ORAL ARGUMENT NOT YET SCHEDULED

Case No. 18-1085 (and consolidated cases)

IN THE 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.

On Petition for Review of Final Action of the United States Environmental Protection Agency

Opening Proof Brief for Petitioner State of California, by and through the California Air Resources Board and Xavier Becerra, Attorney General

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), Petitioner the State of California, by and through the California Air Resources Board and Xavier Becerra, Attorney General, submit this certificate as to parties, rulings, and related cases.

A. Parties

Petitioners

The following parties appear in these consolidated cases as petitioners: In case number 18-1085, filed March 26, 2018, California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, and Sierra Club. In case number 18-1095, filed April 9, 2018, Downwinders at Risk, Hoosier Environmental Council, and Texas Environmental Justice Advocacy Services. In case number 18-1096, filed April 9, 2018, the State of California, by and through the California Air Resources Board and Xavier Becerra, Attorney General.

Respondents:

The respondents in all the above-captioned cases are the United States Environmental Protection Agency ("EPA") and Andrew Wheeler, in his official capacity as Acting Administrator of the EPA.

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Intervenors:

The following parties have intervened for respondents in all of the above-captioned cases: Air Permitting Forum, Auto Industry Forum, National Environmental Development Association's Clean Air Project, and Utility Air Regulatory Group.

B. Amici in This Case

None at present.

C. Rulings Under Review

Petitioners seeks review of the final action taken by EPA in the memorandum from William L. Wehrum, dated January 25, 2018, published in the Federal Register 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.'"

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D. Related Cases

None at present.

/s/ Kavita P. Lesser
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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Board	California Air Resources Board
Environmental Petitioners	California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, Sierra Club, Downwinders at Risk, Hoosier Environmental Council, and Texas Environmental Justice Advocacy Services
EPA	Environmental Protection Agency
HAPs	Hazardous Air Pollutants
JA	Joint Appendix
MACT	Maximum Achievable Control Technology
OIAI	Once In, Always In Policy
Section 112	42 U.S.C. § 7412
Seitz Memo	Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, Environmental Protection Agency, "Potential to Emit for MACT Standards – Guidance on Timing Issues" (May 16, 1995).
Wehrum Memo	Memorandum from William L. Wehrum, Assistant Administrator for Air and Radiation, Environmental Protection Agency, "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" (January 25, 2018).

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JURISDICTIONAL STATEMENT

Petitioner the State of California, by and through the California Air Resources Board and Xavier Becerra, Attorney General ("California"), seeks judicial review of the final action taken by the United States Environmental Protection Agency ("EPA") in a memorandum issued by William L. Wehrum, EPA's Assistant Administrator for Air and Radiation titled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act." ("the Wehrum Memo"). The Court has exclusive jurisdiction to review final actions taken by EPA under the Clean Air Act. 42 U.S.C. § 7607(b)(1). EPA notified the public of its issuance of the Wehrum Memo on February 8, 2018. 83 Fed. Reg. 5543 (Feb. 8, 2018), JA___. California's petition for review was thus timely filed on April 9, 2018, "within sixty days from the date notice . . . appear[ed] in the Federal Register." 42 U.S.C. § 7607(b)(1).

ISSUES PRESENTED

California requests that the Court determine whether EPA acted unlawfully in:

1. Issuing the Wehrum Memo without complying with the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553(b)-(d);

2. Allowing major sources of hazardous air pollutants to be reclassified as area sources to avoid congressionally mandated requirements applicable to major sources in violation of section 112 of the Clean Air Act, 42 U.S.C. § 7412 ("Section 112"); and

3. Failing to provide any substantial justification for issuing the Wehrum Memo, which lacks factual support and contradicts EPA's previous policy.

STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions are contained in the Addendum at the end of this brief.

STATEMENT OF THE CASE

I. THE FEDERAL FRAMEWORK FOR REGULATING HAZARDOUS AIR POLLUTANTS UNDER THE CLEAN AIR ACT

Section 112 regulates the emissions of "hazardous air pollutants" ("HAPs"), defined to include "pollutants that are known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental effects." *See* 42 U.S.C. § 7412(b)(2). In 1990, Congress amended Section 112 to list more than one hundred specific hazardous air pollutants that EPA would be required to regulate. *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008). Section

112 also requires EPA to promulgate and periodically revise, as appropriate, national emission standards for sources of hazardous air pollutants. 42 U.S.C § 7412(d).

The level of control required depends on whether a source is a "major source" or an "area source." Major sources are those that emit, or have "the potential to emit," 10 tons per year or more of any single hazardous air pollutant, or 25 tons per year or more of any combination of hazardous air pollutants. 42 U.S.C. § 7412(a). Section 112 requires EPA to establish standards for major sources that result in the "maximum degree of reductions in emissions" that EPA determines is "achievable," which is no less than the level achieved in practice by the lowest-polluting facilities in a particular source category. *See* 42 U.S.C. § 7412(d)(2). These standards for major sources are referred to as "maximum achievable control technology" or "MACT" standards. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 594 (D.C. Cir. 2016). In addition to meeting MACT standards, major sources of hazardous air pollutants must obtain operating permits known as Title V permits, which combine all federally enforceable requirements applicable to a facility with respect to all air emissions (i.e., both hazardous air pollutants and non-hazardous air pollutants). 42 U.S.C. §§ 7661a(a), 7661c(a). Title V permits also usually require additional monitoring, reporting, and

recordkeeping requirements in order to ensure compliance. *See* 40 C.F.R. §§ 64.1–64.10.

An area sources is "any stationary source of hazardous air pollutants that is not a major source." 42 U.S.C. § 7412(a)(2). Area sources face far fewer requirements and are often not subject to any hazardous air pollutant standards at all. *See* Declaration of Brian Clerico, California Air Resources Board ("Clerico Decl.") ¶ 12. When EPA sets standards for area sources, it generally requires less stringent reductions than those required by MACT. 42 U.S.C. § 7412(d)(5); *see also* Clerico Decl. ¶ 12. Further, most area sources are not required to obtain Title V permits. Clerico Decl. ¶¶13-14.

II. CALIFORNIA'S FRAMEWORK FOR REGULATING STATE AIR TOXICS AND FEDERAL HAZARDOUS AIR POLLUTANTS

California has its own air toxics program that relies on the rigor of the federal program. The California Air Resources Board ("the Board") is charged with regulating air toxics in the state. The Board, with participation from other state agencies, determines which pollutants are air toxics (*see* Cal. Health & Safety Code §§ 39660–39661) and has currently listed 21 such substances (Cal. Code Regs., tit. 17, § 93000). In addition, all the federal hazardous air pollutants in Section 112 are designated as state air toxics. *Id.* § 93001.

The Board determines appropriate regulatory measures for controlling emissions of air toxics based on a threshold exposure level, if any, or emissions must be reduced to the lowest level achievable, which is generally more stringent than the federal MACT level. Cal. Health & Safety Code § 39666; Clerico Decl. ¶ 17. Unlike the federal MACT standards, California's air toxic control measures generally apply to any source, regardless of emissions level. Clerico Decl. ¶ 17. But, the Board has not adopted California air toxics control measures for over 100 source categories and instead relies upon federal standards. Clerico Decl. ¶ 28. The Board also has a statutory obligation to promulgate state air toxics control measures if it determines that the federal standards are inadequate. Cal. Health & Safety Code § 39658(b)(2). Therefore, the distinction between major and area sources is important to California, as federal standards are currently a significant control of air toxics in the state. Clerico Decl. ¶ 8.

III. EPA'S "SYNTHETIC MINOR SOURCE" PROGRAM AND THE SEITZ MEMO

EPA has also created, by regulation, a "synthetic minor source program" for hazardous air pollutants that allows some major sources to be classified as area sources if the source agrees to enforceable limits on its potential to emit that keep emissions below the major source threshold.

Given the "importance of potential to emit to determining the applicability of [MACT] standards and other requirements," EPA had intended to propose a "separate rulemaking [that] would specify deadlines by which major sources of HAP would be required to establish the . . . enforceability of limitations on their potential to emit in order to avoid compliance…." 59 Fed. Reg. 12,408, 12,413-14 (March 16, 1994), JA ___. Instead, EPA adopted a transition policy.

On May 16, 1995, EPA issued a memorandum titled "Potential to Emit for MACT Standards—Guidance on Timing Issues" ("Seitz Memo"). JA___. Under the Seitz Memo, sometimes referred to as the "once in, always in policy," if a facility is a major source of hazardous air pollutants as of the effective compliance date of an applicable MACT standard, it must comply permanently with that standard, even if the facility subsequently decreases its potential emissions below the 10 tons per year/25 tons per year threshold. Seitz Memo at 5, 9, JA___. In addition, any facility deemed a major source of hazardous air pollutants under Title V is perpetually subject to Title V permitting. Seitz Memo at 9, JA___.

As EPA said at the time, the Seitz Memo "follows most naturally from the language and structure of the statute" and prevents sources from backsliding:

> In many cases, application of MACT will reduce a major emitter's emissions to levels substantially below the major thresholds. Without a once in, always in policy, these facilities could 'backslide' from MACT control levels by obtaining potential-to-emit limits, escaping applicability of the MACT standard, and increasing emissions to the major-source threshold (10/25 tons per year). Thus the maximum achievable emissions reductions that Congress mandated for major sources would not be achieved.

Seitz Memo at 9, JA____. The Seitz Memo "ensures that MACT emissions reductions are permanent and that the health and environmental protection provided by MACT standards is not undermined." *Id.* The legal obligations EPA imposed through the Seitz Memo remained in effect until EPA repealed the memo earlier this year.

