

November 1, 2019

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OAR-2019-0282

Re: Proposed Rule – Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

Dear Administrator Wheeler:

The Northeast States for Coordinated Air Use Management (NESCAUM) offer the following comments on the U.S. Environmental Protection Agency's (EPA's) Proposed Rule "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" [84 Fed. Reg. 36304-36371 (July 26, 2019)] (*hereinafter* the "Reclassification Proposal"). NESCAUM is the regional association of air pollution control agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.¹

While NESCAUM supports the potential of the Reclassification Proposal to correct for errors in initial major source classifications and to provide flexibility for major sources to permanently lower emissions of Hazardous Air Pollutants (HAPs) below MACT requirements through pollution prevention measures, it cannot support the rule as written because it creates the potential for increased HAP emissions from some reclassified sources. In this specific respect, the Reclassification Proposal would allow "backsliding" (i.e., less stringent control) should those sources reclassify under the circumstances allowed in the proposal. Prevention of backsliding is essential because HAP emissions impact public health and the environment.

Overview

The Reclassification Proposal puts into regulation the policies set forth in a January 25, 2018 memorandum from then EPA Assistant Administrator William Wehrum, Office of Air and Radiation. It would allow major sources of HAPs to reclassify to area source status at any time, provided that the source's potential to emit (PTE) HAPs is limited to a level below major source HAP thresholds (10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAPs). The Wehrum memo and this subsequent proposed rule reverse EPA's long-standing "Once In Always In" (OIAI) policy, which allowed reclassifications based on PTE limitations

¹ These comments reflect the majority view of the NESCAUM member agencies. Individual members may hold some views different from the NESCAUM majority consensus.

only until the first substantive compliance date in the National Emissions Standard for Hazardous Air Pollutants (NESHAP) applicable to the source.

The Reclassification Proposal also would amend the definition in the NESHAP General Provisions (40 CFR §63.2) that PTE limitations be federally enforceable to allow non-federal (e.g., state only) enforceable limits, provided that those limits are legally and practicably enforceable. In addition, the proposed regulation specifies that, under certain conditions, reclassifying sources would be allowed to apply for extensions of up to three years to comply with area source NESHAP requirements. Similarly, sources that reclassify and then revert to major source status would be allowed to apply for extensions to major source requirements, if those requirements had changed in the interim. In the Reclassification Proposal, EPA requests comments on a number of issues related to the rationale for and implementation of the proposed rule changes.

Allowing for the reclassification of major sources to area sources should only occur where EPA assures that safeguards are in place so that such reclassifications do not result in less stringent control of HAP emissions. For example, reclassification may be appropriate for sources that have implemented permanent and enforceable pollution prevention measures or other significant process or operational changes, provided that: (1) the source has taken action to lower and maintain its PTE below the major source threshold, (2) emissions reductions have been implemented that are equal to or better than the maximum achievable control technology (MACT) requirements specified in applicable NESHAP, and (2) HAP emissions will not increase as a result of the reclassification. Because some states are restricted by state law from implementing requirements that are more stringent than federal requirements, it is essential that the Reclassification Proposal include a federally enforceable no-backsliding requirement.

NESCAUM's comments on the Reclassification Proposal are presented below. Where comments are responsive to issues raised in comment solicitations in the Reclassification Proposal, the identifiers for those solicitations are indicated.

I. To be consistent with the Clean Air Act (CAA), EPA's Reclassification Proposal must be amended to provide safeguards that prohibit less stringent control of HAP emissions as a result of reclassification. (Comment Solicitations C-2 – C-11)

In the Reclassification Proposal, EPA cites a "plain language reading" of the CAA §112(a) definitions of "major source" and "area source" as its rationale for allowing major sources to reclassify to area sources at any time by accepting enforceable PTE limits. EPA states that because those definitions "create a distinction that is based solely on amount of emissions and PTE, and not timing," there should be no temporal restrictions on the availability of reclassifications. This is a reversal of EPA's long-standing OIAI policy, which did not allow sources to reclassify from major to area source status after the first substantive compliance date in the applicable MACT.

While the CAA definition of “major source” does not specify a deadline for PTE determinations, CAA §112(d)(2) specifies that HAP emissions controls must be consistent with the following criterion:

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the *maximum degree of reduction in emissions of the hazardous air pollutants* [emphasis added] subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies[.]

