ORAL ARGUMENT NOT YET SCHEDULED

Case No. 18-1085 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CALIFORNIA COMMUNITIES AGAINST TOXICS, ET AL.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

Petition For Review Of Final Administrative Action Of The United States Environmental Protection Agency

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INITIAL BRIEF OF AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, AMERICAN WOOD COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COUNCIL OF INDUSTRIAL BOILER OWNERS, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties: All parties, intervenors, and amici appearing in these consolidated cases have been listed in the previously filed briefs of the Petitioners and Respondents.

Rulings under Review: The Petitioners challenge a Memorandum from William L. Wehrum, Assistant Administrator, to Regional Air Division Directors, titled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," (Jan. 25, 2018) (JA___-__).

Related Cases: None at present.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, the American Chemistry Council ("ACC"), American Petroleum Institute ("API"), American Wood Council ("AWC"), Chamber of Commerce of the United States of America (the "Chamber"), Council of Industrial Boiler Owners ("CIBO"), and the National Association of Manufacturers ("NAM") state as such:

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; and health and environmental research and product testing. The business of chemistry is a $768 billion enterprise and a key element of the nation's economy. It is among the largest exporters in the nation, accounting for 14 percent of all U.S. goods exported. ACC states that it is a "trade association" for purposes of Circuit Rule 26.1(b). ACC has no parent corporation, and no publicly held company has 10 percent or greater ownership in ACC.

The American Petroleum Institute ("API") is a national trade association with over 625 corporate members that represents all aspects of America's oil and

natural gas industry, including producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API states that it is a "trade association" for purposes of Circuit Rule 26.1(b). API has no parent corporation, and no publicly held company has 10 percent or greater ownership in API.

The American Wood Council ("AWC") is the voice of North American wood products manufacturing, an industry that provides approximately 450,000 men and women in the U.S. with family-wage jobs. AWC represents 86 percent of the structural wood products industry, and members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC states that it is a "trade association" for purposes of Circuit Rule 26.1(b). AWC has no parent corporation. No publicly held company has a 10 percent or greater ownership interest in AWC.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector,

and from every region of the country. The Chamber is a "trade association" within the meaning of Circuit Rule 26.1(b). No publicly held company has a 10 percent or greater ownership interest in the Chamber.

The Council of Industrial Boiler Owners ("CIBO") is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations. CIBO states that it is a "trade association" for purposes of Circuit Rule 26.1(b). CIBO has not issued shares to the public and has no parent company.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing

community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S. The NAM states that it is a "trade association" for purposes of Circuit Rule 26.1(b). The NAM has no parent corporation, and no publicly held company has 10 percent or greater ownership in the NAM.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief.

CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
HAP	Hazardous Air Pollutant
MACT	Maximum Achievable Control Technology
SIP	State Implementation Plan
2018 Guidance	Memorandum from William L. Wehrum, Assistant Administrator, to Regional Air Division Directors, "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act". (Jan. 25, 2018)

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in Petitioners' addendum or the attached addendum.

STATEMENT OF INTEREST

The American Chemistry Council ("ACC"), American Petroleum Institute ("API"), American Wood Council ("AWC"), Chamber of Commerce of the United States of America (the "Chamber"), Council of Industrial Boiler Owners ("CIBO"), and the National Association of Manufacturers ("NAM") (together, the "Industry Amici Curiae") file this amicus brief in support of the Respondents. The Industry Amici Curiae have an interest in this litigation because their members own or operate sources potentially affected by the guidance memorandum being challenged by the Petitioners in these consolidated cases, Memorandum from William L. Wehrum, Assistant Administrator, to Regional Air Division Directors, "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," (Jan. 25, 2018) ("2018 Guidance") (JA___-__).

The Industry Amici Curiae offer their perspective as businesses permitted under the Clean Air Act ("CAA") to assist this Court in understanding the real-world implications of the 2018 Guidance and to rebut the Petitioners' dire and unfounded predictions.

