-0320 and Docket I.D. EPA-HQ-OAR-2019-0282-0428]; Comments submitted by State of California, *et al.* [Docket I.D. EPA-HQ-OAR-2019-0282-0339]. Contrary to EPA’s claim, its deletion of the requirement that a HAP PTE limit be federally enforceable is plainly not “ministerial” and does not qualify for an exemption from Clean Air Act § 307(d)’s public-notice-and-comment requirements.

Though EPA’s 2020 action did not expressly state the agency’s legal rationale for why it thought it could process this allegedly “ministerial” change without complying with public-notice-and-comment requirements, it appears that EPA was trying to take advantage of the “good cause” exemption under the Administrative Procedure Act (“APA”). 5 U.S.C. § 553(b)(3)(B). Pursuant to Clean Air Act § 307(d)(1), section 307(d) does not apply to a rule or circumstance that qualifies for the APA’s good cause exemption. Such exemption applies “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). The D.C. Circuit has made clear that “the good cause exception ‘is to be narrowly construed and only reluctantly countenanced.’” *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)). Likewise, the Office of the Federal Register explains in its “Guide to the Rulemaking Process” that the good cause exception should be applied under very limited circumstances such as:

Emergencies where problems must be addressed immediately to avert threats to public health and safety, minor technical amendments and corrections where there is no substantive issue, and in some instances where an agency has no discretion to propose a rule because Congress has already directed a specific regulatory outcome in a law.

Office of the Federal Register, “A Guide to the Rulemaking Process.”¹⁴

¹⁴ Available at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

In prior rulemaking actions, EPA has explained that when a rulemaking action is “ministerial,” the “unnecessary” prong of the good cause exception applies. *See, e.g., “Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals,”* 76 Fed. Reg. 48,208, 48,221-48,222 (Aug. 8, 2011) (EPA applying the “unnecessary” prong of the APA’s good cause exception where it concluded that a rulemaking was “ministerial”). Unlike here, however, our review of EPA’s prior “ministerial” actions reveals that in each instance, EPA concluded that either: (1) EPA lacked discretion to take a different substantive action in the rulemaking (and thus, public comment would have no impact on the rulemaking), *see, id.* (finding that a regulatory change was “ministerial” because EPA “was bound by the decisions of the courts” and “lack[ed] discretion to reach a different conclusion”)¹⁵ or (2) the action would have no substantive impact. *See, e.g., “Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revision to New Source Review Program,”* Proposed Rule, 83 Fed. Reg. 44,746, 44,769-44,770 (Aug. 31, 2019) (announcing that it was not soliciting public comment on “provisions that are being carried over from the existing implementing regulations into the new implementing regulations” and that “remain substantively the same from their original promulgation”). As demonstrated below, EPA has discretion to make a different substantive decision regarding PTE limit enforceability, and the final rule is indisputably substantive given that it eliminates the rights of the public and EPA to enforce PTE limits and to participate in their development. Accordingly, EPA’s application of the good cause exemption to finalize its removal of the federal enforceability requirement without responding to significant public comments was erroneous.

EPA’s 2020 notice offered three arguments for why EPA thought its removal of the federal enforceability requirement for HAP PTE limits qualified as “ministerial”: (1) the revision reflected the D.C. Circuit’s decision in *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (“*NMA*”) holding that EPA had not explained why a HAP PTE limit had to be federally enforceable, (2) the regulatory revision was only “interim,” and (3) the regulatory revision simply maintained the *status quo* because it was “consistent with EPA’s long-standing policy” allowing sources to reclassify from “major” to “minor” based on HAP PTE limits that are not federally enforceable. 85 Fed. Reg. at 73,876. None of EPA’s arguments are anywhere close to sufficient to classify its significant change to § 63.2’s “potential to emit” definition as ministerial.

¹⁵ *See also, “Prevention of Significant Deterioration and Title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements, Final Rule,* 80 Fed. Reg. at 50,199, 50, 200-50,201 (Aug. 19, 2015) (applying the good cause exception to take the “ministerial” action of removing regulatory provisions from the CFR that had been vacated by the D.C. Circuit (in accordance with a decision by the Supreme Court), and explaining that because EPA no longer has authority to implement the vacated provisions, “removing the affected regulatory text simply implements the decision of the Supreme Court and the D.C. Circuit and it would serve no useful purpose to provide an opportunity for public comment or a public hearing on the issue”).

