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Via Regulations.gov

Mr. Nathan Topham
U.S. Environmental Protection Agency
EPA Docket Center
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: MM2A Coalition Comments on EPA's Proposed Rule "Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" – Docket ID No. EPA-HQ-OAR-2023-0330

Dear Mr. Topham:

The MM2A Coalition is pleased to submit the following comments on the proposed rule entitled "Review of Final Rule Reclassification of Major Source as Area Sources Under Section 112 of the Clean Air Act," which was published at 88 Fed. Reg. 66336 (Sept. 27, 2023) ("Proposed Rule").

The MM2A Coalition is an ad-hoc coalition that was formed for the purpose of submitting comments on the Proposed Rule and engaging in related advocacy. Companies represented by some members of the MM2A Coalition own or operate facilities that have been reclassified from major sources of hazardous air pollutants ("HAPs") to area sources and have availed themselves of the policy and regulations that EPA proposes to change in the subject rulemaking, as well as other facilities that are planning to avail themselves of the rule in the future. Member facilities also include facilities that operate near the major source emissions thresholds. Thus, the MM2A Coalition is impacted by and has a direct interest in this rulemaking.

The Proposed Rule would amend the "Major MACT to Area" ("MM2A") regulation that the U.S. Environmental Protection Agency ("EPA" or "Agency") promulgated in 2020. 85 Fed. Reg. 73854, 73879 (Nov. 19, 2020). That regulation codified the reversal of EPA's prior policy that a HAP major source subject to major source NESHAPs that is reclassified as an area source continues to be subject to the previously applicable major source NESHAPs after it becomes an area source (commonly known as the "once in, always in" ("OIAI") policy). In the 2020 MM2A rule, EPA determined that there is no legal authority under the Clean Air Act ("CAA") to require a major source subject to major source NESHAPs that is reclassified as an area source to continue to comply with previously applicable major source NESHAPs. All that is required to accomplish a reclassification is the imposition of effective limitations on the HAP potential to

emit ("PTE") of a source to levels below the 10 tons-per-year ("tpy") and 25 tpy HAP major source thresholds.

EPA does not claim in the Proposed Rule that it intends to reverse the legal determination that major source NESHAPs cannot apply to area sources. But the Agency plainly intends to achieve the same effect as the OIAI policy, albeit through a different legal approach. In particular, the key element of the Proposed Rule is a proposed requirement that a major source subject to major source NESHAPs that seeks to reclassify as an area source must be subject to anti-backsliding measures that prevent the reclassified source from emitting more HAPs than would have been permissible under previously applicable major source NESHAPs. EPA claims that emissions limitations upon which a major source relies to become an area source are not "effective" unless they include such anti-backsliding measures. In essence, EPA proposes to move the goal posts by asserting that establishing a PTE below the statutory major source thresholds is not adequate to reclassify a major source that is subject to major source NESHAPs as an area source.

As detailed below, the Proposed Rule is fundamentally flawed. EPA provides no factual basis to support its contention that, without anti-backsliding measures, reclassified sources will significantly increase their HAP emissions. In fact, EPA fails to acknowledge or refute the analysis developed in support of the MM2A rule, which showed that there is no reason to expect significant HAP emissions increases from reclassified sources. More importantly, EPA's theory that the words "considering controls" in the CAA § 112(a)(1) definition of "major source" provide authority to impose anti-backsliding measures is not a permissible or reasonable interpretation of the statute. In effect, EPA seeks to impose emissions standards on area sources that are not authorized under the CAA. From another perspective, EPA seeks to impose a lesser major source threshold on reclassified sources without citing to relevant authority and without addressing express statutory factors. CAA § 112(a)(1) (definition of "major source").

In conjunction with the proposed anti-backsliding measures, EPA also proposes that any emissions limitation upon which a source relies to reclassify that source must be "federally enforceable" – i.e., enforceable by EPA and citizens under the CAA. EPA should defer final action on this aspect of the Proposed Rule because the question of what constitutes an "effective" limit on PTE (including the question as to whether a limit must be federally enforceable in order to be effective) is a fundamental issue that cuts across the entire CAA stationary source program. Any rule requiring federal enforceability should not be adopted until a coherent and consistent approach can be developed for all purposes under the CAA.

In any event, EPA has not asserted adequate legal authority for the proposed federal enforceability requirement. In particular, EPA fails to acknowledge and address the key flaws that caused the D.C. Circuit in 1995 to overturn across the entire CAA the Agency's prior federal enforceability rules. *National Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) ("*NMA*"). But in

any event, there is no need or rational legal basis for the proposed federal enforceability requirement.

Lastly, our comments explain that EPA does not have legal authority to impose the proposed new requirements on sources that were reclassified before the effective date of the upcoming final rule. We also explain that it is impermissible for EPA to tie the effective date of a reclassification to the date notification is made to EPA.

I. EPA does not have authority to impose anti-backsliding requirements on HAP major sources subject to major source NESHAPs that reclassify as area sources.