STATEMENT REGARDING AUTHORITY TO FILE AND AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

The American Chemistry Council ("ACC"), American Petroleum Institute ("API"), American Wood Council ("AWC"), Chamber of Commerce of the United States of America (the "Chamber"), Council of Industrial Boiler Owners ("CIBO"), and the National Association of Manufacturers ("NAM") (together, the "Industry Amici Curiae") represent that all parties have consented to the filing of this brief, as explained in the notice filed on October 29, 2018 [ECF No. 1757585].

The Industry Amici Curiae represent that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person/entity other than the Industry Amici Curiae, their counsel, and their members contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Contrary to the parade of horribles Petitioners predict, the 2018 Guidance appropriately and lawfully removes the disincentive for companies to innovate and reduce emissions beyond existing Maximum Achievable Control Technology ("MACT") requirements. A facility's decision whether to become an area source is, contrary to Petitioners' simplistic view, a complex business judgment in which the potentially reduced administrative burdens from area source status are just one relevant factor.

The reality is that major sources would have to reduce their *potential* to emit (*i.e.*, their maximum capacity) below major source thresholds to become area sources. Therefore, removing their MACT pollution controls–the central thesis of Petitioners' argument–is not a realistic option for both legal and practical reasons. To become area sources, facilities will more likely have to continue to operate their MACT controls and reduce their emissions beyond those currently achieved by existing controls.

Moreover, hazardous air pollutant ("HAP") emissions from many of these "new" area sources will not be unregulated because EPA has promulgated area source HAP standards for them. And, EPA has numerous tools under the Clean Air Act to address any potential Petitioners' concerns at individual facilities. Finally, many states have their own hazardous air pollutant laws that provide another level of protection against the health threats that Petitioners predict.

ARGUMENT

I. THE 2018 GUIDANCE PROVIDES THE APPROPRIATE INCENTIVE FOR SOURCES TO REDUCE EMISSIONS BEYOND MACT REQUIREMENTS.

A. EPA Correctly Concluded That the 2018 Guidance Can Prompt Sources to Consider Further Emission Reductions.

Businesses regulated under Section 112 of the CAA have consistently argued that the 1995 Once In, Always In Policy dissuades facilities from considering future actions that would further reduce HAP emissions. That is

because, for sources that are subject to the substantive requirements of a MACT standard, even if they could further reduce emissions by shutting down process lines, installing new and innovative pollution controls, or utilizing raw materials that contain less HAPs, they would get no regulatory benefit for doing so; once they became subject to a MACT rule, they remain subject to all of the requirements of the MACT rule for all time. As a policy, this makes no sense, and, as EPA showed in its brief, as a legal matter, it is inconsistent with the plain language of the CAA.

EPA and the states have long been aware of the disincentive to further emission reductions caused by the Once In, Always In Policy. As EPA noted in the 2018 Guidance:

> Many commenters on EPA's 2007 proposal had expressed the view that, by imposing that artificial time limit, the OIAI policy created a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce HAP emissions. To the extent that the OIAI policy has long discouraged facilities from identifying and undertaking such HAP emission reduction projects, by applying the statute as written as EPA is now doing, many types of sources will be afforded meaningful incentives to undertake such projects.

2018 Guidance at 4 (JA___). In its brief, EPA also cited comments from Ohio's Environmental Protection Agency, South Dakota's Department of Environment

and Natural Resources and Maine's Department of Environmental Protection echoing these same concerns. Resp. Br. at 11-12.

By now correctly interpreting the CAA, the 2018 Guidance has removed this disincentive for companies to innovate ways to further reduce emissions. If a source can reduce its *potential* to emit below the major source thresholds (25 tons per year of total HAP emissions, 10 tons per year of any single HAP), such that it meets the CAA's statutory definition of an area source, the source may be able to benefit from, for example, the reduced regulatory testing, monitoring, recordkeeping, and reporting requirements for area sources.