IV. EPA'S 2007 RULEMAKING TO REPEAL THE SEITZ MEMO

In 2007, EPA proposed a rulemaking to withdraw and effectively reverse the Seitz Memo by amending its regulations to allow major sources to reclassify as area sources by obtaining enforceable limits at any time. 72 Fed. Reg. 69 (Jan. 3, 2007), JA____. The proposed rule also noted that some sources that switch to area sources would no longer be subject to Title V permitting requirements. 72 Fed. Reg. at 76 n.11, JA____.

EPA acknowledged the potential impact of the proposed rulemaking on emissions of hazardous air pollutants. 72 Fed. Reg. at 73-74, JA____. EPA's

Regional Administrators, along with a chorus of state pollution-control agencies, voiced concerns that the proposed rule would significantly increase emissions. *See e.g.,* EPA-HQ-OAR-2004-0094-0151, NRDC Comments, Att. 2, "Regional Comments on Draft OIAI Policy Revisions at 3-4 (Dec. 13, 2005) (summarizing opinion of EPA Regions that result "would be detrimental to the environment and undermine the intent of the MACT program," due to increased HAP emissions), JA_____; EPA-HQ-OAR-2004-0094-0128, Comments of Minnesota Pollution Control Agency at 2 ("We believe actual emissions of HAPs will rise under this proposal."), JA____; EPA-HQ-OAR-2004-0094-0144, Comments of Pennsylvania Department of Environmental Protection at 2-3 (describing how "EPA's proposed rule allows certain sources to increase harmful emissions of HAPs."), JA_____.[1] EPA took comments through May 2007, but did not take any subsequent action to change or revoke the Seitz Memo.

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[1] *Accord* EPA-HQ-OAR-2004-0094-0074, Comments of Wisconsin Department of Natural Resources at 2 ("It is very likely that emissions will increase as a result of the proposed policy change exactly as stated in the 1995 Seitz Memorandum."), JA____; EPA-HQ-OAR-2004-0094-0142, Comments of Oregon Dep't of Envtl. Qual. at 2 ("[T]he major source threshold will become the de facto MACT threshold"), JA___; EPA-HQ-OAR-2004-0094-0130, Comments of Illinois Envtl. Prot. Agency at 1 ("The repeal of the [Seitz Memo] will lead to 'backsliding ….'"), JA____.

V. THE WEHRUM MEMO REPEALS THE SEITZ MEMO

Without providing any notice or opportunity for comment, in January 2018, EPA issued the Wehrum Memo expressly withdrawing and superseding the Seitz Memo. JA____. The Wehrum Memo implements a new rule by allowing a major source to become a "synthetic minor source" at any time:

> [A] major source which takes an enforceable limit on its [potential to emit] 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 [potential to emit].

Wehrum Memo at 4, JA___. EPA claims that the Seitz Memo is "contrary to the plain language" of the Clean Air Act because "Congress placed no temporal limitations on the determination of whether a source emits or has the [potential to emit] HAP in sufficient quantity to qualify as a major source." Wehrum Memo at 3, JA____.

EPA "anticipates" publishing 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." *Id.* at 2, JA____. EPA directs regional offices to send the memorandum to "states within their jurisdiction." *Id.* at 4, JA___. As of the date of this brief, EPA has not followed the Wehrum Memo with any proposed rulemaking.

VI. THIS PROCEEDING

On March 26, 2018, California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, and Sierra Club filed a petition for review challenging the Wehrum Memo. On April 9, 2018, Downwinders at Risk, Hoosier Environmental Council, and Texas Environmental Justice Advocacy Services filed a petition for review. Petitioners in those matters are collectively referred to herein as "Environmental Petitioners." On April 9, 2018, California filed a petition for review challenging the 2018 Wehrum Memo. The Court consolidated the matters on April 12, and 19, 2018.

STANDARD OF REVIEW

Under both the Administrative Procedure Act and the Clean Air Act, a reviewing court shall hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C) & (D); 42 U.S.C. § 7607(d)(9)(A), (C) & (D).

SUMMARY OF ARGUMENT

The Court has jurisdiction over this matter because the Wehrum Memo is a final reviewable agency action under the Clean Air Act. 42 U.S.C. § 7607(b)(1). The Wehrum Memo states, in no uncertain terms, EPA's legal position on whether a major source of hazardous pollutants can be reclassified as an area source. EPA's action has binding legal effects on regulated entities and state permitting authorities by creating new rights for major sources and relieving major sources from permitting requirements and compliance with major source emission standards.

Given that it imposes legally binding obligations, the Wehrum Memo is also a legislative rule that required notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553(b)-(d). The Wehrum Memo does more than clarify or explain a regulatory term – it effected a substantive change in existing law or policy.

In addition, the Wehrum Memo must be set aside because it is inconsistent with the statutory structure of Section 112. By allowing major sources to reclassify as area sources at any time, EPA has rendered the statutory terms of Section 112 legally meaningless. Section 112 requires the "maximum degree of reduction" including the "prohibition" of hazardous air

pollutants. But under the Wehrum Memo, sources now have the legal right to emit up to the major source threshold.

Finally, even if the Court were to determine that the Wehrum Memo is exempt from notice and comment and EPA had the statutory authority, the Wehrum Memo is arbitrary and capricious because it lacks factual support and entirely ignores the concerns that gave rise to the Seitz Memo. EPA fails to explain why it is no longer concerned that major sources may take less stringent standards if allowed, thereby resulting in an increase in emissions of hazardous air pollutants. Indeed, the Wehrum Memo makes no effort at all to assess what impacts it will have upon emissions.

For these reasons, the Court should vacate the Wehrum Memo in its entirety.

STANDING

To establish Article III standing, a plaintiff must demonstrate: (1) injury-in-fact, which means "an actual or imminent" and "concrete and particularized" harm to a "legally protected interest;" (2) causation of the injury, which means that the injury is "fairly traceable" to the challenged action of the defendant, and (3) redressability, which means that it is "likely," not speculative, and that a favorable decision by a court will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

"States are not normal litigants" and are entitled to "special solicitude" for purposes of standing. *Mass. v. EPA*, 549 U.S. 497, 520 (2007); *accord Air Alliance Houston, et al. v. EPA, et al.*, No. 17-1155, 2018 WL 4000490, at *6 (D.C. Cir. Aug. 17, 2018) ("'[T]here is no difficulty in recognizing [a state's] standing to protect proprietary interests or sovereign interests.'") (quoting 13B Wright & Miller, Fed. Prac. & Proc. § 3531.11.1, Government Standing – States (3d. ed.)).

I. INJURY TO CALIFORNIA'S QUASI-SOVEREIGN INTEREST

As a result of the Wehrum Memo, California's ability to rely on the federal framework to protect California from hazardous air pollutants is in stark question. As stated, California has not promulgated any state air toxics control measures for over 100 source categories and instead relies upon federal MACT standards. Clerico Decl. ¶ 28.

Now, under the Wehrum Memo, California facilities previously subject to federal MACT standards are no longer bound by those standards if they reclassify as an area source by taking an enforceable limit on emissions. Accordingly, based on current estimates, the Wehrum Memo may cause hazardous air pollutant emissions in California to more than double. Clerico Decl. ¶¶ 23, 26. Moreover, many sources of hazardous air pollutants are located near schools or in disadvantaged communities. Clerico Decl. ¶ 23.

These communities already suffer from disproportionate health impacts from air toxics. *Id.* Certain air toxics, such as mercury or dioxin, are exceptionally toxic even in low amounts. *Id.* Thus, even small increases in emissions may have significant negative health consequences for California residents. *Id.* For these reasons, the Wehrum Memo will result in concrete harm to California's quasi-sovereign interest in the health and safety of those residents who live near and work at affected facilities. *See Mass. v. EPA*, *supra*, 549 U.S. at 518-21. California has standing to assert these interests.

II. INJURY TO CALIFORNIA'S PROPRIETARY INTEREST

In addition, the Wehrum Memo will result in concrete harm to California's proprietary interests by, among other things, forcing it to expend state resources to address the increase in emissions of hazardous air pollutants within its borders. Many area sources do not have any applicable federal standard, so if these major sources become area sources, they would no longer be subject to any standard whatsoever, including the associated monitoring and reporting requirements. Clerico Decl. ¶¶ 24-27.

In order to avoid the health impacts of the Wehrum Memo, California – specifically the Board – must commit significant staff time and resources to evaluate whether stricter or additional state regulations or permit requirements are required to ensure that emissions of hazardous air

pollutants do not increase in the state. *Id.* at ¶ 28. This is a considerable burden on the Board, requiring extensive time and resources. Indeed, the Board estimated it would have to expend up to $308,000,000 to fill the regulatory gap created by the Wehrum Memo. *Id.* The Board's resources are already limited and it would either have to divert resources from other programs (detracting from those programs' public health benefits and goals) or secure more funding from the Legislature. *Id.* Thus, the Wehrum Memo creates additional public health risks in California that the Board cannot readily meet with current resources. *Id.* Such significant monetary expenditures are precisely the type of "pocketbook" injury that is incurred by the state itself to establish standing. *See Air Alliance Houston, supra,* 2018 WL 4000490, at *6 (D.C. Cir. Aug. 17, 2018).