The primary element of the Proposed Rule is a proposed obligation for anti-backsliding measures to be established for sources that reclassify from being a HAP major source to a HAP area source after January 25, 2018. The anti-backsliding measures are intended to prevent the reclassified source from emitting more HAP than it was permitted to emit under applicable major source NESHAPs. The new requirement would apply to "sources that are or were subject to a major source NESHAP, have PTE over the major source threshold, and are taking a restriction so as to limit the PTE below the major source threshold." 88 Fed. Reg. at 66345. EPA further explains that the rule "would not apply to a source that has taken restrictions to limit PTE (i.e., a synthetic minor source) before the source's first compliance date of the applicable major MACT standard." *Id*. at 66344-5.

EPA proposes that the anti-backsliding measures "must include one of the following control methods or a combination: (1) continue to employ the emission control methods (e.g., control device and/or emission reduction practices) required under the major source NESHAP requirements, including previously approved alternatives under the applicable NESHAP and associated monitoring, recordkeeping, and reporting (MRR);[1] (2) control methods prescribed for reclassification under a specific NESHAP subpart; or (3) 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 NESHAP requirements at the time of reclassification." *Id*. at 66345.

The policy rationale for the proposed rule is tied to EPA's concern that a reclassified major source might theoretically be able to increase its HAP emissions after it becomes an area source to levels that would not have been permissible under previously applicable major source NESHAPs. As a "hypothetical" example, EPA posits that "if a major source standard had the effect of reducing emissions of a certain pollutant to 1 ton per year but there is no corresponding area source standard for the same source category, then a source could take a

[1] We note that NESHAPs typically do not require any particular emissions control device or emissions reduction measure to be implemented. If EPA decides to finalize this measure, it should be revised to focus on the emissions that are permissible under applicable NESHAP and not the particular control measures that are employed.

PTE limit of 9.9 tons per year of a single HAP or 24.9 tons per year of combined HAP emissions, thus increasing its emissions." *Id.* at 66343.

EPA reasons that the proposed anti-backsliding measures are needed "[i]n order to protect the public from the health risks of HAPs, and based on Congress' intent to reduce harmful HAP emissions and regulate to the maximum extent achievable." *Id*. According to EPA, "[w]hile Congress did not speak directly to reclassification from major to area sources, the EPA proposes to find it would be contrary to the emission reduction and health protection objectives of the CAA and CAA section 112 to allow sources to increase their emissions after reclassification." *Id.* at 66344.

As a legal matter, EPA observes that the term "major source" is defined at CAA § 112(a)(1) "in relevant part, as sources that can emit or have the potential to emit ''considering controls,'' 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." *Id.* at 66343. EPA reasons that "in determining what qualifies as an area source the EPA must consider the major source definition and how to ''consider controls'' the facility would rely upon to justify its status as an area source." *Id.* EPA asserts that the "best interpretation" of the term "considering controls" is that "the ''controls'' that are determinative are those that are proven to be at least as effective at reducing emissions as the MACT standard to which the facility has been subject, and which are subject to federal enforcement as defined in 40 CFR 63.2." *Id*.

EPA argues that such an interpretation "is consistent with the D.C. Circuit decision *NMA v. EPA*, which recognized the word ''controls'' commonly refers to governmental restrictions but is ambiguous as used in the major source definition. 59 F.3d 1351, 1362 (D.C. Cir. 1995)." According to EPA, "[i]n considering the term ''controls,'' the *NMA* court settled on the touchstone of ''effectiveness.''" *Id.* The Proposed Rule "is based on this concept of ''effectiveness,'' and specifically on the reasoning that a limit taken to avoid a MACT standard to which a facility is already subject to cannot be considered an ''effective'' control if it results in the facility emitting more than it would have under the MACT standard." *Id.*

As explained below, the proposed anti-backsliding provision is fundamentally flawed in five critical aspects. As a result, EPA does not have an adequate factual basis or legal authority to finalize that provision.

A. The proposed anti-backsliding measures are not factually supported.

The factual predicate for the proposed anti-backsliding measures is the Agency's hypothetical concern that a reclassified major source might emit more HAPs as an area source than it could have as a major source under previously applicable major source NESHAPs. *Id*. at 66343. Such a "hypothetical" concern is inadequate in the first instance to justify the proposed

anti-backsliding measures because EPA provides no further analysis or information as to whether such a theoretical outcome might actually occur and, if so, whether the increase in HAP emissions would have any material impact on public health or the environment.[2] EPA also fails to consider the possibility that a reclassified source might emit less HAP that it did as a major source because greater emissions reductions might be needed to achieve area source status than would otherwise be required under applicable major source NESHAPs. Similarly, EPA ignores disincentives generated by the Proposed Rule that might affect emissions reduction opportunities more broadly under the CAA, such as reductions in criteria pollutant and greenhouse gas emissions that might be accomplished by HAP emissions control measures (such as fuel switching) that might be relied upon by a source that reclassifies from major to area. Lastly, EPA makes no effort to assess other emissions control programs (such as applicable NSPSs, state RACT programs, and major and minor new source review permitting) that could and likely would prevent EPA's "hypothetical" concern.

EPA's failure to support the Proposed Rule with any factual data necessarily means that EPA has failed to satisfy its obligation to include in the record "the factual data on which the proposed rule is based." CAA § 307(d)(3)(A). More importantly, EPA's failure to assert a factual basis for the Proposed Rule prevents it from drawing "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. v. State Farm*, 463 U.S. 29, 43 (1983) ("*MVMA*") (cleaned up). In other words, the lack of a factual basis renders the Proposed Rule arbitrary and capricious.