These benefits are typically of greatest interest to facilities "on the cusp" of major source thresholds after implementation of MACT standards. For example, if a facility's pre-MACT potential to emit was 300 tons per year of total HAPs, and it then installed controls to meet a 90% reduction MACT standard, its potential to emit is reduced to 30 tons per year. If the facility does not have the potential to emit 10 or more tons per year of a single HAP, it could qualify as an area source by finding a way to further reduce its potential to emit by another 6 tons per year. If the benefits of becoming an area source are worth the costs–a complex business decision discussed below–the company would pursue technological innovation, pollution prevention, or other methods of reducing emissions by 6 or more tons to area source thresholds–while continuing to operate the MACT controls.

B. The Benefits of Area Source Status Are Just One Relevant Consideration in a Source's Evaluation of Whether to Pursue Further Pollution Reductions.

Petitioners' misleading and unfounded "Armageddon" prediction of increased HAP emissions resulting solely from the 2018 Guidance reflects their misunderstanding of the complexity of the analysis a company goes through when considering changes to its operations. *See* Envtl. Pet'rs' Br. at 11-15, 38-40. The reality is that when a company considers capital investments, changes in raw materials, or changes in its regulatory status, it evaluates a multitude of factors, including the cost-effectiveness of the project, its potential effect on operating costs and equipment life, its impact on raw material usage, the availability of financing for any needed changes, and its overall impact on the economics and competitiveness of the facility. These factors vary greatly from one industry to another, one economic cycle to another, one local market to another. Therefore, the reduced administrative burden from area source status is just one relevant concern among many. Despite Petitioners' assertions to the contrary, companies would not base business decisions solely on the potential benefits of reclassification as an area source. Projects to achieve additional HAP emission reductions would thus be influenced by, but not solely determined by, the 2018 Guidance.

II. PETITIONERS' WORST-CASE SCENARIOS IGNORE LEGAL AND FACTUAL REALTIES THAT PROMOTE OR REQUIRE RETENTION OF MACT TECHNOLOGY.

A. Few Sources Can Qualify as Area Sources Without Continuing to Operate MACT Pollution Control Technology.

Petitioners incorrectly theorize that sources currently controlled by MACT will remove their controls and increase their emissions to "just below" the major source thresholds as a result of the 2018 Guidance. Envtl. Pet'rs' Br. at 11, 13-15, 28-29. This is wrong for two key reasons. First, the definition of a major source is a source with either actual emissions or the *potential* to emit 25 tons per year total HAPs or 10 tons per year of a single HAP. Potential to emit is a highly conservative estimate of a source's maximum possible emissions. EPA's regulations define potential to emit as follows:

> Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

40 C.F.R. § 63.2.

In other words, potential to emit assumes that all processes are operated at the maximum operational levels under their physical and operational designs. In reality, facilities do not operate *every* piece of equipment at potential to emit levels.

Consequently, potential to emit is always higher, often substantially so, than a source's actual emissions. Indeed, even when companies accept permit limitations on potential emissions, they operate with a "compliance margin" to ensure they comfortably remain in compliance. So, for major source determinations, it does not matter what a source's *actual* emissions are. A source cannot become an area source unless it demonstrates its *potential* to emit HAPs is below the statutory thresholds.

Second, a source with a potential to emit below 25 tons per year because of installation of MACT controls is unlikely to be physically or operationally capable of staying below 25 tons per year without maintaining those controls. That is why Petitioners' Houston-Galveston analysis is flawed. That analysis assumes that without the Once In, Always In Policy, "major sources that reduce their emissions to below major source thresholds simply by complying with a MACT standard could claim to be 'area' sources, *stop complying with MACT standards*, and potentially increase their emissions to just below major source thresholds, undermining the health and air quality benefits that the standards were intended to achieve." Environmental Defense Fund, "Pruitt's New Air Toxics Loophole, An Assessment of Potential Air Pollution Impacts in the Houston-Galveston Region," Declaration of John Stith ("Stith Decl.") Attachment B ("EDF Report") at 3 (emphasis added) (StandingADD0218). Petitioners' fundamental premise–that

these sources will *stop complying with MACT emission limits*–is faulty. Petitioners have not shown how such sources could reduce their potential to emit to area source levels if they stop using existing air pollution controls. Indeed, the opposite is more likely. These sources will not be able to become area sources unless they continue to operate the MACT controls and then further reduce emissions through additional means, *e.g.*, pollution prevention, installation of further controls, or substitution of lesser HAP containing raw materials. Additionally, the Petitioners imply that emission limits in permits automatically disappear once a source is reclassified, but this ignores that the source must submit an application to the permitting authority to amend the permit.