California's expenditure of resources may also increase because major sources that reclassify as area sources may cease critical compliance monitoring, reporting, and public review processes required by the Title V permitting program. Clerico Decl. ¶¶ 24-27. Thus, California may lose access to facility information and oversight because of the Wehrum Memo. *Id.* These impacts on state resources alone provides sufficient basis to establish standing. *See Air Alliance Houston, supra*, 2018 WL 4000490, at

*6 (D.C. Cir. Aug. 17, 2018); *see also Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015).

III. INJURY TO CALIFORNIA'S PROCEDURAL INTEREST

Finally, the Wehrum Memo has injured California by depriving the state of "a procedural right to protect [its] concrete interests." *Mass. v. EPA, supra,* 549 U.S. at 517. "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518.

By failing to provide notice of proposed rulemaking and an opportunity for comment, EPA deprived California of its procedural right under the Administrative Procedure Act, 5 U.S.C. § 553(b)-(d), to submit comments on the Wehrum Memo before it became effective. Further, as stated, the Wehrum Memo will cause concrete financial and environmental harm to California. Because California is alleging deprivation of a procedural protection, it need not demonstrate redressability and immediacy here. *See Mass. v. EPA*, *supra,* 549 U.S. at 517-18. Thus, California has established Article III standing.

ARGUMENT

I. THE WEHRUM MEMO IS A REVIEWABLE FINAL AGENCY ACTION

The Court has jurisdiction to hear this challenge, notwithstanding EPA's expected protestations,[2] because the Wehrum Memo is a "final action" reviewable under the Clean Air Act section 307(b)(1), 42 U.S.C. § 7607(b)(1).

An action is final if it marks the "consummation of the agency's decisionmaking process" and is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotation marks and citations omitted). To determine finality, a court will look at whether the agency's position is "sufficiently final to demand compliance with its announced position." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986). "Once the agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Id.*

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[2] *See* EPA Doc. No. 1730526 ("This filing should not be construed as waiving the Agency's right to argue that the challenged memorandum is not final agency action….").

Here, "[i]n litigation over guidance documents, the finality inquiry is often framed as the question of whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). "The most important factor in differentiating between binding and nonbinding actions is 'the actual legal effect (or lack thereof) of the agency action in question.'" *Id.* at 717 (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014)). The Court has recognized that an agency's pronouncements can, as a practical matter, have a binding effect:

> If the agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule . . . if it leads private parties or State permitting authorities to believe it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

The Wehrum Memo easily passes the finality test. It marks the "consummation" of EPA's decisionmaking process by revoking the Seitz Memo and asserting, in no uncertain terms, that the Seitz Memo was inconsistent with the plain meaning of Section 112. The Wehrum Memo

also contains no equivocal or tentative language regarding EPA's legal position. Rather, it states, quite clearly, that "a source that was previously classified as major, and which so limits its [potential to emit], *will* no longer be subject either to the major source MACT or other major source requirements…." Wehrum Memo at 1 (emphasis added), JA___.

The Wehrum Memo also has an actual legal effect on regulated entities and state permitting authorities. The Wehrum Memo "creates new rights" for major sources seeking to reclassify as an area source that were not previously available under the Seitz Memo. *See, e.g.*, 71 Fed. Reg. 70,383, 70,387 (Dec. 14, 2006) (determining that a facility "is not eligible for minor source status" because of the "once in, always in policy."), JA ____; Letter from Steven Riva, EPA to Raymond Yarmac, Sci-Tech, Inc. (June 19, 2000) ("based on the 'once in, always in policy', EPA has determined that Varflex is not eligible for a variance from complying with the MACT and it needs to keep its title V permit active."), JA ___; Letter from Michael Kenyon, EPA to David Horowitz, Tighe & Bond (June 21, 2000) (requiring compliance with MACT and Title V permitting because of the once in, always in policy), JA____.

Thus, the Wehrum Memo revises legal obligations by allowing a major source to reclassify as an area source, relieving major sources from

compliance with MACT standards and Title V permitting requirements. The Wehrum Memo also directs EPA Regional Offices to "send this memorandum to states within their jurisdiction," (Wehrum Memo at 4, JA____) and hence, state permitting authorities are not "free to ignore it" (*Nat'l Mining Ass'n*, *supra*, 758 F.3d at 252). Indeed, the Wehrum Memo has caused legal consequences for California, which relies on the federal MACT standards for HAP emission reductions. Clerico Decl. ¶¶ 17-20. As stated, California must expend resources to evaluate whether stricter or additional state regulations or permit requirements are required to ensure that emissions of hazardous air pollutants do not increase. Clerico Decl. ¶¶ 24-32. The Wehrum Memo will have "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 178.

The finality of the Wehrum Memo is not undone by the possibility that EPA will "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." Wehrum Memo at 2, JA____. Nothing in EPA's intent to conduct a future rulemaking purports to change its legal position. That EPA's action begets another rulemaking process also does not make the Wehrum Memo any less final. "To be final, an action need not be the last administrative action contemplated by the statutory scheme." *Role*

Models Am. v. White, 317 F.3d 327, 331 (D.C. Cir. 2003) (quotation marks and brackets omitted).

And even if EPA may possibly change its position in a future rulemaking, "[t]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (holding EPA guidance final even it was "subject to change"). Moreover, the issues raised here are "purely legal" and the question before the Court is fit for judicial review. *See Cement Kiln Recycling Coal v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007) ([A] purely legal claim in the context of a facial challenge is presumptively reviewable.").

II. EPA VIOLATED THE ADMINISTRATIVE PROCEDURE ACT BY FAILING TO SEEK NOTICE AND COMMENT ON THE WEHRUM MEMO

The Administrative Procedure Act requires agencies to provide "notice of its proposed rulemaking adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process." *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988). Accordingly, before an agency promulgates a legislative rule – i.e., a rule carrying the force and effect of law – it must give notice to the public by publishing its proposed rule in the Federal Register, invite any interested persons to submit

comments, and publish its final rule in the Federal Register. 5 U.S.C. § 553(b)-(d). This notice-and-comment procedure is premised upon notions of basic "fairness and informed administrative decisionmaking." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). Interpretive rules or policy statements, on the other hand, do not require notice-and-comment procedures. *See Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) *citing* 5 U.S.C. § 553.

A. The Wehrum Memo is a Legislative Rule Subject to Notice and Comment Procedures

The tests for whether a rule is final and whether it is legislative are closely related. "[W]here an agency action is clearly final, the question whether [it] 'is a legislative rule that required notice and comment[ ] is easy.'" *Sierra Club v. EPA*, 699 F.3d 530, 535 (D.C. Cir. 2012) (quoting *Nat. Res. Def. Council*, *supra*, 643 F.3d at 320). Agency actions that establish "legally binding requirements for a private party to obtain a permit or license" are legislative rules. *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716-717 (D.C. Cir. 2015). Legislative rules modify or add "to a legal norm based on the agency's own authority flowing from a congressional delegation to engage in supplementary lawmaking." *Id.* By contrast, an interpretive rule does not have "the force and effect of law."

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015). Rather than imposing a new requirement, an interpretive rule simply explains an existing one. *See Mountain States Health All. v. Burwell*, 128 F. Supp. 3d 195, 205 (D.D.C. 2015).

Given that the Wehrum Memo is clearly final, the question of whether it is a legislative rule that required notice and comment "is easy." EPA asserts that the Clean Air Act does not specifically address the question of when a major source can switch to area source status by taking an enforceable limit on its potential to emit. Wehrum Memo at 3, JA___. Thus, the Wehrum Memo "'d[id] more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy.'" *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quoting *Nat'l Family Planning & Reprod. Health Ass'n, Inc.* v. *Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992)). It "supplement[ed]" the Clean Air Act – which according to EPA says nothing about when a major source can reclassify as an area source – and "effect[ed] a substantive change in existing law or policy." *Id.* Accordingly, the Wehrum Memo has "the force and effect of law," *Perez*, *supra*, 135 S. Ct. at 1204, and constitutes a legislative rule.

B. EPA's Failure to Provide Notice and Comment for the Seitz Memo Does Not Render the Wehrum Memo an Interpretive Rule

Given the legally binding requirements imposed by the Wehrum Memo, EPA cannot claim that it is merely an interpretive rule and therefore exempt from the notice and comment procedures of the Administrative Procedure Act. Nor can EPA claim that EPA's failure to provide notice and comment before issuing the Seitz Memo excuses EPA's failure to do so now.

When EPA originally promulgated the implementing regulations for Section 112, it intended to propose a separate rulemaking to "specify deadlines by which major sources" would be required to establish enforceable limits on their potential to emit to avoid compliance with MACT standards. 59 Fed. Reg. 12,408, 12,413-14 (March 16, 1994), JA___. But rather than conduct a separate rulemaking, EPA issued the Seitz Memo. Indeed, as stated, EPA regularly cited the Seitz Memo in communications with states and regulated entities regarding the applicability of MACT standards and Title V permit requirements, indicating that EPA believed the policy to be binding. *See, e.g.*, 71 Fed. Reg. 70,383, 70,387 (Dec. 14, 2006), JA ____; Letter from Steven Riva, EPA to Raymond Yarmac, Sci-Tech, Inc. (June 19, 2000), JA ___; Letter

from Michael Kenyon, EPA to David Horowitz, Tighe & Bond (June 21, 2000) , JA____. Thus, what EPA may have intended as a transition policy effectively became a substantive rule without an opportunity for notice and comment by the public.

