IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CALIFORNIA COMMUNITIES AGAINST TOXICS, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL INTEGRITY PROJECT, LOUISIANA BUCKET BRIGADE, NATURAL RESOURCES DEFENSE COUNCIL, OHIO CITIZEN ACTION, and SIERRA CLUB, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, *Respondents*.	No.

PETITION FOR REVIEW

Pursuant to Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), Rule 15 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 15, California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, and Sierra Club (collectively, "Petitioners") hereby petition this Court for review of the final action taken by Respondents U.S. Environmental

Protection Agency and Administrator Scott Pruitt in the attached memorandum from William L. Wehrum, dated January 25, 2018 (Attachment 1), and the Federal Register notice published at 83 Fed. Reg. 5543 (Feb. 8, 2018) and titled "Issuance of Guidance Memorandum, 'Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act'" (Attachment 2).

DATED: March 26, 2018

Respectfully submitted,

/s/ Tomás Carbonell (w/permission)
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CALIFORNIA COMMUNITIES AGAINST TOXICS, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL INTEGRITY PROJECT, LOUISIANA BUCKET BRIGADE, NATURAL RESOURCES DEFENSE COUNCIL, OHIO CITIZEN ACTION, and SIERRA CLUB, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, *Respondents*.	No.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Sierra Club and Natural Resources Defense Council make the following disclosures:

California Communities Against Toxics

Non-Governmental Corporate Party to this Action: California Communities Against Toxics ("CCAT").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: California Communities Against Toxics is a non-profit organization that is a project of a non-profit corporation (Del Amo Action Committee) that is organized and existing under the laws of the State of California. It is an environmental justice network that aims to reduce exposure to pollution, to expand knowledge about the effects of toxic chemicals on human health and the environment, and to protect the most vulnerable people from harm.

Environmental Defense Fund

Non-Governmental Corporate Party to this Action: Environmental Defense Fund ("EDF"). Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EDF, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to society's most urgent environmental problems.

Environmental Integrity Project

Non-Governmental Corporate Party to this Action: Environmental Integrity Project ("EIP").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EIP, a corporation organized and existing under the laws of the District of Columbia, is a national nonprofit organization that advocates for more effective enforcement of environmental laws.

Louisiana Bucket Brigade

Non-Governmental Party to this Action: Louisiana Bucket Brigade ("LABB").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: The Louisiana Bucket Brigade is a non-profit environmental health and justice organization organized and existing under the laws of the state of Louisiana. LABB works with communities that neighbor Louisiana's oil refineries and chemical plants and uses grassroots action to create an informed, healthy society with a culture that holds the petrochemical industry and government accountable for the true costs of pollution to create a healthy, prosperous, pollution-free, and just state where people and the environment are valued over profit.

Natural Resources Defense Council

Non-Governmental Corporate Party to this Action: Natural Resources Defense Council ("NRDC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: NRDC, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

Ohio Citizen Action

Non-Governmental Corporate Party to this Action: Ohio Citizen Action.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Ohio Citizen Action is a nonprofit organization existing under the laws of the State of Ohio dedicated to preventing and reducing exposure to pollution and strengthening public health and environmental protections.

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

DATED: March 26, 2018

Respectfully submitted,

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Counsel for Petitioner Natural Resources Defense Council

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Petition for Review** and **Rule 26.1 Disclosure Statement** on Respondents by sending a copy via First Class Mail to each of the following addresses on this 26th day of March, 2018.

Scott Pruitt
EPA Headquarters 1101A
United States Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
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Correspondence Control Unit
Office of General Counsel (2311)
United States Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Robyn Winz
Earthjustice

Attachment 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

FROM: William L. Wehrum
Assistant Administrator

1-25-18

TO: Regional Air Division Directors

This guidance memorandum addresses the question of when a major source subject to a maximum achievable control technology (MACT) standard under section 112 of the Clean Air Act (CAA) may be reclassified as an area source, and thereby avoid being subject thereafter to major source MACT and other requirements applicable to major sources under CAA section 112. As is explained below, the plain language of the definitions of "major source" in CAA section 112(a)(1) and of "area source" in CAA section 112(a)(2) compels the conclusion that a major source becomes an area source at such time that the source takes an enforceable limit on its potential to emit (PTE) hazardous air pollutants (HAP) below the major source thresholds (*i.e.*, 10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAP). In such circumstances, a source that was previously classified as major, and which so limits its PTE, will no longer be subject either to the major source MACT or other major source requirements that were applicable to it as a major source under CAA section 112.