B. Sources May Need MACT Emission Controls to Reduce Emissions of Other Regulated Pollutants.

Pollution technology used to control the specific listed hazardous air pollutants in CAA § 112 may also be essential to how the facility controls other regulated CAA pollutants, such as criteria pollutants covered by the National Ambient Air Quality Standards. A facility likely will need to retain these controls to meet its permit limits for these other pollutants. For example, ozone is not a HAP, but a criteria pollutant regulated under a different CAA program. EPA allows nonattainment areas for ozone to take credit for reductions in ozone precursors (volatile organic compounds and NOx) resulting from limits established through MACT standards. *See* Memorandum from William T. Harnett, Director,

Air Quality Policy Division, to Regional Air Division Directors, "Guidance for Estimating VOC and NOx Emission Changes from MACT Standards," (May 11, 2007).[1] In this memorandum, EPA recognized 30+ MACT standards that reduce ozone precursors, and as such, should be available for nonattainment credit toward attaining the ozone standard. These 30+ MACT standards include source categories the Petitioners are concerned about, such as petroleum refineries, iron and steel foundries, organic chemical production and processes, asphalt processing and roofing manufacturing, municipal solid waste landfills, pesticide active ingredient production, and plywood and composite wood products. *Id.* at 5-6.

In addition, many MACT standards use surrogate non-HAP pollutants to regulate HAPs. These surrogates are often criteria pollutants for which, as just discussed, EPA establishes National Ambient Air Quality Standards under CAA § 109. These pollutants include particulate matter and carbon monoxide. Permits issued under State Implementation Plans ("SIPs") to achieve the national ambient air quality standards have considered and often incorporated MACT emission limits.

For example, EPA often uses particulate matter as a surrogate for regulating HAP metals, *see, e.g.* 66 Fed. Reg. 3180, 3184 (Jan. 12, 2001). This Court has

[1] *Available at* https://www3.epa.gov/Director Harnett VOC and NOx Guidance.pdf.

upheld use of surrogates when, *inter alia*, emissions of both the non-HAP surrogate and the HAP are controlled by the same technology. *See, e.g., Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 637 (D.C. Cir. 2000). Although the surrogate pollutant and the regulated HAP are subject to different requirements under different parts of the CAA, they are both controlled with the same pollution control technology. There is no reason to conclude that just because the MACT legal basis for the controls is removed that the SIP basis would also be removed. The more likely outcome is that the air pollution controls would remain in place and the operating permit's citation for the legal authority for those controls would change from both the SIP and the MACT to just the SIP. Accordingly, Petitioners have not shown that the 2018 Guidance will result in facilities removing air pollution control technology.

III. THE CLEAN AIR ACT IS A COMPREHENSIVE STATUTE WITH MULTIPLE LAYERS OF PROTECTION FOR PUBLIC HEALTH AND THE ENVIRONMENT.