Indeed, by EPA's current characterization of the Seitz Memo, it was an attempt by EPA to modify the plain statutory requirements of Section 112 by invoking EPA's own authority. Wehrum Memo at 3, JA_____. Therefore, by EPA's own account, the Seitz Memo it not an interpretive rule but rather a legislative rule. Accordingly, as a legislative rule revising a prior legislative rule, EPA should have complied with the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(d).[3]

III. EPA HAS NO AUTHORITY TO ALLOW MAJOR SOURCES OF HAZARDOUS AIR POLLUTANTS TO RECLASSIFY AS AREA SOURCES AT ANY TIME

The Wehrum Memo is also unlawful because it is inconsistent with the statutory text, structure, and Congressional intent of Section 112. California

[3] Thus, the Supreme Court decision of *Perez v. Mortgage Bankers Ass'n* permitting agencies to amend interpretative rules without notice and comment, does not apply here. 135 S. Ct. 1199, 1206 (2015).

adopts Environmental Petitioners' argument on this issue and emphasizes the following:

By allowing major sources of hazardous air pollutants to become area sources, major sources now have the legal right, under Section 112, to increase emissions to the major source threshold of 10/25 tons per year. Thus, EPA relies on an argument that renders the statutory terms of Section 112 legally meaningless. Section 112(d)(2) states that EPA:

> [S]hall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (*including a prohibition on such emissions, where achievable*) that the Administrator . . . determines is achievable . . . through application of measures, processes, methods, systems or techniques including, but not limited to, measures which (A) reduce the volume of, *or eliminate emissions* of, such pollutants through process changes, substitution of materials or other modification,…."

42 U.S.C. § 7412(d)(2) (emphasis added). Under the Wehrum Memo, EPA could never require a "prohibition" of hazardous air pollutants because sources have a legal right to emit up to the major source threshold. The Wehrum Memo thus runs counter to Section 112's "maximum degree of reduction" and "prohibition" commands and effectively erases Section 112(d)(2)'s "prohibition" language from the statute.

Likewise, the Wehrum Memo is inconsistent with Section 112's requirement that MACT standards require emission reductions to the maximum level achievable, and no less than the level achieved in practice by the lowest-emitting sources. *See* 42 U.S.C. §§ 7412(d)(2) & (3). Specifically, the Wehrum Memo allows major sources to limit their emission reductions to the major source threshold rather than the "emission control that is achieved in practice by the best controlled similar source" (for new sources) and the average emission limitations achieved by the best performing sources (for existing sources). *Id.* The Wehrum Memo in effect creates a MACT ceiling of 9.9 tons per year/24.9 tons per year, undermining the "MACT floor" that "ensures that all HAPs sources 'at least clean up their emission to the level that their best performing peers have shown can be achieved.'" *U.S. Sugar Corp. v. EPA,* 830 F.3d 579, 594 (D.C. Cir. 2016) (quoting *Sierra Club v. EPA*, 353 F.3d 976, 980 (D.C. Cir. 2004).

Finally, the Wehrum Memo advances an interpretation of Section 112 that runs counter to the intent of Congress. As detailed in the Environmental Petitioners' brief, in 1990, Congress reconstructed Section 112 to centralize the federal role in regulating hazardous air pollutants through an aggressive, technology-forcing regime. Now, by creating a loophole for major sources of hazardous air pollutants to escape that regime, EPA has handed an

unfunded mandate to the states – like California – to patch the regulatory gap filled by the Wehrum Memo.

Accordingly, the Court should vacate the Wehrum Memo because it creates a self-defeating statutory approach that runs afoul of basic canons of statutory construction and is contrary to the Congressional intent of Section 112.

IV. THE WEHRUM MEMO IS ARBITRARY AND CAPRICIOUS BECAUSE IT LACKS FACTUAL SUPPORT AND IGNORES THE CONCERNS UNDERLYING THE SEITZ MEMO

Even if the Wehrum Memo is exempt from notice and comment rulemaking, it must be set aside because it is arbitrary and capricious. When an agency changes its policy on an issue:

> [T]he [Administrative Procedure Act] requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.

Perez, 135 S. Ct. at 1209 (quoting *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009)).

Here, EPA fails to explain why it is no longer concerned that major sources of hazardous air pollutants may "backslide" without the policy. Seitz Memo at 9, JA___. Nor does EPA explain how it intends to ensure

that emissions reductions from major sources are permanent, "and that the health and environmental protection provided by MACT standards is not undermined." *Id.*, JA___. Section 112's primary purpose is to achieve "the maximum degree of reduction" in emissions of hazardous air pollutants. 42 U.S.C. § 7412(d)(2). Yet the Wehrum Memo makes no effort to assess what effect it will have upon emissions of hazardous air pollutants. Indeed, the Wehrum Memo does not address at all the potential of a net increase in hazardous emissions.

By ignoring the issue entirely, EPA fails to reconcile the underlying rationale supporting the Seitz Memo. When EPA sought to withdraw the Seitz Memo in 2007, EPA's Regional Administrators voiced "significant concerns about the increases in emissions of hazardous air pollutants that will likely occur from the revisions to the [the Seitz Memo]." EPA-HQ-OAR-2004-0094-0151, NRDC Comments, Att. 1, "Regional Comments on Draft OIAI Policy Revisions at 2 (Mar. 10, 2006), JA____; *accord* EPA-HQ-OAR-2004-0094-0151, NRDC Comments, Att. 2, "Regional Comments on Draft OIAI Policy Revisions at 3 (Dec. 13, 2005) ("the reductions that were intended to be achieved through the MACT standard would be offset by synthetic minor limits that allow sources to emit HAPs at levels higher than those allowed by the MACT standard."), JA___. The EPA regional

offices further stated, "many sources would take limits less stringent than MACT requirements, if allowed." EPA-HQ-OAR-2004-0094-0151, NRDC Comments, Att. 2, JA___.

This concern was echoed by State pollution-control agencies, observing that withdrawing the Seitz Memo would produce a significant increase in emissions of hazardous air pollutants. EPA-HQ-OAR-2004-0094-0128, JA____; EPA-HQ-OAR-2004-0094-0144, JA_____; EPA-HQ-OAR-2004-0094-0074, JA____; EPA-HQ-OAR-2004-0094-0142, JA___; EPA-HQ-OAR-2004-0094-0130, JA____. Indeed, EPA's responsive analysis suggested that it might produce an increase in emissions for certain source categories. *See* EPA-HQ-OAR-2004-0094-0151, NRDC Comments, Att. 9, Letter from William Wehrum, EPA to Hon. John Dingell, U.S. House of Representatives (March 30, 2007) at 15-18 (describing analysis of one industrial source category that may increase emissions), JA___.

Yet EPA has now made the same change without even inquiring into the impact of the Wehrum Memo, or providing any explanation to contradict the assessment of the EPA regional offices and state permitting authorities. Instead, EPA relies on conclusory statements that the Seitz Memo "creates a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce

HAP emissions." Wehrum Memo at 4, JA___. But EPA fails to furnish the basic, necessary factual data or projections to determine how many sources may be incentivized to implement further technological controls or, more importantly, how many sources may avoid MACT obligations to increase emissions of hazardous air pollutants. Further, EPA has not explained how providing incentives to reduce potential to emit will achieve the same maximum achievable reductions as the MACT standard, and provide the same protection for public health and the environment.

For these reasons, the Wehrum Memo is arbitrary and capricious because it lacks factual support, ignores the concerns underlying the Seitz Memo, and fails to address EPA's previous rationale for rejecting an interpretation of Section 112 that allows major sources to be reclassified as area sources at any time.

CONCLUSION

In sum, the Wehrum Memo, which creates a loophole for major sources of hazardous air pollutants to escape stringent, technology-forcing federal emission standards, is unlawful for three reasons. First, the Wehrum Memo is a legislative rule that required notice and comment. The Wehrum Memo does more than clarify or explain a regulatory term – according to EPA, it supplements Section 112 by determining when a major source can reclassify

as an area source. The Wehrum Memo thus effected a substantive change in existing law or policy. Second, the Wehrum Memo is inconsistent with the statutory structure of Section 112 and runs afoul of its Congressional mandate to require emission reductions from major sources to the maximum achievable level. Finally, the Wehrum Memo is arbitrary and capricious because it lacks factual support and entirely ignores the concerns underlying the Seitz Memo that prevented major sources from reclassifying as areas sources at any time.

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For all of the foregoing reasons, California respectfully requests the Court to vacate the Wehrum Memo in its entirety.

Dated: October 1, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Opening Proof Brief, dated October 1, 2018, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's briefing order issued on August 17, 2018, which limited the briefs for Petitioners to a total of 16,500 words in no more than two briefs. I certify that this brief contains 6,620 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and that when combined with the word count of the Environmental Petitioners' brief, the total does not exceed 16,500 words.

/s/ Kavita P. Lesser
KAVITA P. LESSER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opening Proof Brief was filed on October 1, 2018, using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Kavita P. Lesser
KAVITA P. LESSER

Case No. 18-1085 (and consolidated cases)

IN THE 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.

On Petition for Review of Final Action of the United States Environmental Protection Agency

Declaration of Brian Clerico in Support of Petitioner State of California's Standing

DECLARATION OF BRIAN CLERICO

I, Brian Clerico, state and declare as follows:

Experience

1. I have been an Air Pollution Specialist in the Industrial Strategies Division of the California Air Resources Board ("CARB") since April 2017. I have broad experience with air pollution control at stationary sources.