This problem is compounded by the fact that EPA conducted an extensive inquiry into the emissions consequences of the existing MM2A rule when it was promulgated in 2020. That analysis included a detailed review of 69 reclassifications that occurred between March 2019 and February 2020, as well as a general assessment of 72 source categories representing "a broad array of the sources subject to major source NESHAP requirements and the types of sources that could seek reclassification to area source status" under the MM2A Rule. 85 Fed. Reg. at 73879. EPA concluded that only one of the 69 sources that had actually reclassified had a HAP emissions increase, but "the change in emissions would be modest and is not likely to result in significant health impacts." *Id*. at 73822.

With regard to the general assessment of 72 source categories, EPA concluded that "3.1 percent of the facilities in the MM2A database that we were able to analyze could increase emissions if sources: (1) Voluntarily opt to reclassify and (2) were allowed to reduce operation of adjustable add-on controls." *Id*. at 73857. EPA also "found a potential for emissions decreases in cases where sources choose to reduce emissions from above the [major source

[2] The MM2A Coalition does not concede that such a showing is required because EPA must apply the plain language of the statute, which (as explained below) provides no authority for EPA to impose the proposed anti-backsliding measures.

threshold] to below the [major source threshold] to reclassify." *Id*. EPA further found that "[t]he facilities that we were able to assess for emission increases and decreases are located across the United States (i.e., in more than 10 states and in every region of the United States) and are not clustered in close proximity to each other." *Id*. In sum, EPA concluded that while "there may be both emissions increases and decreases, we are uncertain of the magnitude and geographic distribution of the changes in emissions resulting from this rulemaking across the broad array of sources that could reclassify." *Id*. at 73854.

In short, EPA's analysis showed that there was no reason to believe that the 2020 MM2A Rule would result in any significant emissions increases or impacts on public health or the environment.

EPA's assessment of sources that had actually reclassified is particularly relevant for two reasons in the context of the Proposed Rule. First, EPA fails to acknowledge or address the 2020 analysis in the Proposed Rule. That means that EPA has "entirely failed to consider an important aspect of the problem." *MVMA* at 43.

Second, EPA's current concern about hypothetical emissions increases is belied by its prior analysis showing that facilities that actually reclassified did not have significant emissions increases (indeed, 68 of 69 had no increases at all) and that evidence did not support a conclusion that emissions increases more broadly should be expected across the CAA § 112 program as a whole.[3] In other words, EPA has "offered an explanation" in support of the Proposed Rule that "runs counter to the evidence before the agency." *Id*.; *see also FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1832 (2009) ("*Fox*") (When changing position rather than writing on a clean slate, an agency must assert a more detailed justification "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy."). For these reasons, the Proposed Rule is arbitrary and capricious.

B. The term "considering controls" cannot have the meaning that EPA suggests.

As explained above, EPA asserts that the term "considering controls" in the CAA § 112(a)(1) definition of "major source" is the source of its legal authority to impose the proposed anti-backsliding measures. Specifically, EPA asserts that those proposed measures are "based on this concept of ''effectiveness,'' and specifically on the reasoning that a limit taken to avoid a MACT standard to which a facility is already subject to cannot be considered an ''effective'' control if it results in the facility emitting more than it would have under the MACT standard." 88 Fed. Reg. at 66344. EPA argues that its interpretation "is consistent with the D.C. Circuit decision NMA v. EPA, which recognized the word ''controls'' commonly refers to governmental restrictions but is ambiguous as used in the major source definition." *Id*.

[3] Indeed, EPA admits in the Proposed Rule that its prior analysis likely was overly conservative, in that there have been "90% fewer reclassifications than our estimate in the 2020 final rule." 88 Fed. Reg. at 66349 n. 29.

According to EPA, "[i]n considering the term ''controls,'' the NMA court settled on the touchstone of ''effectiveness.''" *Id*.

EPA's interpretation is flawed for at least two reasons. First, EPA's reliance on *NMA* is wholly misplaced. Among other things, that case involved a challenge to the requirement that limitations on a source's potential to emit ("PTE") under the CAA § 112 air toxics program must be "federally enforceable" – i.e., "enforceable by the Administrator and citizens under the Act or … under other statutes administered by the Administrator." *NMA* at 1362. Petitioners in that case argued "that this restrictive definition — which disregards emissions limitations imposed by state or local regulations not deemed "federally enforceable" — is contrary to the language of § 112(a)(1) of the Act." *Id*. According to the Court, the Petitioners "conceded at oral argument — quite properly, we believe — that Congress intended the term [controls] to stand for *effective* controls." *Id*. (emphasis in original). The Court opined that "EPA clearly is not obliged to take into account controls that are only chimeras and do not really restrain an operator from emitting pollution." From there, the Court went on to assess "petitioners claim that EPA has imposed the federal enforceability requirement in pursuit of policy objectives unrelated to concerns about the effectiveness of controls imposed at the state and local level." *Id*.