A. Several Common Types of Potentially Reclassified Area Sources Would Be Subject to Area Source HAP Rules.

Petitioners predict HAP emission increases if sources use the 2018 Guidance to become area sources. Envtl. Pet'rs' Br. at 11-15, 38-40. But the reality is that many common sources potentially eligible for reclassification are subject to Section 112 area source standards. *See* U.S. Environmental Protection Agency, "Compilation of Area Source Rules," Technology Transfer Network, Air Toxics

Website, https://www3.epa.gov/airtoxics/area/compilation.html (last visited Jan. 11, 2019). For example, there are area source standards for chemical manufacturers (Subparts NNNNNN, VVVVVV), boilers (Subpart JJJJJJ), polyvinyl chloride producers (Subpart DDDDDD), iron and steel foundries (Subpart ZZZZZ), metal smelters (Subparts EEEEEE, FFFFFF, GGGGGG), Portland Cement manufacturing (Subpart LLL), stationary engines, such as emergency generators (Subpart ZZZZ), and several other heavy industries.[2]

The Portland Cement manufacturing source category provides a good example of how protective area source rules can be. For this category, EPA established nearly identical emission limitations for both major and area source cement kilns. *See* 40 C.F.R. Part 63, Subpart LLL. For example, emission limits are the same for major/area non-volatile HAP metals (arsenic, cadmium, beryllium, and lead), dioxin/furans, mercury, and other organic HAPs such as polycyclic organic matter and polychlorinated biphenyl compounds. 40 C.F.R. § 63.1343, Table 1 (listing single emission limits for kilns, whether located at a "major or area source," for particulate matter as a surrogate for metal HAPs, dioxin/furans, mercury, and total hydrocarbons[3]); 75 Fed. Reg. 54970, 54987-88 (Sept. 9, 2010)

[2] All of these area source standards are in 40 C.F.R. Part 63.

[3] Particulate matter is a surrogate for non-volatile metal HAPs, and total hydrocarbons are a surrogate for all organic HAPs other than dioxins and furans, such as polycyclic organic matter and polychlorinated biphenyl compounds. *See* 75 Fed. Reg. 54970, 54974 (Sept. 9, 2010) (explaining use of particulate matter as

(explaining EPA's decision to require MACT for area source emissions of particulate matter); 83 Fed. Reg. 35122 (retaining MACT standards for area sources after completing risk and technology review for Portland Cement manufacturing source category). Like major sources, area sources must install continuous emission monitoring systems for mercury, particulate matter and total hydrocarbons. 75 Fed. Reg. at 55031. The only different emission standard for area sources is for hydrogen chloride. 40 C.F.R. § 63.1343, Table 1.

B. Other Provisions of the CAA Empower EPA and the States to Address Any Potential Concerns for an Individual Facility.

Petitioners fail to point out that there are other provisions of the CAA and state laws that can protect against the concerns they raise. For example, CAA § 303 grants EPA powers to address air pollution emergencies that threaten human health. 42 U.S.C. § 7603. In addition, states can adopt stricter standards, as a matter of state law, than those established by EPA under CAA § 112. *See* 42 U.S.C. § 7416. Nothing in the 2018 Guidance prevents state permitting agencies from imposing such stricter standards. Thus a state may require a reclassified area source to retain its MACT controls, meet MACT-like standards, or comply with testing, recordkeeping, and reporting requirements similar to major sources. For

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a surrogate for HAP metals and total hydrocarbons as a surrogate for polycyclic organic matter and polychlorinated biphenyl compounds); 83 Fed. Reg. 35122, 35125 (July 25, 2018) (explaining use of total hydrocarbons as a surrogate for all organic HAPs other than dioxins and furans).

example, Indiana requires compliance monitoring for sources that take permit restrictions on their Potential to Emit to become area sources. *See* Indiana Department of Environmental Management, Technical Guidance Document, "Compliance Monitoring Guidance," at 7 (Jan. 2011) https://www.in.gov/Indiana Technical Guidance.pdf.

Further, Petitioners misrepresent how the operating permit provisions of Title V of the CAA work, ignore that many area sources *are* subject to Title V, and omit the fact that EPA decides when area sources are exempted from Title V. Envtl. Pet'rs' Br. at 18-19. The legal default under Title V (CAA § 502(a)) is that all sources regulated by CAA § 112 must comply with Title V. 42 U.S.C. § 7661a(a). Area sources subject to CAA § 112 standards are only exempt from Title V if EPA determines that compliance with Title V is "impracticable, infeasible, or unnecessarily burdensome" for said sources. *Id.* EPA makes this determination when it issues a CAA § 112 standard through notice-and-comment rulemaking (which the Petitioners can proceed to challenge in federal court). 40 C.F.R. § 70.3(b)(2).