2. My current duties include reviewing and commenting on draft New Source Review ("NSR") and Title V air permits issued by California local air districts to ensure compliance and consistency with federal, State, and local air pollution laws and regulations. I also review and comment on Best Available Control Technology ("BACT") determinations, emission reduction credit banking actions, and rulemakings by local air districts. I also work with the districts to ensure proposed revisions to their NSR rules do not violate the Protect California Air Act of 2003, which prohibits changes to local NSR rules that would exempt a source or reduce its obligations from NSR requirements relative to what those requirements were on December 30, 2002.

3. Before joining CARB, I worked for 16 years at the San Joaquin Valley Air Pollution Control District ("SJVAPCD"), where I was an Air Quality Specialist for one year (2001) and an Air Quality Engineer for 15 years (2002 - 2017). As an Air Quality Engineer, I processed permit applications. I applied local, State, and federal air pollution rules and regulations in reviewing projects seeking a permit to construct, including NSR, New Source Performance Standards, National Emissions Standards for Hazardous Air Pollutants ("NESHAPs"), and California Air Toxic Control Measures. I also processed Title V applications for major sources of air pollution.

4. As an Air Quality Specialist, I prepared risk assessments under the SJVAPCD risk management policy. I identified toxic air contaminants from

permitted sources, selected appropriate emission factors or derived them from source test data, calculated emission rates, and used dispersion modeling programs with acute, chronic, and cancer exposure threshold values to determine the potential increased risk to the most impacted receptor(s). I worked with permit applicants and district engineers to identify potential mitigations to significant risks by process modifications or by pollution controls through determination of BACT for air toxics ("T-BACT"). I also reviewed air toxics plans and reports submitted by permitted facilities subject to reporting requirements under California Assembly Bill 2588 (toxic "Hot Spots").

5. From 2006 – 2011, I worked five semesters as an adjunct instructor of chemistry at State Center Community College District in Fresno and Clovis, California. I taught both lecture and laboratory for their Chemistry 1A and 1B series for science, pre-med, and engineering majors.

6. Prior to working in the field of air pollution, I was a laboratory technician for three years for Los Angeles County Sanitation Districts working in an analytical laboratory performing wet chemical and instrumental testing of water and wastewater samples. I also performed similar work on California and federal Resource Conservation and Recovery Act hazardous wastes for Laidlaw Environmental at a hazardous waste landfill in Buttonwillow, California for one year.

7. I have a Bachelor of Science degree in chemistry from the University of California at Irvine, a Master of Science degree in chemistry from California State University at Fresno, and a Master of Business Administration degree from the University of California at Irvine.

8. Unless otherwise noted, my statements are based on my professional regulatory experience at CARB and SJVAPCD, as well as my review of publicly available records.

Toxics and Air Permitting in California

9. I have reviewed the recent memorandum from William Wehrum, Assistant Administrator of the United States Environmental Protection Agency ("U.S. EPA"), titled "Issuance of Guidance Memorandum 'Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act'" ("Wehrum Memo"). The Wehrum Memo has significant implications for California regulators, including resource costs required to ensure that the public is sufficiently protected from toxic air pollution, as well as impacts on the efficacy and implementation of California's air pollution programs. This declaration focuses primarily on implications for permitting and for the toxic air pollution program. I begin with some background on these programs.

Federal Law

10. Air toxic pollutants, which are identified as toxic air contaminants ("TACs") by California and as hazardous air pollutants ("HAPs") by U.S. EPA, are pollutants that may cause or contribute to an increase in mortality or in serious illness, or which may pose a present or potential hazard to human health. Studies have shown that emissions of these air toxics may increase the risks of developing cancer and non-cancer effects such as premature mortality, heart and lung disease, asthma, increased respiratory symptoms, and reproductive and developmental impacts. Children are especially susceptible to the health effects from air toxics. Recent advances in science have shown that early-life exposures to air toxics contribute to an increased lifetime risk of developing cancer, or other adverse health effects, compared to exposures that occur in adulthood.

11. The federal Clean Air Act ("CAA") creates a framework for regulating HAPs. The applicability of this framework largely depends on whether an emitting source is a major source or an area source. A major source is a stationary source that emits or has the potential to emit 10 or more tons per year of

any one HAP or 25 or more tons per year of any combination of HAPs. 42 U.S.C. § 7412(a)(1). An area source is a stationary source that is not a major source. 42 U.S.C. § 7412(a)(2).

12. Major sources are subject to the maximum achievable control technology, or MACT, required by the NESHAPs. MACT often controls HAP emissions to well below the major source threshold. While some area sources are also subject to MACT standards or NESHAPs, area sources are generally subject to less stringent requirements, if any federal requirements at all.[1] Under the federal program, it therefore matters what type of source (major vs. area) a source is, as that will usually determine what level of control to which the source is subject.

13. Federal controls, such as those implemented by a NESHAP, are reflected in federal operating permits. Specifically, the 1990 CAA Amendments created the Title V operating permit program with the purpose to strengthen enforcement of the CAA by:

- Including all air pollution requirements that are applicable to a source in a single document;
- Enhanced reporting, monitoring, and recordkeeping;
- EPA oversight and veto authority over permit issuance;
- Greater opportunity for federal and citizen enforcement; and
- Enhanced public participation during the permit issuance process.

Sources subject to Title V permitting must also provide a written compliance certification by a responsible official affirming their source is meeting the

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[1] See https://www.epa.gov/stationary-sources-air-pollution/national-emission-standards-hazardous-air-pollutants-neshap-9 (listing the more than 140 sources categories subject to hazardous air pollutant standards, approximately 30 of which are for or otherwise applicable to area sources).

requirements of their permit. In addition, Title V frequently requires additional conditions related to monitoring, reporting, and recordkeeping to ensure federal enforceability of emission limits and optimal functioning of air pollution control devices. All Title V permits require a semi-annual report of required monitoring and an annual compliance certification. Finally, renewing Title V permits requires a formal application by the operator, including a compliance certification and a compliance plan. In contrast, renewing a non-Title V permit at the air district level can be done automatically upon payment of the annual permit fees, depending on the district.

14. The following types of sources are required to obtain Title V permits:

- Major sources of criteria pollutants;
- Major sources of HAPs;
- Certain area sources of HAPs that are subject to a NESHAP;
- Sources subject to Title IV, the Acid Rain Program; and
- Solid waste incineration units.

California's Toxics and Permitting Programs

15. Title V programs are administered by the local air districts in California. Sources required to obtain a Title V permit are subject to additional layers of scrutiny – both federal and public – compared to non-Title V sources. This additional scrutiny is ensured by the notice and comment period mandated under Title V. Thus, prior to issuing, modifying, or renewing the Title V permit, the district submits the permit to U.S. EPA for review and publishes a draft copy of the permit for public review. Any interested party can comment on a draft permit during the comment period. U.S. EPA's decisions to grant or deny a citizen petition are subject to judicial review in federal court.

16. The Title V permit itself does not impose any new control requirements, operational limits, or emission limits on sources; those are required through other emissions standards, such as NSR, NESHAPs, or other state or local prohibitory rules. However, the Title V permit frequently requires additional monitoring, reporting, and recordkeeping that are tailored to the source to ensure the control, operational, and emissions limits are enforceable. These are critical tools for enforcement and accountability.

17. California also has its own air toxics program that relies substantially on the rigor of the federal toxics program. CARB, with participation from the Office of Environmental Health Hazard Assessment and formal review by the Scientific Review Panel, determines which pollutants are TACs and lists them as such by regulation. Cal. Health & Saf. Code §§ 39660–39661. CARB also determines the measures for controlling TAC emissions based on a threshold exposure level, if any; if there is no threshold level, then emissions must be reduced to the lowest level achievable through the best available control technology. *Id.* § 39666. California air toxic control measures or "ATCMs" can take the form of emission limitations, control technologies, operational and/or maintenance conditions, closed system engineering, and other means. *Id.* § 39656. The local air districts must then adopt the ATCMs applicable to their jurisdictions, though they could adopt different measures as long as those measures are equally as or more stringent than those adopted by CARB. *Id.* § 39666. CARB has listed 21 substances as TACs under state law. 17 Cal. Code Regs. § 93000. CARB has also designated all of the federal HAPs in section 112 of the CAA as TACs. 17 Cal. Code Regs. § 93001.

18. California's ATCMs generally apply to any non-vehicular source emitting the TACs regardless of volume or mass. There is generally no volume or

mass threshold for the ATCMs, unlike the federal standards, and thus for the ATCMs the distinction between major and area source does not matter for control.

19. The State Legislature directed CARB to use the NESHAPs instead of using its limited resources to promulgate new toxics standards altogether. Cal. Heath & Saf. Code § 39658(b)(1). However, if CARB finds a NESHAP does not provide sufficient toxics protection for Californians, CARB must promulgate additional state control measures. *Id.* § 39658(b)(2).

20. CARB has established 25 ATCMs for approximately half of the California-listed TACs; for the remaining air toxics (the remaining half of California's TACs and most of the federal HAPs), CARB has used the federal standards. *See* 17 Cal. Code Regs. §§ 93101–93120. Therefore, although California's TAC program does not differentiate between major and area sources, the distinction is still important for air toxics control in California, as the federal standards are largely built around that distinction, and the federal standards are the primary control for about half of the TACs and most of the federal HAPs in California.

Implications of the Wehrum Memo for California

21. Previously, under U.S. EPA's "once in, always in" policy, if a source was a major source for HAPs as of the effective compliance date, that source was permanently considered a major source. This meant the source would always be subject to the applicable federal MACT standard and Title V requirements, even if the source later limited its emissions through pollution controls, process modifications, or enforceable reductions of its potential to emit. Now, under the Wehrum Memo, a major source can agree to an enforceable limit on its potential to emit so that its emissions are below the major source threshold, thus becoming an area source and likely no longer subject to a NESHAP. The result is that CARB and the air districts will no longer be able to rely on the federal Title V and

NESHAP major source programs to protect Californians from toxic air contaminants.