Thus, EPA is correct that the Court in *NMA* focused its analysis on the "effectiveness" of emissions controls. But it is abundantly clear that the Court was focused on the question of what sort of emissions limitations should be considered legally effective for purposes of limiting a source's PTE. More particularly, the question was whether an emissions limitation issued by a state that is not enforceable by EPA and citizens under the CAA should be considered legally sufficient for limiting PTE. Nothing in *NMA* supports EPA's contention that anti-backsliding measures may be imposed on a HAP major source that reclassifies as a HAP area source to prevent hypothetical HAP emissions increases. EPA has taken the word "effective" wholly out of context and given it meaning that simply cannot be derived from the *NMA* opinion.

Second, it is not plausible that the term "considering controls" can be construed as providing authority for EPA to impose anti-backsliding measures as a mandatory condition on certain sources that reclassify from being HAP major sources to HAP area sources. In relevant part, CAA § 112(a)(1) defines "major source" to mean a source "that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year of more of any combination of hazardous air pollutants." CAA § 112(a)(1). The term "considering controls" modifies the phrase "emits or has the potential to emit" and imposes an obligation that emissions controls must be considered in determining whether the 10 and 25 tpy major thresholds have been exceeded by a given source.

Indeed, the *NMA* court concluded that Congress enacted the CAA § 112(a)(1) definition of major source "in 1990 against a backdrop of over a decade of skirmishing between the

agency and affected companies, during which the issue of whether and to what extent state and local controls were to be credited in calculating a source's "potential to emit" was very much in the forefront." *NMA* at 1653. The Court concluded that Congress opted to resolve that issue by "specifically direct[ing] EPA to consider controls in determining which producers should be classified as "major sources."" *Id*.

Thus, even if there is ambiguity as to how the term "considering controls" should be interpreted for purposes of determining what emissions limits are effective in limiting a source's PTE, there is no ambiguity in how the term "considering controls" should be used. That term plainly must be used solely in assessing whether actual or potential emissions from a given source exceed the major source thresholds. Nothing in the definition of "major source" suggests that the term "considering controls" serves any broader purpose. Consequently, EPA's contention that "the best interpretation of the term "considering controls" in the definition of "major source" in CAA section 112" authorizes the proposed anti-backsliding measures" is without merit and unfounded. 88 Fed. Reg. at 66344.

C. EPA fails to acknowledge and address the contrary position it took in 2020.

EPA explained in the 2020 MM2A final rule that "[i]n the MM2A proposal, the EPA took comment on whether it can and should promulgate regulatory provisions that would prevent a source that has reclassified from major to area source status from increasing emissions above what the source was allowed to emit when it was a major source." 85 Fed. Reg. at 73862. In other words, EPA took comment on the very anti-backsliding concept contained in the current Proposed Rule.

EPA concluded in 2020 that "the plain language of CAA section 112 precludes the promulgation of such provisions." *Id*. According to EPA:

> [T]he plain language of CAA section 112 provides that a source is an area source if its emissions and PTE are below the thresholds of 10 tpy of any one HAP and 25 tpy of any combination of HAP. Just as there is nothing in the statutory definitions in CAA sections 112(a)(1) and (2) or elsewhere in CAA section 112 that sets, or gives the EPA the authority to set, a cut-off date after which a major source cannot classify to area source status, there is nothing in CAA section 112 that imposes, or gives the EPA the authority to impose, a requirement that a source can only be an area source if it limits its emissions to some level below the [major source threshold]. Congress clearly identified the thresholds of 10 tpy of any one HAP and 25 tpy of all combined HAP as the dividing line between major source status and area source status. The EPA cannot impose a different dividing line from what Congress wrote into CAA section 112. See *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 325–326 (2014) (where Congress created precise

numerical thresholds in the statute, the EPA's rewriting of the statutory thresholds is impermissible). *Id*.

EPA further argued that "even if there were some ambiguity in the text and structure of CAA section 112 that gave the EPA the discretion to impose such a requirement, the EPA's conclusion in light of both the statute and policy considerations is that such a requirement should not be imposed." *Id*. The Agency reasoned that if it "were to mandate that a reclassified area source maintain its emissions below the level that the source was subject to as a major source, that would be contrary to the fundamental structure that Congress created in CAA section 112." *Id*.

Notably, EPA fails to mention in the Proposed Rule that it previously took a diametrically opposite position on the Agency's legal authority to impose anti-backsliding measures on HAP major sources that reclassify as area sources. EPA also fails to acknowledge that it proposes to fundamentally change course in the Proposed Rule and fails to distinguish its current legal interpretation from the interpretation asserted in 2020. Such failures to acknowledge past contrary positions and explain the reasons for taking a new course cause the Proposed Rule to be arbitrary and capricious. *Fox* at 1811 ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio*.") (internal citations omitted).

D. EPA may not regulate area sources by way of the proposed anti-backsliding measures.

EPA's concern about hypothetical HAP emissions increases that might occur when a source reclassifies from major to area "stems from the differences in stringency in major source rules compared to area source rules for the same source category." 88 Fed. Reg. at 66342. EPA notes that area source standards may be less stringent than corresponding major source standards because they are based on "GACT" rather than "MACT." EPA also observes that area source standards may apply only to select HAPs rather than all HAPs, and that some area source categories are not regulated at all. EPA lastly notes that no residual risk review under CAA § 112 is required for GACT-based area source standards. EPA asserts that the proposed anti-backsliding measures are needed because "it would be contrary to the emission reduction and health protection objectives of the CAA and CAA section 112 to allow sources to increase their emissions after reclassification." *Id*. at 66344.