First, EPA’s contention that removing the federal enforceability requirement from the “potential to emit” definition without considering significant public comments was warranted because its action “merely reflects” the D.C. Circuit’s 1995 *NMA* decision (85 Fed. Reg. at 73,876) is wrong. Though the *NMA* court held that EPA had not adequately explained why only federally enforceable measures should be considered as effective limits on a source’s HAP PTE (59 F.3d at 1364-1365), it did not—as EPA acknowledges—vacate the language in 40 C.F.R. § 63.2 requiring that HAP PTE limits be federally enforceable. 84 Fed. Reg. at 36,317 (explaining that the *NMA* Court “did not vacate” § 63.2’s definition of “potential to emit”). Instead, the court *remanded* the “potential to emit” definition to EPA for it “to justify the requirement that physical or operational limits be ‘federally enforceable.’” 84 Fed. Reg. at 36,314.

Thus, it cannot be disputed that EPA has discretion regarding how to respond to the *NMA* decision on remand. While the *NMA* Court “held that the EPA had not explained why a PTE limit had to be ‘federally enforceable’ to be considered as the basis for reclassifying a major source to area source status,” 85 Fed. Reg. at 73,876, EPA also has not provided a reasoned explanation for how its regulations would ensure the effectiveness of HAP PTE limits in the absence of the federal enforceability requirement. As EPA concedes, “[t]he *NMA* Court decision confirmed that the EPA has an obligation to ensure that limits considered in determining a source’s PTE are effective.” 84 Fed. Reg. at 36,306. *NMA* did not hold (nor does EPA demonstrate) that such limits are effective absent federal enforceability *or* any substitute measures ensuring adequate mechanisms for the limits’ enforcement. Accordingly, there is no basis for EPA’s contention that the *NMA* decision somehow justified EPA’s deletion of the federally enforceable requirement from § 63.2’s PTE definition without responding to significant public comments contending that this requirement is needed to ensure the effectiveness of HAP PTE limits. *See NRDC v. Wheeler*, 955 F.3d 68, 84 (D.C. Cir. 2020) (where EPA “alter[s] [a judicial] decision’s legal effect in the manner of a legislative rule,” notice and comment is required).

Second, there is no merit to EPA’s claim in its 2020 notice that elimination of the federal enforceability requirement did “not alter any rights or legal consequences and simply preserves the status quo,” 85 Fed. Reg. at 73,876, in that it is “consistent with the EPA’s long-standing policy” allowing major sources to reclassify to minor status based on HAP PTE limits that are enforceable only by a state or local agency. 85 Fed. Reg. at 73,856. EPA’s issuance of a “policy” does not alter regulatory requirements issued pursuant to notice-and-comment rulemaking. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101 (2015) (“[A]gencies must use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”). *See also, Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (explaining that a general policy statement “is not finally determinative of the issues or rights to which it is addressed”). The plain language of § 63.2’s existing

definition of “potential to emit” continues to require (as it has since 1994) that a HAP PTE limit be “federally enforceable.” EPA expressly acknowledged this fact when it issued its 1996 “Interim Policy on Federal Enforceability of Limitations on Potential to Emit” in the wake of the *NMA* decision, stating: “Because the court did not vacate the rule, the current part 63 regulations, requiring federal enforceability, remain in effect.” John Seitz and Robert Van Heuvelen, U.S. EPA, “Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit” (Jan. 22, 1996), at 2.¹⁶