22. I have reviewed the attached chart (see Attachment A), which lists all the federal and California source categories. Those highlighted in light red are those for which CARB does not have its own ATCM and therefore implements the federal standard (to the extent there are corresponding facilities within California and to the extent California permitting authorities have delegation from U.S. EPA).

23. Under the Wehrum Memo, California facilities subject to MACT standards are no longer bound by those standards and can increase their emissions of air toxics by becoming area sources, unless state or air district rules are able to prevent these increases (at an ongoing resource cost for regulatory and compliance activities to California). I am informed and believe that there are at least 42 facilities in California subject to a NESHAP with emissions currently below the major source threshold.[2] These sources can now petition the local district permitting authority to remove the NESHAP requirements from its permit and drop out of the Title V program (if this source were not otherwise subject to Title V permitting). In the worst-case scenario, HAP emissions in California could more than double, increasing by as much as 935 tons per year.[3] Many of these MACT

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[2] Union of Concerned Scientists, *EPA Decision Increases Hazardous Air Pollution Risk*, https://www.ucsusa.org/science-and-democracy/epa-decision-increases-hazardous-air-pollution-risk#.W6AD2rpFyUm.

[3] The worst-case scenarios are discussed because U.S. EPA did not provide any impacts or emissions analyses along with the Wehrum Memo, and it remains unclear exactly how each of the air districts' other rules and regulations will interplay. It is possible that air districts with particularly stringent NSR and air toxics rules would not functionally allow a source to relax its control requirements, as the district's NSR rules may impose stricter control requirements than the NESHAP through BACT or T-BACT. BACT or T-BACT will continue to apply regardless of whether the NESHAP does. However, for districts with less stringent

(continued…)

facilities are located near schools and/or are located in disadvantaged communities. These communities already suffer from disproportionate health impacts from air toxics. Increasing emissions in these communities will have even more significant negative health consequences. If communities are further exposed to air toxics, additional costs would be incurred from health care and missed work and school days. Moreover, certain air toxics, such as mercury or dioxins, are exceptionally toxic even in low amounts; small increases may have disproportionately high harms on the surrounding communities.

24. Many area sources do not have any applicable NESHAP, so if these major sources become area sources, they would no longer be subject to any federal HAP standard whatsoever, including the associated monitoring and reporting requirements. While some NESHAPs still have reporting requirements for area sources, it is important to note that many area-source NESHAPs remain undelegated to air districts, meaning the area-source NESHAP requirements are not directly enforceable by the local permitting authority and may not even appear on the permit. This creates new regulatory burdens for CARB and the air districts if California entities are to maintain clear enforcement and compliance authority.

25. California's expenditure of resources may also increase because sources leaving the major source program under Title V are likely to cease critical compliance monitoring activities. For example, major sources with control devices subject to a NESHAP promulgated or proposed prior to November 15, 1990, are

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(…continued)
permitting programs, or for "grandfathered" sources, NSR may not be available as a backstop. Additionally, for sources that pre-date promulgation of the relevant NESHAP, NSR may consist of controls that are less stringent than the NESHAP. For these older sources, removal of the NESHAP requirements is more likely to lead to an increase in HAP emissions. Thus, the maximum, upper bound on increases or costs are currently the clearest illustrated impacts.

also subject to Compliance Assurance Monitoring (CAM), 40 C.F.R. part 64. CAM requires operators to monitor add-on air pollution control devices for emissions units that: (1) have a pre-control potential to emit greater than or equal to the major source threshold for the controlled pollutant; (2) are subject to an emissions standard or limit; and (3) that depend on the control device to meet the emission standard or limit. Without CAM, it is possible that an emissions source could operate out of compliance undetected for an extensive period until the next emissions source test is performed. Only Title V sources are subject to CAM and a facility that reclassifies from major to area source status would no longer be subject to CAM.

26. At least 25 of the 42 facilities in California are major sources whose source categories do not have an existing NESHAP for area sources. Under the Wehrum Memo, California will lose some degree of control over HAP emissions from those sources, including reporting and monitoring, unless air districts or CARB are able to address these gaps by reallocating regulatory and enforcement resources. These facilities include petroleum refineries; cement, plastics, and chemical manufacturers; and aluminum refining and production. The HAP emissions for these facilities range from as little as 0.001 tons per year to 4.007 tons per year; if these sources became area sources, their emissions could increase to just under 25 tons per year, about a 600% to 2,500,000% increase in HAP emissions. For instance, there is an industrial gas manufacturing facility in Los Angeles County whose HAP emissions (as of 2014) were 0.446 tons per year. Under the Wehrum Memo, this facility may increase its emissions up to 24.554 tons per year (about a 5,500% increase).

27. The air districts, CARB, and the public would also lose access to facility information and oversight as the source no longer is subject to Title V monitoring, reporting, and public review processes. Moreover, CARB and the air

districts will be forced to expend resources to determine whether the remaining controls are sufficient, as state law requires CARB to promulgate ATCMs when it finds that federal measures are inadequate. Thus, in addition to the potential increase in emissions, both CARB and the air districts must make resource allocation decisions in rulemakings or permit proceedings to prevent backsliding and to ensure adequate monitoring.

28. In order to avoid the potential health impacts of increases in air toxics emissions, CARB must, at a minimum, evaluate remaining source emissions and controls and undertake its own rulemaking procedures to adopt its own ATCMs, which generally do not distinguish between major and area sources, in place of the MACT standards. CARB recently analyzed and estimated how much it would cost to adopt the entire federal HAP program in response to a proposed state bill, SB 49, which would have directed CARB to ensure that no backsliding occurs as a result of any change to the CAA or any of its regulations. Using the fiscal conducted for SB 49 to reflect only the MACT standards (see Attachment B), CARB would have to expend at most $2,500,000 per regulation to review, develop, adopt, and implement the new rules. There are about 140 federal MACT standards; California's current ACTMs overlap with nine, and there are seven currently known source categories of which no corresponding sources exist in California. Thus, the estimated maximum total CARB would have to expend would be around $308,000,000, if CARB had to adopt all outstanding MACT standards. The Board's resources are already stretched thinly; to cover this, the Board would either have to divert resources from other programs (detracting from those programs' public health benefits and goals) or secure more funding from the Legislature. Either way, the Wehrum Memo creates additional public health risks in California that the Board cannot readily meet with current resources.

29. The California Legislature has also tasked CARB, through AB 617 (C. Garcia, Statutes of 2017), to further reduce exposure to toxics and criteria air pollutants in disadvantaged communities experiencing high cumulative burdens. AB 617 requires an accelerated retrofit of pollution controls, increased penalties, and more transparency in air quality and emissions data. CARB establishes a list of communities with high cumulative exposure burdens and each year will choose several communities in which to develop emissions reduction programs and/or community air monitoring systems, as deemed appropriate. The air districts in which the chosen communities for community emission reduction programs are located must then evaluate all relevant polluting sources, including major and area/minor sources, and must conduct source apportionment to determine the portion of total emissions attributable to the sources impacting the chosen communities' air quality. Based on the apportionment, the district will then set emissions targets, reduction measures, an implementation schedule, and enforcement measures. The air districts must accomplish this within one year. CARB reviews the districts' plans and either approves or denies them.

30. CARB has recently selected the first round of communities for AB 617 reduction programs. The districts are now in the process of establishing schedules and reduction programs for submittal to CARB in fall 2019.

31. The Wehrum Memo may disrupt the AB 617 process. The analysis done by CARB and the local air districts in developing a list of communities and plans to address pollution standards assumes that major sources of HAPs are permanently subject to federal MACT standards. Now, CARB and the local air districts must reallocate or expend more time and resources to adjust source apportionment, reduction strategies like BACT, and potential emissions reduction targets. The Wehrum Memo may also delay further emissions reductions in disadvantaged communities as additional time and resources are diverted to

address the lack of permanently enforceable MACT standards to prevent any backsliding from current conditions.

32. Finally, U.S. EPA failed to provide notice and comment for the Wehrum Memo and failed to provide any impacts analysis regarding the potential emissions increases caused by the Wehrum Memo. Had U.S. EPA provided notice, California would have commented and raised these issues for U.S. EPA to consider before the legal obligations of the Wehrum Memo took effect. Instead, California has already spent, and will continue to spend, a significant amount of time assessing the impacts of the Wehrum Memo, and the necessary courses of action as a result of those impacts.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 1, 2018.