In several cases, EPA has required area sources to comply with Title V requirements.[4] For instance, the Portland Cement rule subjects all area cement

[4] There are two kinds of sources referred to as "area sources." Memorandum from John S. Seitz, EPA Office of Air Quality Planning and Standards, "Potential to Emit (PTE) Guidance for Specific Source Categories," at 2 (Apr. 14, 1998),

kilns to Title V permitting. 40 C.F.R. § 63.1340(a), (d) (specifying that subpart LLL applies to both major and area sources and that any source subject to any provision in subpart LLL is also subject to Title V permitting requirements). Similarly, synthetic area sources in the chemical manufacturing area source category must comply with Title V. 40 C.F.R. § 63.11494(e); 74 Fed. Reg. 56008, 56013-14 (Oct. 29, 2009). EPA has exempted area sources when most of the sources in that category naturally have "very low emissions before control" or have low emissions because they have accepted enforceable limits on their operations (such as limited operating hours). *Id*. at 56013-14.

Finally, as EPA correctly noted in its brief, Petitioners have multiple opportunities to object to or challenge individual operating permits they believe place the environment or public health at risk. Resp. Br. at 28-30. Petitioners may petition EPA for a rulemaking if they believe the aggregate effects of reclassification to area source status require additional action. *Id.* at 41-42. Moreover, EPA intends to conduct a rulemaking to incorporate the 2018 Guidance into its regulations, providing an opportunity for Petitioners to comment and

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available at https://www3.epa.gov/airtoxics/pte/lowmarch.pdf. A true area source (or a natural area source) is one that lacks "the physical or operational capacity to emit major amounts (even if the source owner and regulatory agency disregard any enforceable limitations)." *Id*. A synthetic area source is one that is below the major source thresholds because of an enforceable limitation, such as a limit on the hours of operation or pollution control technology. *Id*.

participate in the public process. Similarly, EPA can always evaluate whether to promulgate new or revised area source standards.[5]

C. Several States Already Successfully Implement State-Law Hazardous Air Pollutant Programs.

Petitioners' also ignore the fact that many states are successfully running their own state-law air toxics programs, and they could therefore regulate reclassified area sources under those regulations. These state law requirements may be more complex or onerous than MACT standards. Therefore, the benefits and costs of reclassifying to area source status will differ greatly from facility to facility and state to state.

For example, North Carolina implements a health-based air toxics rule that, in some instances, is more stringent than federal MACT standards. Under North Carolina law, facilities cannot emit listed toxic air pollutants "in such quantities that may cause or contribute beyond the facility's premises to any significant *ambient air* concentration that may adversely affect human health." 15A N.C. Admin. Code 02D.1104 (emphasis added). Under North Carolina regulations, if a facility is subject to a MACT standard, it is not subject to the North Carolina air toxics rule requirements, but if it is not subject to a MACT standard, it may be

[5] And, to the extent that Petitioners complain that area source "Generally Achievable Control Standards" are too weak, Envtl. Pet'rs' Br. at 10-11, 30 n.8, that is an argument that must be addressed to Congress, not EPA.

subject to the North Carolina rule. 15A N.C. Admin. Code 02D.1111. So, if a facility currently subject to a MACT standard were reclassified as an unregulated area source, North Carolina's air toxics rule would kick in. And, because North Carolina's air toxics rule is a health-based, ambient air standard, North Carolina can potentially require that more sources utilize more controls to meet ambient air concentration limits than required by technology-based MACT standards. *See* 15A N.C. Admin. Code 02D.1104; *see also Sierra Club v. EPA*, 353 F.3d 976, 979-80 (D.C. Cir. 2004) (explaining that, prior to 1990, EPA regulated hazardous air pollutants under a health-based risk standard but that Congress amended the CAA to establish the current technology-based standards in 112 because of EPA's serious difficulties in implementing a risk-based health standard); 42 U.S.C. § 7412(b)(1)(B), Pub. L. No. 91-604, § 112, 84 Stat. 1676, 1685 (1970) (prior version of CAA § 112 that used a health-based standard to regulate hazardous air pollutants).