A prior EPA guidance memorandum had taken a different position. *See* "Potential to Emit for MACT Standards – Guidance on Timing Issues." John Seitz, Director, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (May 16, 1995) (the "May 1995 Seitz Memorandum"). The May 1995 Seitz Memorandum set forth a policy, commonly known as "once in, always in" (the "OIAI policy"), under which "facilities may switch to area source status at any time until the 'first compliance date' of the standard," with "first compliance date" being defined to mean the "first date a source must comply with an emission limitation or other substantive regulatory requirement." May 1995 Seitz Memorandum at 5. Thereafter, under the OIAI policy, "facilities that are major sources for HAP on the 'first compliance date' are required to comply permanently with the MACT standard." *Id.* at 9.

The guidance presented here supersedes that which was contained in the May 1995 Seitz Memorandum. The OIAI policy stated in the May 1995 Seitz Memorandum is withdrawn, effective immediately.

EPA anticipates that it will soon publish a *Federal Register* notice to take comment on adding regulatory text that will reflect EPA's plain language reading of the statute as discussed in this memorandum.

BACKGROUND

Relevant Statutory Provisions

Section 112 of the CAA establishes a multi-level regulatory structure for stationary sources of HAP, in which sources meeting a threshold amount of actual or potential HAP emissions – *i.e.*, "major sources" – are generally subject to different standards than sources with HAP emissions below the threshold.[1] Specifically, the CAA defines a "major source" to mean "any stationary source or group of stationary sources located within a contiguous area and under common control 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 or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1). The term "area source" is defined to mean "any stationary source of hazardous air pollutants that is not a major source." *Id.* 42 U.S.C. § 7412(a)(2).[2] In contrast to the OIAI policy, the CAA contains no provision which specifies that, if a major source wishes to switch to area source status, by taking an enforceable limit on its PTE, it must do so prior to the "first compliance date," or that a major source MACT standard will continue to apply to a former major source that, subsequent to the first compliance date, takes an enforceable limit on its PTE to below the applicable thresholds.

EPA's Past Actions

Shortly after EPA began implementing individual MACT standards through rulemaking, the agency received multiple requests to clarify when a major source of HAP could avoid the requirements applicable to major sources by taking measures to limit its PTE below the major source thresholds. In response, EPA produced the May 1995 Seitz Memorandum. At that time, EPA took the position that facilities that are major sources of HAP on the first substantive compliance date of an applicable major source MACT standard must comply "permanently" with that standard, even if the source was subsequently to become an area source by limiting its PTE. The expressed basis for this OIAI policy was that this would help ensure that required reductions in HAP emissions were maintained over time. *See* May 1995 Seitz Memorandum at 9 ("A once in,

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[1] Standards for major sources are based on MACT, which is the level of control achieved by the best controlled sources in the category. *See* 42 U.S.C. § 7412 (d)(2), (d)(3). Standards for area sources may be based on MACT, but alternatively may be based on either generally available control technology (GACT) or generally available management practices that reduce HAP emissions. *Id.* 42 U.S.C. §7412(d)(2), (5).

[2] The CAA section 112 implementing regulations define "major source" and "area source" in nearly identical terms. *See* 40 CFR 63.2. ("Major source means any stationary source or group of stationary sources located within a contiguous area and under common control 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 or more of any combination of hazardous air pollutants, unless the Administrator establishes a lesser quantity, or in the case of radionuclides, different criteria from those specified in this sentence."; "Area source means any stationary source of hazardous air pollutants that is not a major source as defined in this part.")

always in policy ensures that the health and environmental protection provided by MACT standards is not undermined.").