Furthermore, the only reason that EPA’s policy is “long-standing” is that EPA delayed responding to the *NMA* Court’s remand for nearly 25 years. In fact, EPA has always intended for the 1995 policy to which it is referring serve only as a “transition policy.” John S. Seitz, U.S. EPA, “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), at 9.¹⁷ Initially, EPA announced that the policy would merely “allow certain sources to be treated as minor for a period of time sufficient for these sources to obtain a federally-enforceable limit.” *Id.* More specifically, EPA explained that the policy would apply “until the gaps in program implementation [were] filled, but no later than January 1997.” *Id.* Though EPA stated that it “intend[ed] to codify [the transition policy] through notice and comment rulemaking,” it never did. *Id.* EPA subsequently extended the policy three times, in 1996, 1998, and 1999. John S. Seitz and Eric V. Schaeffer, U.S. EPA, “Third Extension of January 25, 1995 Potential to Emit Transition Policy,” (December 20, 1999), at 1.¹⁸ In the third extension, EPA declared: “The state-enforceable provision of the transition policy, which allows a source to rely on a practically enforceable, state-enforceable limit to restrict its PTE, *will remain in effect until EPA has completed its rulemaking on the term ‘potential to emit.’*” *Id.* at 2. In sum, since 1994, the definition of “potential to emit” in EPA’s regulations has unambiguously required that HAP PTE limits be federally enforceable. EPA recognized that its 1995 transition policy conflicted with the regulations and indicated that such policy would only apply for a limited time until it completed its PTE rulemaking. The fact that EPA waited nearly 25 years to undertake that rulemaking does not mean that its unlawful policy supplanted the actual regulatory requirements, and certainly cannot justify EPA’s decision to delete the federal enforceability requirement from its regulations without following the required notice-and-comment procedures.

Finally, contrary to EPA’s suggestion, it could not dispense with notice-and-comment requirements on the basis that its 2020 action was only an “interim revision” covering “the period of time while the EPA continues to consider the comments on this aspect of the proposal.” 85 Fed. Reg. at 73,876. Despite EPA’s claim that its removal of the “federally enforceable” criterion from the regulatory

¹⁶ Available at <https://www.epa.gov/sites/production/files/2015-07/documents/pottoemi.pdf>.

¹⁷ Available at <https://www.epa.gov/sites/production/files/documents/limit-pte-rpt.pdf>.

¹⁸ Available at <https://www.epa.gov/sites/production/files/2015-08/documents/4thext.pdf>.

definition of “potential to emit” was not “final,” its action definitively revised the regulations that currently govern HAP PTE limits. 85 Fed. Reg. at 73,885 (amending the definition of “[p]otential to emit” at 40 C.F.R. § 63.2 to eliminate the word “federally” before the word “enforceable”).

Neither Clean Air Act § 307(d) nor 5 U.S.C. 553(b)(B) excuses a promulgated rule from public-notice-and-comment requirements on the basis that it is anticipated to be “interim.” Moreover, the D.C. Circuit has long held that “the limited nature of [a] rule cannot in itself justify a failure to follow notice and comment procedures,” *Mack Trucks*, 682 F.3d at 94 (quoting *Mid-Tex Electric Coop., Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987)), and has specifically rejected agency attempts to issue “interim regulations” without complying with public procedures. *See, e.g., id.* As the court has explained, if agencies could evade notice-and-comment procedures simply by dubbing a rule “interim,” they “could issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency.” *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992). If this were allowed, the court reasons, “the good cause exception would soon swallow the notice and comment rule.” *Id.* EPA’s 2020 rulemaking perfectly illustrates this concern: given that EPA has been obligated to address the *NMA* court’s remand ever since the court issued its decision in 1995, EPA cannot credibly argue that it faced an urgent need to remove the federal enforceability requirement from the definition of “potential to emit.” Furthermore, there was no reason to assume that this “interim revision” would be in effect for only a short time; EPA is not subject to a deadline for acting on its proposed enforceability criteria and its 2020 action failed to offer even a suggestion as to when it might take such action.

E. If EPA Moves Forward with a Piecemeal Approach and Limits its Final Action to Making Limits on Reclassified Sources Federally Enforceable, EPA Must Add Language to the Regulations Requiring Public Notice and an Opportunity to Comment on Proposed Limits.

In its proposal, EPA states that the process in 40 C.F.R. part 63, subpart E for federal approval of state HAP programs does require public notice and comment when programs are submitted to EPA, but EPA seeks comment on “whether the EPA should require, as an additional condition of reclassification, that every permit containing the provisions required in this proposal used to reclassify from a major source to an area source of HAP should undergo an individual public notice and comment period.” 88 Fed. Reg. at 66,347. As explained above, the opportunity for public comment on individual facility limits is critical to ensuring that limits are accurate and enforceable. The opportunity for public comment on a state’s program is not an adequate replacement for such opportunity.