North Carolina requires toxic air pollutant permits for facilities with emission rates over certain levels. 15A N.C. Admin. Code 02Q.0711. To obtain a permit, dispersion modeling must show that the facility will not cause a violation of any acceptable ambient level or, if it does, that it will not adversely affect human health through a facility-specific risk assessment. 15A N.C. Admin. Code

02Q.0709; 15A N.C. Admin. Code 02D.1106.[6] This modeling must evaluate the facility's impact on ambient air concentrations of toxic pollutants on an annual basis, 24-hour basis, and one-hour basis. 15A N.C. Admin. Code 02D.1106(e). For several toxic pollutants, including formaldehyde and nitric acid, the one-hour analysis is done conservatively by using an emission rate based on the highest facility emissions in any 15-minute period. 15A N.C. Admin. Code 02D.1106(d). Sources are also subject to monitoring, reporting, and recordkeeping requirements. 15A N.C. Admin. Code 02D.1105; 15A N.C. Admin. Code 02D.0600. North Carolina is not alone in adopting its own air toxics program, and as the details of its program illustrate, states are fully capable of addressing the concerns that the Petitioners have raised.

IV. PETITIONERS' STANDING DECLARATIONS FAIL TO SUPPORT THEIR ALARMIST AND SPECULATIVE ASSERTIONS.

Petitioners rely on assumptions and hypotheticals to paint their picture of a dire post-2018 Guidance world. Yet, the real-world examples in their standing declarations for which they submit information–two sources purportedly using the 2018 Guidance–actually disprove their theory. There has not been, and as we have

[6] Further, even if modeling shows that the facility does not itself cause a violation of the acceptable ambient levels, the state can require additional controls if that facility, in combination with other facilities, causes a violation that also may adversely affect human health. 15A N.C. Admin. Code 02Q.0709(d); 15A N.C. Admin. Code 02D.1107.

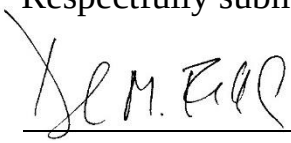
demonstrated above, is not likely to be, a stampede by industry to reclassify major sources as area sources, and certainly not to remove air pollution control technology simply because EPA has now correctly interpreted the plain language of the CAA in the 2018 Guidance.

CONCLUSION

The Court should deny the Petitioners' Petitions to Review the 2018 Guidance.

Dated: January 14, 2019

Respectfully submitted,



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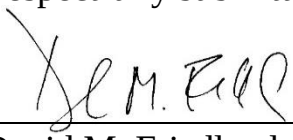
CERTIFICATE OF COMPLIANCE OF BRIEF

I certify, pursuant to Fed. R. App. P. Rule 29(a)(5), that the foregoing Initial *Amici Curiae* Brief, complies with the type-volume limitation of Fed. R. App. P. Rule 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), this document contains 4180 words, as computed by Microsoft Word. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman, 14 points.

Dated: January 14, 2019

Respectfully submitted,



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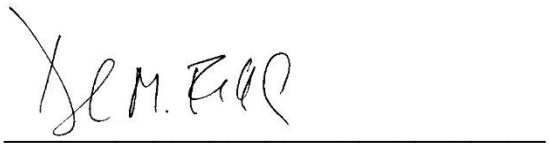
CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2019, I have served the foregoing Initial Brief of American Chemistry Council, American Petroleum Institute, American Wood Council, Chamber of Commerce of the United States of America, Council of Industrial Boiler Owners, and National Association Of Manufacturers as *Amici Curiae* In Support of Respondents was served electronically through the Court's CM/ECF system with the Court and all registered counsel.

Dated: January 14, 2019



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