What EPA fails to note is that the elements of the CAA § 112 area source program that the Agency cites as the problem here are elements that Congress decided to include in the program. In other words, for example, if Congress was worried about the possibility that a GACT-regulated area source might have higher HAP emissions than a MACT-regulated major

source, it would not have allowed for GACT-based area source standards. EPA's policy rationale for the Proposed Rule is, thus, predicated on the mistaken notion that Congress's chosen methods for regulating area sources are deficient and must be corrected through the proposed anti-backsliding measures. EPA's position is irrational and contrary to the plain text and intent of CAA § 112.

Similarly, the proposed anti-backsliding measures constitute area source emissions control obligations that are not authorized under CAA § 112. EPA has authority to regulate area sources only under three prescribed circumstances.

First, EPA may list and regulate an area source category if it finds the category "presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section." CAA § 112(c)(3). Second, EPA may list and regulate area source categories as needed to satisfy the aggregate pollutant-specific emissions control requirements of CAA § 112(c)(6). And, third, EPA may list and regulate area source categories as needed to satisfy the "Urban Air Toxics" program prescribed by CAA § 112(k).

Those three provisions indicate that Congress intended area sources to be generally less regulated than major sources, such that area sources should be regulated only under particular circumstances and in particular ways. The fact that Congress did not direct EPA to regulate area sources that previously were major sources subject to major source NESHAPs is a clear signal that EPA does not have any general residual authority to regulate such sources. In other words, in the face of a specific, highly prescribed area source regulatory program, EPA has no authority to devise additional area source requirements by way of general elements of the program, such as the CAA § 112(a)(1) definition of "major source."

Along the same lines, EPA "specifically seek[s] comment on whether additional restrictions are warranted for source categories that are subject to MACT standards for the persistent and bioaccumulative HAP listed pursuant to CAA section 112(c)(6)" to "achieve Congress's directive that source categories emitting these HAP are subjected to MACT standards under CAA section 112(d)(2) or (d)(4)." 88 Fed. Reg. at 66345. EPA suggests three alternative approaches: (1) prohibit reclassification from major to area source status for major sources subject to major source NESHAPs that EPA relied upon in satisfying CAA § 112(c)(6); (2) require relevant major source NESHAPs to continue to apply to reclassified sources; and (3) allow reclassification but require "the source to "continue to employ the emission control methods (e.g., control device and/or emission reduction practices) required under the major source NESHAP requirements."" *Id*. at 88346.

EPA has no authority to impose such constraints. CAA § 112(c)(6) requires EPA to list and regulate a sufficient number of source categories to "assur[e] that sources accounting for not

less than 90 per centum of the aggregate emissions of each pollutant [list under CAA § 112(c)(6)] are subject to standards under subsection (d)(2) or (d)(4)." CAA § 112(c)(6). That is unambiguously a one-time requirement. It does not impose any obligation on EPA to monitor the regulated source categories and make adjustments over time to maintain the 90% requirement. Similarly, it imposes no obligation on affected sources to continue to comply with a NESHAP that EPA relied upon in making the 90% determination. Indeed, it would be unreasonable in any event to construe the statute as imposing such obligations because EPA would forever have to track the number of affected sources, the emissions of such affected sources, and changes to those sources that might affect EPA's prior 90% determination. EPA also would be required to adjust existing emissions standards or impose new emissions standards to maintain 90% coverage. No such obligations exist or reasonably can be derived from the statute.

In short, no restriction on the reclassification of major sources to area sources is expressed in or reasonably authorized under CAA § 112(c)(6).

E. EPA may not regulate an area source as a major source.

The Proposed Rule does not explain what happens if a HAP major source subject to a major source NESHAP reclassifies as an area source and does not obtain a permit implementing the proposed anti-backsliding measures. For example, what if that major source becomes subject to effectively enforceable emissions limitations that cause its potential to emit HAP to fall below the 10 and 25 tpy major source thresholds, but does not at the same time become subject to anti-backsliding measures that would prevent greater HAP emissions than allowed under the applicable major source NESHAPs? Presumably, the answer is that the source would still be considered a major source because it lacks the prescribed anti-backsliding measures.

Yet, under the CAA §§ 112(a)(1) and (2) definitions of "major source" and "area source," that hypothetical facility plainly would be an area source because its HAP PTE is effectively limited to less than 10/25 tpy. As EPA notes in the Proposed Rule, the CAA § 112(a)(1) definition of "major source" authorizes EPA in prescribed circumstances to "establish a lesser quantity" to define major sources than the default 10/25 ton per year thresholds. 88 Fed. Reg. at 66343 n. 17. But EPA here does not propose to redefine the term "major source." It instead proposes to impose conditions on certain sources that seek to reclassify from major to area.