Brian Clerico

Brian Clerico
Air Pollution Specialist
California Air Resources Board

ATTACHMENT A

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Acrylic/Modacrylic Fiber (area sources)	40 CFR 63 Subpart LLLLLL (6L)	Aerators and Sterilizers (commercial and non-commercial) (ethylene oxide)	17 CCR §§ 93108-93108.5
Aerospace	40 CFR 63 Subpart GG	Asbestos (construction, grading, quarrying, surface mining, and surfacing applications)	17 CCR §§ 93105-93106
Asbestos	40 CFR 61 Subpart M	Automotive Maintenance and Repair (chlorinated TACs)	17 CCR § 93111
Asphalt Processing and Asphalt Roofing Manufacturing	40 CFR 63 Subpart LLLLL	Auxiliary Diesel Engines on Ocean-Going Vessels	17 CCR §§ 93118, 93118.3 (§ 93118 can only be enforced with authorization from USEPA)
Asphalt Processing and Asphalt Roofing Manufacturing (area sources)	40 CFR 63 Subpart AAAAAAA (7A)	Chromate-Treated Cooling Towers	17 CCR § 93103

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Auto and Light Duty Truck Surface Coating	40 CFR 63 Subpart IIII	Chromium Plating and Chromic Acid Anodizing Facilities	17 CCR § 93102
Auto Body Refinishing (area sources) - see Paint Stripping and Miscellaneous Surface Coating Operations		Commercial Harbor Craft (PM, SOx, NOx)	17 CCR § 93118.5
Benzene Transfer Operations	40 CFR 61 Subpart BB	Composite Wood Products (formaldehyde)	17 CCR § 93120
Benzene Waste Operations	40 CFR 61 Subpart FF	Dry Cleaning (perchloroethylene)	17 CCR. § 93109
Beryllium	40 CFR 61 Subpart C	Fuel Sulfur and Other Operational Requirements for Ocean-Going Vessels (PM, NOx, SOx)	17 CCR § 93118.2
Beryllium Rocket Motor Firing	40 CFR 61 Subpart D	Medical Waste Incinerators (dioxins)	17 CCR § 93104

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Boat Manufacturing	40 CFR 63 Subpart VVVV	Motor Vehicle Coating (hexavalent chromium and cadmium)	17 CCR § 93112
Boilers (see Industrial-Commercial-Institutional Boilers)		Non-Ferrous Metal Melting (lead, copper, zinc, cadmium, arsenic, aluminum)	17 CCR § 93107
Brick and Structural Clay Products Manufacturing (see also Clay Ceramics)	40 CFR 63 Subpart JJJJJ	Nonvehicular Diesel Fuel (PM)	17 CCR § 93114
Carbon Black Production (area sources)	40 CFR 63 Subpart MMMMMM (6M)	Onboard Incineration on Oceangoing Ships	17 CCR. § 93119
Cellulose Products Manufacturing	40 CFR 63 Subpart UUUU	Outdoor Residual Waste Burning	17 CCR § 93113
Chemical Manufacturing Industry (area sources): CMAS	40 CFR 63 Subpart VVVVVV (6V)	Retail Service Stations (benzene)	17 CCR § 93101
Chemical Preparations Industry (area sources)	40 CFR 63 Subpart	Stationary Compression Ignition Engines	17 CCR §§ 93115-93115.15

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
	BBBBBBB (7B)		
Chromium Electroplating	40 CFR 63 Subpart N	Thermal Spraying (hexavalent chromium and nickel)	17 CCR § 93101.5
Chromium Compounds (area sources)	40 CFR 63 Subpart NNNNNN (6N)		
Clay Ceramics Manufacturing (see also Brick and Clay Products)	40 CFR 63 Subpart KKKKK		
Clay Ceramics Manufacturing (area sources)	40 CFR 63 Subpart RRRRRR (6R)		
Coke Ovens: Charging, Top Side, and Door Leaks	40 CFR 63 Subpart L		
Coke Ovens: Pushing, Quenching, and Battery Stacks	40 CFR 63 Subpart CCCCC		
Coke Oven By-product Recovery Plants	40 CFR 61 Subpart L		
Combustion Sources at Kraft, Soda, and Sulfite Pulp & Paper Mills (Pulp and Paper MACT II)	40 CFR 63 Subpart MM		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
(see also Pulp and Paper noncombust MACT)			
Commercial Sterilizers (see Ethylene Oxide Emission Standards for Sterilization Facilities)			
Degreasing Organic Cleaners (see Halogenated Solvent Cleaners)			
Dry Cleaning	40 CFR 63 Subpart M		
Electric Arc Furnace Steelmaking Facilities (area sources)	40 CFR 63 Subpart YYYYY		
Engine Test Cells/Stands (see also Beryllium Rocket Motor Firing)	40 CFR 63 Subpart PPPPP		
Ethylene Oxide Emission Standards for Sterilization Facilities (see also Hospital Ethylene Oxide Sterilizers)	40 CFR 63 Subpart O		
Fabric Printing, Coating and Dyeing	40 CFR 63 Subpart OOOO		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Ferroalloys Production (major sources)	40 CFR 63 Subpart XXX		
Ferroalloys Production (area sources)	40 CFR 63 Subpart YYYYYY (6Y)		
Flexible Polyurethane Foam Fabrication Operation	40 CFR 63 Subpart MMMMM		
Flexible Polyurethane Foam Production and Fabrication (area sources)	40 CFR 63 Subpart OOOOOO (6-O)		
Flexible Polyurethane Foam Production	40 CFR 63 Subpart III		
Friction Products Manufacturing	40 CFR 63 Subpart QQQQQ		
Gasoline Dispensing Facilities (area sources)	40 CFR 63 Subpart CCCCCC (6C)		
Gasoline Distribution (Stage 1)	40 CFR 63 Subpart R		
Gasoline Distribution Bulk Terminals, Bulk Plants,	40 CFR 63 Subpart BBBBBB (6B)		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
and Pipeline Facilities (area sources)			
Generic MACT I - Acetal Resins	40 CFR 63 Subpart YY		
Generic MACT I - Hydrogen Floride	40 CFR 63 Subpart YY		
Generic MACT I - Polycarbonates Production	40 CFR 63 Subpart YY		
Generic MACT I - Acrylic/Modacrylic Fibers	40 CFR 63 Subpart YY		
Generic MACT II - Spandex Production	40 CFR 63 Subpart YY		
Generic MACT II - Carbon Black Production	40 CFR 63 Subpart YY		
Generic MACT II - Ethylene Processes	40 CFR 63 Subpart YY		
Glass Manufacturing (area sources)	40 CFR 63 Subpart SSSSSS (6S)		
Glass Manufacturing - Inorganic Arsenic	40 CFR 61 Subpart N		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Gold Mine Ore Processing and Production (area sources)	40 CFR 63 Subpart EEEEEEE (7E)		
Halogenated Solvent Cleaning	40 CFR 63 Subpart T		
Hazardous Organic NESHAP (Synthetic Organic Chemical Manufacturing Industry)	40 CFR 63 Subpart F, G, H, I		
Hazardous Waste Combustors	40 CFR 63 Subpart EEE		
Hospital Ethylene Oxide Sterilizers (area sources) (see also Ethylene Oxide Sterilizers)	40 CFR 63 Subpart WWWWW		
Hydrochloric Acid Production	40 CFR 63 Subpart NNNNN		
Industrial, Commercial and Institutional Boilers and Process Heaters (major sources)	40 CFR 63 Subpart DDDDD		
Industrial, Commercial and Institutional Boilers (area sources) (see also Boiler	40 CFR 63 Subpart JJJJJJ (6J)		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Compliance at Area Sources)			
Industrial Process Cooling Towers	40 CFR 63 Subpart Q		
Inorganic Arsenic Emissions from Primary Copper Smelters	40 CFR 61 Subpart O		
Inorganic Arsenic from Arsenic trioxide and Metallic Arsenic Production	40 CFR 61 Subpart P		
Integrated Iron and Steel	40 CFR 63 Subpart FFFFF		
Iron and Steel Foundries (major sources)	40 CFR 63 Subpart EEEEE		
Iron and Steel Foundries (area sources)	40 CFR 63 Subpart ZZZZZ		
Large Appliances Surface Coating	40 CFR 63 Subpart NNNN		
Lead Acid Battery Manufacturing (area sources)	40 CFR 63 Subpart PPPPPP (6P)		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Leather Finishing Operations	40 CFR 63 Subpart TTTT		
Lime Manufacturing	40 CFR 63 Subpart AAAAA		
Magnetic Tape Surface Coating	40 CFR 63 Subpart EE		
Manufacturing Nutritional Yeast (formerly Bakers Yeast)	40 CFR 63 Subpart CCCC		
Marine Vessel Loading Operations	40 CFR 63 Subpart Y		
Mercury Cell Chlor-Alkali Plants	40 CFR 63 Subpart IIIII		
Mercury Production	40 CFR 61 Subpart E		
Metal Can Surface Coating	40 CFR 63 Subpart KKKK		
Metal Coil Surface Coating	40 CFR 63 Subpart SSSS		
Metal Fabrication and Finishing Source Nine Categories (area sources)	40 CFR 63 Subpart XXXXXX (6X)		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Metal Furniture Surface Coating	40 CFR 63 Subpart RRRR		
Mineral Wool Production	40 CFR 63 Subpart DDD		
Miscellaneous Coating Manufacturing	40 CFR 63 Subpart HHHHH		
Miscellaneous Metal Parts and Products Surface Coating	40 CFR 63 Subpart MMMM		
Misc. Organic Chemical Production and Processes (MON)	40 CFR 63 Subpart FFFF		
Municipal Solid Waste Landfills	40 CFR 63 Subpart AAAA		
Natural Gas Transmission and Storage	40 CFR 63 Subpart HHH		
Nonferrous Foundries: Aluminum, Copper, and Other (area sources)	40 CFR 63 Subpart ZZZZZZ (6Z)		
Off-Site Waste Recovery Operations	40 CFR 63 Subpart DD		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Oil and Natural Gas Production includes Area Sources	40 CFR 63 Subpart HH		
Oil-Water Separators and Organic-Water Separators	40 CFR 63 Subpart VV		
Organic Liquids Distribution (non-gasoline)	40 CFR 63 Subpart EEEE		
Paints and Allied Products Manufacturing (area sources)	40 CFR 63 Subpart CCCCCCC (7C)		
Paint Stripping and Miscellaneous Surface Coating Operations (area sources) (see also Collision Repair Campaign)	40 CFR 63 Subpart HHHHHH (6H)		
Paper and Other Web Surface Coating	40 CFR 63 Subpart JJJJ		
Pesticide Active Ingredient Production	40 CFR 63 Subpart MMM		
Petroleum Refineries	40 CFR 63 Subpart CC		
Petroleum Refineries	40 CFR 63 Subpart UUU		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Pharmaceuticals Production	40 CFR 63 Subpart GGG		
Phosphoric Acid	40 CFR 63 Subpart AA		
Phosphate Fertilizers	40 CFR 63 Subpart BB		
Plastic Parts Surface Coating	40 CFR 63 Subpart PPPP		
Plating and Polishing Operations (area sources)	40 CFR 63 Subpart WWWWWW (6W)		
Plywood and Composite Wood Products (formerly Plywood and Particle Board Manufacturing)	40 CFR 63 Subpart DDDD		
Polyether Polyols Production	40 CFR 63 Subpart PPP		
Polymers & Resins I	40 CFR 63 Subpart U		
Polymers & Resins II	40 CFR 63 Subpart W		
Polymers & Resins III	40 CFR 63 Subpart OOO		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Polymers & Resins IV	40 CFR 63 Subpart JJJ		
Polyvinyl Chloride and Copolymers Production	40 CFR 63 Subpart HHHHHHH (7H)		
Polyvinyl Chloride and Copolymers Production (area sources)	40 CFR 63 Subpart DDDDDD (6D)		
Portland Cement Manufacturing	40 CFR 63 Subpart LLL		
Prepared Feeds Manufacturing (area sources)	40 CFR 63 Subpart DDDDDDD (7D)		
Primary Aluminum	40 CFR 63 Subpart LL		
Primary Copper Smelting	40 CFR 63 Subpart QQQ		
Primary Copper Smelting (area sources)	40 CFR 63 Subpart EEEEEE (6E)		
Primary Lead Processing	40 CFR 63 Subpart TTT		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Primary Magnesium Refining	40 CFR 63 Subpart TTTTT		
Primary Nonferrous Metals-Zinc, Cadmium, and Beryllium (area sources)	40 CFR 63 Subpart GGGGGG (6G)		
Printing and Publishing Surface Coating	40 CFR 63 Subpart KK		
Publicly Owned Treatment Works (POTW)	40 CFR 63 Subpart VVV		
Pulp and Paper (non-combust) MACT (see also Combustion Sources at Kraft, Soda, and Sulfite Pulp & Paper Mills -Pulp and Paper MACT II)	40 CFR 63 Subpart S		
Reciprocating Internal Combustion Engines (RICE) includes area sources	40 CFR 63 Subpart ZZZZ		
Refractory Products Manufacturing	40 CFR 63 Subpart SSSSS		
Reinforced Plastic Composites Production	40 CFR 63 Subpart WWWW		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Rubber Tire Manufacturing	40 CFR 63 Subpart XXXX		
Secondary Aluminum	40 CFR 63 Subpart RRR		
Secondary Copper Smelting (area sources)	40 CFR 63 Subpart FFFFFF (6F)		
Secondary Lead Smelters	40 CFR 63 Subpart X		
Secondary Nonferrous Metals Processing (Brass, Bronze, Magnesium and Zinc) (area sources)	40 CFR 63 Subpart TTTTTT (6T)		
Semiconductor Manufacturing	40 CFR 63 Subpart BBBBB		
Shipbuilding and Ship Repair Surface Coating	40 CFR 63 Subpart II		
Site Remediation	40 CFR 63 Subpart GGGGG		
Solvent Extraction for Vegetable Oil Production	40 CFR 63 Subpart GGGG		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Stationary Combustion Turbines	40 CFR 63 Subpart YYYY		
Steel Pickling - HCL Process	40 CFR 63 Subpart CCC		
Taconite Iron Ore Processing	40 CFR 63 Subpart RRRRR		
Utility NESHAP	40 CFR 63 Subpart UUUUU		
Vinyl Chloride	40 CFR 61 Subpart F		
Wet Formed Fiberglass Mat Production	40 CFR 63 Subpart HHHH		
Wood Building Products Surface Coating (formerly Flat Wood Paneling Products)	40 CFR 63 Subpart QQQQ		
Wood Furniture Surface Coating	40 CFR 63 Subpart JJ		
Wood Preserving (area sources)	40 CFR 63 Subpart QQQQQQ (6Q)		