Since issuing the OIAI policy, EPA has twice proposed regulatory amendments that would have altered this interpretation. In 2003, EPA proposed amendments that focused on HAP emissions reductions resulting from pollution prevention (P2) activities. Apart from certain provisions associated with EPA's National Environmental Performance Track Program, that proposal was never finalized. *See* 68 FR 26249 (May 15, 2003); 69 FR 21737 (April 22, 2004).

In 2007, EPA issued a proposed rule to replace the OIAI policy set forth in the May 1995 Seitz Memorandum. 72 FR 69 (January 3, 2007). In that proposal, EPA reviewed the provisions in CAA section 112 relevant to the OIAI interpretation, applicable regulatory language, stakeholder concerns and potential implications. *Id.* at 71-74. Based on that review, EPA proposed that a major source that is subject to a major source MACT standard would no longer be subject to that standard, if the source were to become an area source through an enforceable limitation on its PTE. Under the proposal, major sources could take such limits on its PTE and obtain "area source" status at any time and would not be required to have done so before the "first compliance date," as the OIAI policy provided. *Id.* at 70 ("The regulatory amendments proposed today, if finalized, would replace the 1995 OIAI policy and allow a major source of HAP emissions to become an area source at any time by limiting its PTE for HAP before the major source thresholds."). EPA has never taken final action on this 2007 proposal, which has not been withdrawn.

DISCUSSION

EPA has determined that the OIAI policy articulated in the May 1995 Seitz Memorandum is contrary to the plain language of the CAA, and, therefore, must be withdrawn. Congress expressly defined the terms "major source" and "area source" in CAA section 112(a), in unambiguous language. A "major source" is a source that "emits or has the potential to emit considering controls, in the aggregate," 10 tpy or more of any single HAP or 25 tpy or more of any combination of HAP. An "area source" is defined simply to mean any stationary source that is not a "major source." The OIAI policy had envisioned a source whose PTE is *below* 10 tpy of any single HAP and 25 tpy of any combination of HAP (*i.e.*, an "area source"), but which is nevertheless subject to the requirements applicable to major sources, including major source MACT standards. Notably absent from the statutory definitions is any reference to the compliance date of a MACT standard. Furthermore, the phrase "considering controls" within the definition of "major source" indicates that measures a source adopts to lower its PTE below the major source threshold must be considered as operating to remove it from the major source category regardless of the time at which those controls are adopted.

In short, Congress placed no temporal limitations on the determination of whether a source emits or has the PTE HAP in sufficient quantity to qualify as a major source. To the extent the OIAI policy imposed such a temporal limitation (*i.e.*, before the "first compliance date"), EPA had no authority to do so under the plain language of the statute.[3]

[3] Noteworthy too is the fact that EPA, in promulgating the regulatory definitions of "major source" and "area source" contained in the General Provisions of 40 CFR part 63, copied the statutory language almost verbatim. *See*

Accordingly, EPA has now determined that a major source which takes an enforceable limit on its PTE and takes measures to bring its HAP emissions below the applicable threshold becomes an area source, no matter when the source may choose to take measures to limit its PTE. That source, now having area source status, will not be subject thereafter to those requirements applicable to the source as a major source under CAA section 112, including, in particular, major source MACT standards – so long as the source's PTE remains below the applicable HAP emission thresholds.

Nothing in the structure of the CAA counsels against the plain language reading of the statute to allow major sources to become area sources after an applicable compliance date, just as they have long been able to become area sources before the applicable compliance date. Congress defined major and area sources differently and established different requirements for such sources. The OIAI policy, by contrast, created an artificial time limit that does not exist on the face of the statute by including a temporal limitation on when a major source can become an area source by limiting its PTE.

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.

The Regional offices should send this memorandum to states within their jurisdiction. Questions concerning specific issues and sources should be directed to the appropriate Regional office. Regional office staff should coordinate with Ms. Elineth Torres or Ms. Debra Dalcher, Policy and Strategies Group, Sector Policies and Programs Division (D205-02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541-4347 or (919) 541-2443, respectively; and email address: torres.elineth@epa.gov or dalcher.debra@epa.gov, respectively.

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note 2, *supra*. EPA did not at that time include any language in those definitions that could reasonably be construed to provide support for the OIAI policy. Accordingly, the policy is contrary not only to the plain language of the CAA (which in itself is dispositive of the policy's lawfulness), but to the plain language of EPA's own regulations.