As a result, the proposed anti-backsliding measures are arbitrary and capricious and not in accord with the law because they cannot be reconciled with the definitions of "major source" And "area source." If the HAP PTE of a source is less than 10/25 tpy, then that source is an area source under the statutory and regulatory definitions. The proposed anti-backsliding measures do not constitute a change to those definitions and, thus, lack of anti-backsliding does not change or prevent the operation of those definitions.

From another perspective, EPA in effect seeks to redefine the term "major source" without applying the statutory criteria in CAA § 112(a)(1) and without making the requisite findings. EPA does not have authority to do so.

Lastly, EPA fails to acknowledge and explain other fundamental inconsistencies that would be caused by the Proposed Rule. For example, major source NESHAPs are periodically reviewed and sometimes are revised as the result of such review to include more stringent or additional emissions standards. It would not seem appropriate to require a reclassified source to obtain revised anti-backsliding measures that mirror the new NESHAP requirements because the source would not be "backsliding" from standards to which it was never subject. Yet EPA's silence on this topic leaves an important gap and resulting ambiguity as to how the Proposed Rule would be applied in this circumstance. Similarly, HAP emissions limits of less than the 10/25 tpy major source thresholds facially would be adequate to establish a HAP major source as a synthetic minor source under the Title V operating permit program. Yet, under the Proposed Rule, that source would remain a major source for purposes of the CAA § 112 air toxics program. At best, EPA's silence on these anomalous and inconsistent results leaves another material gap in the Proposed Rule. More importantly, such inconsistent results highlight the legal and practical shortcomings of the Proposed Rule.

II. Emissions limits can be effective in limiting potential to emit even if they are not enforceable by EPA and citizens under the Clean Air Act.

Another "safeguard" that EPA proposes to establish for major sources subject to a major source NESHAP that reclassify as an area source is that the emissions limitations used to accomplish the reclassification must be "federally enforceable" – i.e., enforceable by EPA and citizens under the CAA. 88 Fed. Reg. 66346. EPA proposes that the federal enforceability requirement would apply only to such reclassified sources and would not apply more broadly within the CAA § 112 air toxics regulatory program. *Id*.

According to EPA, this proposed requirement "is based on the EPA's assessment that federal enforceability of limits for reclassified sources significantly enhances the effectiveness of controls because limits taken by sources to reclassify that are enforceable by the federal government and citizens, in addition to state and local permitting authorities, are more likely to ensure compliance." *Id*. In other words, "[s]imply put, 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." *Id.* EPA acknowledges that "state and local enforcement can be an effective means for ensuring compliance with PTE limits for other NESHAP sources and CAA programs (e.g., NSR and title V)," but asserts that federal enforceability is needed here "given the EPA's heightened concerns surrounding reclassified sources." *Id.*

EPA observes that the ability of EPA and citizens to enforce under state programs is limited or nonexistent in many states. According to EPA, "in many instances, state and local permitting authorities are the only means of enforcement." *Id*. EPA asserts that "the ability for citizens to enforce permits" for reclassified sources is needed to help ensure such sources "do not erode the goals of the CAA section 112 program." *Id*. Similarly, EPA contends that the "potential for federal enforcement for reclassified source limits provides an additional incentive for facilities to comply, ensures consistency in protection across jurisdictions, and thereby enhances the effectiveness of controls." *Id*. In sum, EPA argues that "[f]ederal enforcement for reclassified sources creates a clear regulatory structure for EPA and citizen enforcement through the CAA and produces a level playing field on which sources are subject to the same enforcement mechanisms regardless of the state in which they are located." *Id*. at 66347.

EPA further contends that "state-only enforceability for reclassified source limits creates significant burdens on the EPA if it were to attempt to enforce a violation of such a limit." *Id.* State-only enforcement also would "eliminate[] the EPA's use of the [] administrative enforcement powers," "could create conflicts between what limits a state interprets as sufficient to avoid major source MACT requirements and what limits the EPA interprets as enforceable as a practical matter," might limit or prevent litigation in federal court, and "create fairness issues [] that a source could use in its defense." *Id*.

As explained in detail below, the proposed federal enforceability requirement is unwarranted and inadequately justified.

A. EPA should not address the *NMA* remand in a piecemeal fashion.

As an initial matter, EPA tacitly acknowledges that addressing federal enforceability in the Proposed Rule is intended as a partial response to the remand of the Part 63 federal enforceability requirement ordered in *NMA*. *Id*. at 66346.

But the question of what constitutes an acceptable and effective "legally and practicably enforceable limit" has implications far beyond this narrow regulatory provision. That question is relevant across EPA's CAA stationary source programs: from major source permitting under NSR/PSD, to the Title V operating permit program, to all manner of federal and state emissions control programs (of which CAA § 112 is just one). And, what constitutes an acceptable and effective "legally and practicably enforceable limit" has been an open question since the mid-1990s, when the prior "federal enforceability" requirement was remanded or vacated across EPA's programs. See *NMA*; Chemical Mfrs. Ass'n v. EPA, 70 F. 3d 637 (D.C. Cir. 1995); Clean Air Implementation Project v. EPA, 1996 WL 393118 (1995). EPA announced its intent to conduct a comprehensive rulemaking to address the holdings in these cases soon after they were handed down, but has not yet taken action almost 30 years after these cases were decided. *See, e.g.*,

Memorandum from John S. Seitz to Regional Office Addressees, Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit (Jan 22, 1996) at 1.