First, when a state puts out a program for comment, the public has no idea which facilities will be subject to the program. By the time residents of frontline

communities become aware that a facility in their community will be escaping major source HAP control requirements by taking a MACT avoidance limit, the time for commenting on defects in the program will be long gone. More importantly, commenting on program is simply not the same as being able to comment on whether a particular operating limit is sufficient to restrict a facility's emissions to below the major source threshold, or whether the monitoring, recordkeeping, and reporting is sufficient to demonstrate the facility's ongoing compliance with that limit.

There is simply no way for a state to provide sufficient detail in its regulations to obviate the need for comment on individual proposed limits. For example, when citizen advocacy groups reviewed the HAP PTE limits for the wood pellet manufacturing plants described above, they discovered that the wood pellet production limits were nowhere near the levels needed to ensure that HAP emissions remained below major source thresholds. Other permitting deficiencies included problems like the failure to consider emissions from all of a facility's HAP-emitting units, or the failure to include all HAPs emitted by the facility when calculating cumulative HAP emissions. If states could issue PTE limits in secret without public notice and an opportunity to comment, problems like these would never be discovered, and facilities emitting HAP well above major source levels could operate with limited controls, or even no controls at all. Frontline communities deserve better than this. EPA must ensure that the public receives notice of and an opportunity to comment on each facility's HAP PTE limits.

F. EPA Should Also Require Public Notice and Comment on Reclassifications That Do Not Involve a New PTE Limit.

Aside from requiring public notice and an opportunity for public comment on proposed HAP PTE limits, EPA should also require public comment on reclassifications that don't involve the adoption of new PTE limits. This is especially important where the owner or operator of a facility isn't doing anything to reduce the facility's emissions below the major source threshold but is instead subdividing and selling off parts of the facility so that no one section emits or has the potential to emit HAP above the major source threshold. Prior to the Reclassification Rule, this wasn't a problem because once a facility was subject to a MACT rule it couldn't reclassify regardless of whether the facility later discovered that it could reduce its PTE to below the major source threshold.

An example of a facility that could possibly take advantage of this loophole is the Union Carbide chemical plant in Institute, West Virginia. Until 2018, Union Carbide owned and operated the entire plant, which includes nine units. Prior to 2018, state regulators calculated the facility's PTE based on the emissions capacity of all nine units. DAQ, Fact Sheet for final renewal permitting action under 45CSR30 and Title V of the Clean Air Act, Logistics (Group 3 of 8), R30-03900005-

2017 at 2.¹⁹ In 2018 and 2019, Union Carbide transferred ownership of two of the units to Specialty Products US, LLC. *See* DAQ, Title V Permits and Applications.²⁰ Union Carbide also transferred ownership of five units to Alivia, as well as the industrial park in which the units are located. Alivia, Press Release: Alivia Completes Dow’s Acetone Derivatives Business Acquisition, PR Newswire (Nov. 4, 2019).²¹ As a result, Union Carbide now only owns two of the nine units. In a recent draft permit for Union Carbide, state regulators determined that these remaining two units no longer exceeded any major source threshold because PTE is calculated based only on potential emissions from those units. Accordingly, “the source will remain a Title V source on the basis of once in always in until such time the permittee request review for removal from the Title V program and approval is granted by the Secretary.” *See* DAQ, Fact Sheet for Draft/Proposed Permitting Action Under 45CSR30 and Title V of the Clean Air Act, Logistics (Group 2 of 2), R30-03900005-2022.²² While state regulators removed this language from the final permit fact sheet, the sources’ PTE remains below all major source thresholds, and reclassification of the units as area sources remains a distinct possibility.

By selling off individual units, a facility like Union Carbide’s chemical plant can continue operating a facility in the exact same way and emitting the exact same amount of pollution (or even more), and yet, under the Reclassification Rule, could reclassify as separate area sources and escape MACT control requirements. Frontline communities deserve notice of and an opportunity to comment on reclassifications that enable large polluting facilities to escape federal control requirements through creative business dealings.

G. To Enable Oversight of Facility Compliance with HAP PTE Limits, EPA Should Require States to Track Which Sources Have HAP PTE Limits and Provide that Information to the Public Upon Request.