NESHAP (MACT) Standard Source Categories	Code of Federal Regulations	California ATCM Source Categories	California Code of Regulations
Wool Fiberglass Manufacturing	40 CFR 63 Subpart NNN		
Wool Fiberglass Manufacturing (area sources)	40 CFR 63 Subpart NN		

ATTACHMENT B

Fiscal for Provision 120041(b) – SB 49 (De León and Stern)
California Environmental, Public Health, and Workers Defense Act of 2017
As Amended July 18, 2017

These resource estimates apply to Section 120041(b) only.

Major Provisions	FY 2017-2018	FY 2018-2019	FY 2019- 2020 & on-going	Fund
Task 1 Evaluation: Evaluate up to 20 regulations per year from 140 NESHAP/MACT standards, 10 TSCA Rules, 20 mobile source regulations, 70 area source NESHAPs, and 95 NSPS. The State Air Resources Board will evaluate federal laws or regulations that have been repealed, revised, or amended to be less stringent than the baseline federal standards to determine subsequent actions. (In addition to rule development staff, we have considered contributing resources and included those in our estimates. These include consideration of attorney, inventory, economic, enforcement, and CEQA input/collaboration.)	20 Positions (1 ARS 2, 3 ARS1, 3 SAPS, 6 APS, 6.5 ARE, 0.5 Att III) Plus $500,000 in contract monies for data acquisition, surveys, and inventory assessments **($3,612,000) plus additional 20% overhead costs (ASD/OIS/Chair/EO); and $500,000 contract monies**	20 Positions (1 ARS 2, 3 ARS1, 3 SAPS, 6 APS, 6.5 ARE, 0.5 Att III) Plus $500,000 in contract monies for data acquisition, surveys, and inventory assessments **($3,592,000) plus additional 20% overhead costs (ASD/OIS/Chair/EO); and $500,000 contract monies**	20 Positions (1 ARS 2, 3 ARS1, 3 SAPS, 6 APS, 6.5 ARE, 0.5 Att III) Plus $500,000 in contract monies for data acquisition, surveys, and inventory assessments **($3,592,000) plus additional 20% overhead costs (ASD/OIS/Chair/EO); and $500,000 contract monies**	APCF
Task 2 Rule Development: Develop rules under the Section 100 process for regulations that have been determined to be less stringent than baseline federal standards. (In addition to rule development staff, we have considered contributing	((**Per REG**)) 8 Positions (0.25 ARS 2, 1 ARS1, 1 SAPS, 2.5 APS, 3 ARE, 0.25 Att III) Plus $500,000 in contract monies for source testing	((**Per REG**)) 8 Positions (0.25 ARS 2, 1 ARS1, 1 SAPS, 2.5 APS, 3 ARE, 0.25 Att III) Plus $500,000 in contract monies for source testing	((**Per REG**)) 8 Positions (0.25 ARS 2, 1 ARS1, 1 SAPS, 2.5 APS, 3 ARE, 0.25 Att III) Plus $500,000 in contract monies for source testing	

resources and included those in our estimates. These include consideration of attorney, inventory, economic, laboratory, enforcement, and CEQA input/collaboration. Contracts cost estimates from MLD are also included.)	$1,000,000 for analysis equipment (MLD) **($1,430,500) plus additional 20% overhead costs (ASD/OIS/Chair/EO); $500,000 contract, and $1,000,000 in equipment monies**	**($1,422,500) plus additional 20% overhead costs (ASD/OIS/Chair/EO); and $500,000 contract monies**	**($1,422,500) plus additional 20% overhead costs (ASD/OIS/Chair/EO); and $500,000 contract monies**	
Task 3 Implementation: Implement the rules developed under Task 2. (In addition to rule implementation staff, we have considered contributing resources and included those in our estimates. These include consideration of enforcement staff.)			3.2 Positions (0.2 ARS1, 1 APS, 2 ARE) **($552,200) plus additional 20% overhead costs (ASD/OIS/Chair/EO);**	
Total	**SEE ABOVE for positions and costs by task**	**SEE ABOVE for positions and costs by task**	**SEE ABOVE for positions and costs by task**	**APCF**

Classifications for Estimating Costs:
AGPA = Associate Governmental Program Analyst
AISA = Associate Information Systems Analyst
APS = Air Pollution Specialist
ARE = Air Resources Engineer
ARS I = Air Resources Supervisor I
ARS II = Air Resources Supervisor II
Att III = Attorney III
SAPS = Staff Air Pollution Specialist
SSS II (Tech) = Systems Software Specialist II (Technical)

[$3,592,000 + ($3,592,000 x .2) + $500,000] + [($1,422,500 + ($1,422,500 x .2) + $500,000) x 20 regulations/year] + [$552,200 + ($552,200 x .2)] =

[$4,810,400 per year] + [$44,140,000 per year] + [$662,640 per year] = $49,613,040 per year

$49,613,040 per year / 20 regulations per year = $2,480,652 per regulation

$49,613,040 per year x (124 total regulations/20 regulations per year) = $307,600,848 total