With this as a backdrop, issues surrounding what constitutes an effective limit on PTE (including whether such a limit must be federally enforceable) have implications that go far beyond the narrow confines of the Proposed Rule. Addressing it in a piecemeal, rule-by-rule fashion as EPA proposes to do will ultimately cause confusion and potential inconsistency across the relevant programs. Further, it could inadvertently call into question existing permitting and regulatory regimes that do not provide for enforcement by EPA and citizens. Moreover, affected facilities and states now have years of experience in crafting appropriate emissions limitations to govern applicability of Part 63 emissions standards and other related program elements. Creating new mandatory requirements here is unnecessary, given that no systemic problem has emerged during this long implementation period. Therefore, we suggest that EPA defer final action on the proposed federal enforceability requirement until such time as the Agency undertakes a broad-based rule that would provide a single, consistent approach across all affected CAA programs.

B. EPA fails to address key findings in *NMA*.

While EPA acknowledges *NMA* in its discussion of the proposed federal enforceability requirement, the Agency fails to identify and explicitly address the reasons why the Part 63 federal enforceability requirement was remanded. Such a failure causes the Proposed Rule to suffer from the same inadequacies that caused the *NMA* court to remand the federal enforceability requirement in the first instance and, in any event, is arbitrary because EPA fails to address key factors that should influence its decision here.

For example, by requiring emissions limits to be federally enforceable, "EPA has proposed conditions for achieving "federal enforceability" that go beyond the mere effectiveness of particular constraint as a practical matter." *NMA* at 1363. The Court observed that "[i]nclusion in a SIP, for example, is required in each instance even though EPA's own approach suggests that it is a consideration independent of and in addition to the need that a constraint be effective for it to count towards reductions." *Id*.

In other words, the Court ruled that EPA did not adequately explain for the Part 63 federal enforceability requirement at issue in that case why a "federal enforceability" requirement is needed when state programs that do not provide for federal enforceability could be "effective." Here, the same flaw exists. By EPA's own admission, the primary justification for the proposed federal enforceability requirement is the proposition 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 66346. But EPA provides no evidence to support that

proposition – it is offered as a purely conclusory assertion. That in itself causes the proposal to be fundamentally arbitrary because EPA has offered no evidence to support the key contention on which the proposed federal enforceability requirement is based.

But more importantly, EPA's justification fails to address the *NMA* Court's concern that a state program might be "effective," even though it does not provide for federal enforceability. EPA simply assumes that any state program without federal enforceability is ineffective. EPA has thus completely failed to adequately address the *NMA* remand and to adequately explain in the current proposal why federal enforceability is a necessary program component for reclassified sources.

The *NMA* Court also was concerned that "EPA's core justifications for its federal enforceability policy are the need to avoid the administrative burden that EPA would have to bear were it obligated to evaluate the effectiveness of state and local controls and the desirability of uniformity in environmental enforcement." *NMA* at 1364. The Court observed that "[t]hese, of course, are not illegitimate agency objectives," but "EPA would have us accept a rather strained interpretation of the statute based on what appears to be only its unwillingness to evaluate any state or local controls that are not federalized." *Id*. "As for national uniformity," the Court concluded that nothing in CAA § 112 "suggest[s] that Congress necessarily intended for state emissions controls to be disregarded in determining whether a source is classified as "major" or "area" under that national standard. Nor did Congress mandate that EPA assume the administration and enforcement of all governmental efforts at emissions limits." *Id*. at 1365. In sum, "[i]f such administration and enforcement is necessary to ensure that controls are effective in the context of the extant regulatory environment, EPA has certainly not made that case and has not indicated how that consideration supports its claim that its interpretation of the statute is reasonable." *Id*.

Notably, EPA advances essentially the same arguments here. For example, EPA laments that "state-only enforceability for reclassified source limits creates significant burdens on the EPA if it were to attempt to enforce a violation of such a limit." 88 Fed. Reg. at 66347. EPA also argues that "[f]ederal enforcement for reclassified sources creates a clear regulatory structure for EPA and citizen enforcement through the CAA and produces a level playing field on which sources are subject to the same enforcement mechanisms regardless of the state in which they are located." *Id.* But in doing so, the Agency fails to acknowledge that the *NMA* Court was expressly concerned about these arguments and does nothing to explain how burdens on the Agency or a perceived need for consistency are factors that have any significant bearing on assessing the effectiveness of state-only controls.

In short, EPA purports to address the *NMA* remand of federal enforceability (at least for purposes of reclassified sources), yet turns a blind eye towards the factors that caused the Court to return the rule to EPA for further consideration. The Proposed Rule, thus, is insufficient to

overcome the holding in *NMA* and also is arbitrary and capricious for failure to consider key factors that must be assessed in determining whether federal enforceability is supportable under the law.

III. EPA does not have authority to impose retroactive regulatory requirements on sources that already have reclassified from HAP major sources to area sources.