Especially because facilities with HAP PTE limits are likely to cluster together, it is important for the public to be able to identify which facilities are subject to HAP PTE limits so that they can ensure that emissions from these facilities remain below the major source threshold. Unfortunately, it does not appear that EPA requires sources or states to report to EPA which facilities are subject to HAP PTE limits. As a result, states do not maintain their facility data in a way that enables them to generate a list of sources with HAP PTE limits. To aid communities in ensuring that sources comply with their HAP PTE limits, EPA should require state

¹⁹ Available at <https://dep.wv.gov/daq/permitting/titlevpermits/Documents/August%202017/UCC%20Institute%203of8%208-1%20FFS.pdf>.

²⁰ Available at <https://dep.wv.gov/daq/permitting/titlevpermits/Pages/default.aspx>.

²¹ Available at www.prnewswire.com/news-releases/altivia-completes-dows-acetone-derivatives-business-acquisition-300950706.html.

²² Available at [https://dep.wv.gov/daq/permitting/titlevpermits/Documents/October%202022/039-00005/DPFactSheet%20R30-03900005-2022%20\(2%20of%202\).pdf](https://dep.wv.gov/daq/permitting/titlevpermits/Documents/October%202022/039-00005/DPFactSheet%20R30-03900005-2022%20(2%20of%202).pdf).

and local permitting agencies to track which facilities are subject to HAP PTE limits and provide that information (including facility addresses) to EPA and the public upon request.

III. Conclusion

For all of the reasons above, EPA should: (1) finalize a rule that prevents sources in categories necessary to meet section 112(c)(6)'s threshold from discarding MACT limits through reclassification; (2) finalize its proposed regulation preventing all sources from reclassifying based on controls that increase emissions; (3) require that all PTE limits used to avoid major-source requirements under section 112 be federally enforceable; and (4) require that affected members of the public receive notice and an opportunity to comment on each PTE limit.

Thank you for your time and consideration.

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Attachments

- Appendix A: SELC, 50-State Survey of Publicly/Federally Enforceable Limits on Hazardous Air Pollutants Included in State-Issued Clean Air Act Title V Operating Permits.
- Attachment 1: Petition for Reconsideration of “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” 85 Fed. Reg. 73,594 (Nov. 19, 2020) Docket ID No. EPA-HQ-OAR-2019-0282 and for Withdrawal of the Guidance Memorandum titled “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (January 25, 2019) (OAQPS-2020-415) (January 18, 2021) (EPA-HQ-OAR-2019-0282-0659).
- Attachment 2: Comments of Earthjustice, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club on Proposed Rule: Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,304 (July 26, 2019) (September 24, 2019) (EPA-HQ-OAR-2019-0282-0341).
- Attachment 3: Mapping of EPA’s List of Reclassified Facilities and Justice40 Census Tracts.
- Attachment 4: Table of Facility Descriptors for Reclassified Sources.
- Attachment 5: *Sierra Club v. Woodville Pellets, LLC*, 2021 WL 8315042 (E.D.Tex.).
- Attachment 6: EIP, Dirty Deception: How the Wood Biomass Industry Skirts the Clean Air Act (Apr. 26, 2018).
- Attachment 7: EIP, Comments on the Proposed Synthetic Minor Air Permit for Louisiana Green Fuels (Jul. 13, 2023)
- Attachment 8: Louisiana DEQ, Response to Comments and Notification of Final Permit Action for Louisiana Green Fuels, LLC (Sep. 19, 2023).
- Attachment 9: SELC, Public Comments on Air Permit Application No. 780227 for Telfair Forest Products, at 1 (Sep. 29, 2023).
- Attachment 10: EIP, Comments on Draft Title V Permit for Enviva Pellets Northampton, LLC (Oct. 20, 2017).

- Attachment 11: NCDAQ, Air Permit Review for 2015 Enviva Pellets Northampton, LLC (Permit Issue Date Oct. 12, 2015).
- Attachment 12: EIP, Comments on the Draft Air Quality Permit for Enviva Pellets Hamlet (Nov. 15, 2018).
- Attachment 13: Enviva Hamlet Plant Settlement Agreement (June 2, 2019).
- Attachment 14: Compilation of example Title V permits with federally enforceable HAP PTE limits from all 50 states.