Attachment 2

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart XX—West Virginia

§ 52.2520 [Amended]

■ 2. In § 52.2520, the table in paragraph (c) is amended by:

■ a. Removing the table heading "[45 CSR] Series 39 Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides" and the entries "Section 45–39–1" through "Section 45–39–90";

■ b. Removing the table heading "[45 CSR] Series 41 Control of Annual Sulfur Dioxides Emissions" and the entries "Section 45–41–1" through "Section 45–41–90".

[FR Doc. 2018–02463 Filed 2–7–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL–9973–51–OAR]

RIN 2060–AM75

Issuance of Guidance Memorandum, "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act"

AGENCY: Environmental Protection Agency (EPA).

ACTION: Issuance and withdrawal of guidance memorandums.

SUMMARY: The Environmental Protection Agency (EPA) is notifying the public that it has issued the guidance memorandum titled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act". The EPA is also withdrawing the memorandum titled "Potential to Emit for MACT Standards—Guidance on Timing Issues."

DATES: Effective on February 8, 2018.

ADDRESSES: You may view this guidance memorandum electronically at: *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112-clean.*

FOR FURTHER INFORMATION CONTACT: Ms. Elineth Torres or Ms. Debra Dalcher, Policy and Strategies Group, Sector Policies and Programs Division (D205–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–4347 or (919) 541–2443, respectively; and email address: *torres.elineth@epa.gov* or *dalcher.debra@epa.gov,* respectively.

SUPPLEMENTARY INFORMATION: On January 25, 2018, the EPA issued a guidance memorandum that addresses the question of when a major source subject to a maximum achievable control technology (MACT) standard under CAA section 112 may be reclassified as an area source, and thereby avoid being subject thereafter to major source MACT and other requirements applicable to major sources under CAA section 112. As is explained in the memorandum, the plain language of the definitions of "major source" in CAA section 112(a)(1) and of "area source" in CAA section 112(a)(2) compels the conclusion that a major source becomes an area source at such time that the source takes an enforceable limit on its potential to emit (PTE) hazardous air pollutants (HAP) below the major source thresholds (*i.e.,* 10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAP). In such circumstances, a source that was previously classified as major, and which so limits its PTE, will no longer be subject either to the major source MACT or other major source requirements that were applicable to it as a major source under CAA section 112.

A prior EPA guidance memorandum had taken a different position. *See* Potential to Emit for MACT Standards—Guidance on Timing Issues." John Seitz, Director, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (May 16, 1995) (the "May 1995 Seitz Memorandum"). The May 1995 Seitz Memorandum set forth a policy, commonly known as "once in, always in" (the "OIAI policy"), under which "facilities may switch to area source status at any time until the 'first compliance date' of the standard," with "first compliance date" being defined to mean the "first date a source must comply with an emission limitation or other substantive regulatory requirement." May 1995 Seitz Memorandum at 5. Thereafter, under the OIAI policy, "facilities that are major sources for HAP on the 'first compliance date' are required to comply permanently with the MACT standard." *Id.* at 9.

The guidance signed on January 25, 2018, supersedes that which was contained in the May 1995 Seitz Memorandum.

The EPA anticipates that it will soon publish a **Federal Register** document to take comment on adding regulatory text that will reflect EPA's plain language reading of the statute as discussed in this memorandum.

Dated: January 25, 2018.

Panagiotis E. Tsirigotis,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2018–02331 Filed 2–7–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 27, 54, 73, 74, and 76

[MB Docket No. 17–105; FCC 18–3]

Deletion of Rules Made Obsolete by the Digital Television Transition

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) eliminates rules that have been made obsolete by the digital television transition.

DATES: These rule revisions are effective on February 8, 2018.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Raelynn Remy of the Policy Division, Media Bureau at *Raelynn.Remy@fcc.gov,* or (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (Order), FCC 18–3, adopted and released on January 24, 2018. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW, Room CY–A257, Washington, DC 20554. This document will also be available via ECFS at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-18-3A1.docx.* Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW, Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and