EPA proposes that the anti-backsliding measures and federal enforceability requirement "will apply to sources that reclassify after the effective date of this action, as well as those that have reclassified since the 2018 Wehrum memorandum." 88 Fed. Reg. at 66345.[4] Thus, for sources that reclassified between the time the 2018 memorandum was issued and the effective date of the rule, the Proposed Rule would impose new obligations tied to the prior reclassifications. In other words, the Proposed Rule would impose retroactive regulatory obligations on sources that reclassified prior to the effective date of the final rule. Such obligations would be retroactive because the events that would give rise to the new obligations would have occurred wholly in the past (akin to the Internal Revenue Service promulgating a new tax in 2023 on income generated in 2021 – i.e., a new obligation for wholly past conduct). EPA has no authority here to impose such retroactive obligations.

The U.S. Supreme Court has held that "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). Under that principle, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id*. And, "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Id*. at 208-9.

Here, EPA has cited no CAA provision that expressly authorizes it to impose the proposed retroactive obligations. That is for good reason – neither CAA § 112 nor the CAA more generally grant EPA express authority to promulgate retroactive regulations for reclassified sources. Given that lack of express authority, EPA's proposal to apply new obligations to sources that previously reclassified is not authorized under the law.

IV. EPA does not have authority to require that the reclassification of a source from major to area is not effective until electronic notification is submitted to the Agency.

[4] The draft regulatory language EPA posted in the docket does not state that the proposed anti-backsliding and federal enforceability requirements only apply to sources reclassifying to area source status after January 25, 2018. Subparagraph 63.1(c)(6)(iv) should be either merged into subparagraph 63.1(c)(6)(iii), changed to a subparagraph 63.1(c)(iii)(A), or amended by inserting "pursuant to subparagraph (c)(6)(iii)" prior to "must include…."

EPA explains in the Proposed Rule that "[t]he notification requirements of 40 CFR 63.9(j) apply to those sources that reclassify from major source to area source status under CAA section 112 (e.g., by taking production or operation limits to reduce a source's HAP emissions below the applicability threshold)." 88 Fed. Reg. at 66343. Such notifications must be submitted "within 15 days after reclassification." *Id*. EPA proposes to "clarify" that "reclassifications that occur after the effective date of this action will be effective upon the date of electronic submittal of the notification to the EPA." *Id*. EPA asserts that it has "become aware of some sources that have reclassified and the required reclassification has not been submitted through CEDRI." *Id*. EPA reasons that the proposed clarification "will ensure that sources submit the required notification to the EPA when reclassification occurs." *Id*.

EPA's proposal that a reclassification is not effective until an electronic notification is submitted to the Agency is flawed for two reasons. First, EPA fails to explain the legal basis for that element of the Proposed Rule. The only justification that EPA asserts is that such a requirement is needed to make sure that required notifications are submitted. But that is merely a factual assertion, which by itself does not explain where EPA finds authority to declare that a reclassification is not effective until an electronic notification is submitted to the Agency. In fact, nowhere in the Proposed Rule does EPA identify the CAA provision that authorizes such a requirement. CAA § 307(d)(3) requires the Proposed Rule to include a statement of basis and purpose that includes, among other things, "the major legal interpretations … underlying the proposed rule." CAA § 307(d)(3)(C). EPA's failure to explain the legal basis for the proposal to tie the effectiveness of a reclassification to the submittal of electronic notification to the Agency plainly violates CAA § 307(d)(3).

Second, and in any event, EPA has no authority under the CAA to require that a reclassification is not effective until electronic notification is made. The determination as to whether a given source is a "major source" or an "area source" under CAA § 112 depends only on the HAP potential to emit of the source. Thus, when a source reclassifies from major to area, the reclassification must become effective at the time the physical or legal limitations on PTE that accomplish the reclassification become effective.

For example, sources might rely on emissions limitations established in a state minor new source review ("NSR") permit to accomplish a reclassification. Such emissions limitations typically become effective upon the effective date of the permit. There is no provision in the CAA that authorizes EPA to prohibit a state minor NSR emissions limit from becoming effective until after notification to the Agency. And, there is no provision in the CAA that authorizes EPA to declare that an effective state minor NSR emissions limitation somehow is ineffective in limiting PTE for purposes of a reclassification until after notification to EPA.

Rather, the definitions of "major source" and "area source" in CAA § 112(a)(1) and (2) unambiguously provide that the HAP PTE of a source is the determining factor in distinguishing

major and area sources. There is no room in these definitions to allow for a notification requirement unrelated to the PTE of a source to somehow control the time that a reclassification occurs. The effective date of the change in PTE for a source unambiguously dictates the timing of a reclassification. Accordingly, the proposed requirement that a reclassification is not effective until electronic notification is made to EPA is unsupportable under CAA § 112.

Thank you for the opportunity to submit these comments.

Sincerely,

Air Permitting Forum
American Chemistry Council
American Coke and Coal Chemicals Institute
American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
American Petroleum Institute
Auto Industry Forum
Brick Industry Association
Composite Panel Association
Council of Industrial Boiler Owners
The Fertilizer Institute
Interstate Natural Gas Association of America
National Lime Association
National Oilseed Processors Association
Portland Cement Association
US Chamber of Commerce
US Tire Manufacturers Association