CAA §112(d)(2) specifically identifies minimum stringency criteria for MACT emissions limitations (MACT floors) for new and existing sources that are based on reductions achieved in practice by similar sources. Clearly, this subsection requires maximum achievable HAP emissions reductions. Nowhere is it stated, or implied, that major source HAP emissions should be reduced only to the major source thresholds. Therefore, it would be inconsistent with the language and intention of §112 to allow a reclassification to occur after the implementation of a MACT if that reclassification would result in a relaxation of emissions reductions that have already been achieved in practice.

The emissions reductions requirements specified in the CAA are designed to minimize the public health and environmental impacts associated with exposure to those pollutants. CAA §112(b)(3)(B) sets forth the following criteria for including a substance on the list of HAPs: “that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.” Note that many of the HAPs are associated with non-threshold health effects, i.e., any additional exposure to those pollutants is associated with an increased health risk. Because HAP emission increases have direct impacts on public health, it is essential that the Reclassification Proposal be amended to include safeguards to ensure that such increases do not occur as a result of reclassification.

The emission impacts analysis (EIA)² done in support of the Reclassification Proposal focuses on 34 sources that reclassified from major to area HAP sources subsequent to the issuance of the January 2018 Wehrum memo. The analysis found that HAP emissions either stayed the same (30 sources) or decreased (1 oil and gas, 3 fuel combustion sources) subsequent to reclassification. In considering the necessity of safeguards, the EPA is requesting information about the likely extent of emissions increases following reclassification.

² E. Torres, *Documentation of the emission impacts analysis for the proposed rulemaking “Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act,”* EPA/OAQPS Memorandum to MM2A Docket No. EPA-HQ-OAR-2019-0282 (May 2019).

The 34 sources analyzed in the EIA, which all requested reclassification very soon after the issuance of the Wehrum memo, are likely not a good representation of the range of sources that may request reclassification in the future. As the EIA acknowledges, “For some facilities, if permitting authorities were to allow for changes in the operating parameters of adjustable add-on controls, these changes could potentially result in emissions increases.”³ The EIA also repeatedly presents a summary conclusion that it does not expect emissions to increase from the reclassified sources as the result of reclassification. Assurance of no emission increases should require more than an expectation. NESCAUM strongly believes that in order to prevent increased risks to public health and the environment, it is essential that reclassification occurs with federally enforceable safeguards that would prohibit emissions increases as a result of reclassification. NESCAUM also believes that enforceable backstop requirements must be in place regardless of how infrequently EPA believes increases are likely to occur.

Note that some states have minor source permitting programs that allow them to establish strict limits on area source emissions. However, a number of states are precluded by state law from adopting restrictions that are more stringent than federal requirements. Therefore, it is essential that provisions that safeguard against HAP emissions increases as a result of reclassification be included in the EPA’s regulation and not be left for later implementation guidance.

II. Facilities that reclassify from major to area sources and then revert to major source status should not be granted extensions. (C-40 – C-48)

As stated above, reclassifications should be approved only for sources that have implemented permanent and enforceable pollution prevention measures or other significant process or operational changes that reduce and maintain the sources’ HAP emissions to levels that are both below major source thresholds and equivalent to or lower than MACT emissions levels. The reclassification request must include documentation showing that emissions will remain below those thresholds so that a source does not later revert to major source status. Such reversions after reclassification would tax the resources of regulatory agencies and may delay compliance with MACT requirements. Therefore, NESCAUM does not support EPA’s proposal to allow MACT compliance extensions of up to 3 years for sources that revert to major source status after reclassifying to area sources.

III. Major HAP sources that reclassify to area sources must continue to be subject to §112(f) residual risk assessment requirements.

Residual risk assessments, as required in CAA §112(f), have not yet been completed for all major source categories. EPA is under a consent decree to complete risk and technology reviews for 33 source categories by October 1, 2021. The Reclassification Proposal must be amended to specify that all major sources that reclassify to area source status must be included in the CAA §112(f) public health and environmental impact analyses. This is especially important

³ Ibid, 28.

because EPA has already completed its evaluation of area sources under the Urban Air Toxics Strategy.

Summary

In summary, EPA's proposal to allow major HAP sources to reclassify to area sources must provide that:

- As specified in enforceable conditions, the source's PTE is below the major source threshold and emissions reductions and limits are consistent with applicable MACT standards;
- The proposed rule is amended to require enforceable conditions specifying that the source's emissions cannot increase due to reclassification;
- If a reclassified source triggers a major source HAP threshold at a later date, that source shall be immediately subject to applicable MACT requirements; and
- Reclassified sources in source categories for which CAA §112(f) residual risk assessments have not yet been conducted must be included in those assessments when they occur.

Sincerely,



Paul J. Miller
Executive Director

cc: NESCAUM directors
Lynne Hamjian, EPA R1
Richard Ruvo, EPA R2