ORAL ARGUMENT NOT YET SCHEDULED

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

No. 18-1085

CALIFORNIA COMMUNITIES AGAINST TOXICS, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PETITION FOR REVIEW OF FINAL ADMINISTRATIVE ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PROOF OPENING BRIEF OF PETITIONERS

DATED: October 1, 2018

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 27(a)(4), Petitioners California Communities Against Toxics, Downwinders At Risk, Environmental Defense Fund, Environmental Integrity Project, Hoosier Environmental Council, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, Sierra Club, and Texas Environmental Justice Advocacy Services submit this certificate as to parties, rulings, and related cases.

(A) Parties and *Amici*

(i) Parties, Intervenors, and *Amici* Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

18-1085	California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, and Sierra Club
18-1095	Downwinders at Risk, Hoosier Environmental Council, and Texas Environmental Justice Advocacy Services
18-1096	State of California

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Respondents:

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

Intervenors:

The Air Permitting Forum, Auto Industry Forum, National Environmental Development Association's Clean Air Project, and Utility Air Regulatory Group are intervenors in these cases.

(iii) *Amici* in This Case

None at present.

(iv) Circuit Rule 26.1 Disclosures

See disclosure form of Petitioners in Nos. 18-1085 and 18-1095 accompanying this brief.

(B) Rulings Under Review

Petitioners seeks review of the final actions taken by EPA in the memorandum from William L. Wehrum, dated January 25, 2018; and at 83 Fed. Reg. 5543 (Feb. 8, 2018) and entitled "Issuance of Guidance Memorandum, 'Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act.'"

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(C) Related Cases

None at present.

Dated: October 1, 2018

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioners make the following disclosures:

California Communities Against Toxics

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

Parent Corporations: None.

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

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

Downwinders at Risk

Non-Governmental Corporate Party to this Action: Downwinders at Risk.

Parent Corporations: None.

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

Party's General Nature and Purpose: Downwinders at Risk, a non-profit corporation organized and existing under the laws of the State of Texas, is a

diverse grassroots citizens group dedicated to protecting public health and the environment from air pollution in North Texas.

Environmental Defense Fund

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

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

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

Environmental Integrity Project

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

Parent Corporations: None.

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

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

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Hoosier Environmental Council

Non-Governmental Corporate Party to this Action: Hoosier Environmental Council ("HEC").

Parent Corporations: None.

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

Party's General Nature and Purpose: HEC is a non-profit corporation organized and existing under the laws of the state of Indiana. HEC is Indiana's largest environmental public policy organization, working to improve our health, economy, and environment for thirty-five years, through education, technical assistance, and advocacy.

Louisiana Bucket Brigade

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

Parent Corporations: None.

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

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

prosperous, pollution-free, and just state where people and the environment are valued over profit.

Natural Resources Defense Council

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

Parent Corporations: None.

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

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

Ohio Citizen Action

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

Parent Corporations: None.

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

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

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Sierra Club

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

Parent Corporations: None.

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

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

Texas Environmental Justice Advocacy Services

Non-Governmental Corporate Party to this Action: Texas Environmental Justice Advocacy Services ("TEJAS").

Parent Corporations: None.

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

Party's General Nature and Purpose: TEJAS is a non-profit corporation organized and existing under the laws of the state of Texas. TEJAS promotes environmental protection through education, policy development, community awareness, and legal action to ensure that everyone, regardless of race or income, is entitled to live in a clean environment.

Dated: October 1, 2018

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS[1]

APA	Administrative Procedure Act
EPA	Environmental Protection Agency
GACT	Generally Available Control Technology
HAP	Hazardous Air Pollutant
MACT	Maximum Available Control Technology
PTE	Potential to Emit

[1] Many of these abbreviations are used in quotations from EPA documents in the record.

JURISDICTIONAL STATEMENT

This petition seeks review of a final action by the Environmental Protection Agency ("EPA") under the Clean Air Act. This Court has jurisdiction under 42 U.S.C. § 7607(b)(1). The petitions were timely filed on March 26, 2018 and April 9, 2018, within sixty days of EPA's publication of its action in the Federal Register, 83 Fed. Reg. 5,543 (Feb. 8, 2018).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are in an addendum.

STATEMENT OF ISSUES

EPA has issued a memorandum that exempts certain large industrial facilities from previously applicable National Emissions Standards for Hazardous Air Pollutants, issued under section 112(d) of the Clean Air Act, 42 U.S.C. § 7412(d).

(1) Did EPA violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b)(3)(A), by failing to provide notice and comment before taking this action?

(2) Does the Clean Air Act unambiguously prevent EPA from requiring a source to continue to comply with major-source standards under 42 U.S.C. § 7412(d), if, after the source complies, it is no longer one whose emissions exceed

10 tons per year of a single hazardous air pollutant ("HAP"), or 25 tons per year of combined hazardous pollutants?

(3) Was EPA's decision arbitrary and capricious because it failed to consider the impact of EPA's new interpretation on air pollution and public health, and on EPA's implementation of section 112?

STATEMENT OF FACTS

I. LEGAL FRAMEWORK

Section 112, enacted in its current form in 1990, established an "aggressive new program for the regulation of hazardous air pollutants." The Hon. Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1721, 1758 (1991). Dissatisfied with prior air-toxics regulation, which relied upon EPA's assessments of health risks and costs, Congress re-built section 112's air-toxics regimes around mandatory, technology-based standards. Congress sought to make standards "based on the *maximum reduction* in emissions which can be achieved by application of best available control technology… the principal focus of activity under section 112." S. Rep. No. 101-228, at 133 (1989), *as reprinted in* A Legislative History of The Clean Air Act Amendments of 1990 (1993) ("Leg. Hist."), 8473. (emphasis added); *accord* H.R. Rep. No. 101-490, at 327, Leg. Hist. 3351. With that aim, Section 112 establishes a progressive, step-by-step regulatory mechanism to establish and implement technology-based controls for major

industrial polluters, in which each step—listing of source-categories, setting technology-based standards, and evaluating the residual risks after such standards are implemented—builds upon the foundation of the regulatory steps that precede it.

A. Listing of Major and Area Source Categories

As a starting point, Congress provided within the statute "an initial list of 191 hazardous air pollutants." Leg. Hist. 8487; *see* 42 U.S.C. § 7412(b)(1). From that start, section 112 (c) required EPA to divide sources of such pollutants into two groups, by listing all categories of "major" sources and certain categories of "area" sources. 42 U.S.C. §§ 7412(c)(1), (c)(3), (c)(6). "Major sources" include "any stationary source or group of stationary sources ... that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1). Area sources are those stationary sources of hazardous air pollutants that are "not a major source." *Id.* § 7412(a)(2). *See* 40 C.F.R. § 63.2. EPA has also created a "synthetic" area source program, which allows a source to be classified as an area source if it agrees to cap its emissions below the major source threshold before becoming subject to a major source standard. *See Sierra Club v. EPA*, 895 F.3d 1, 17 (D.C. Cir. 2018).

Congress ensured that once EPA lists source categories for regulation, it cannot easily backtrack. *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008) (Section 112 "restrict[s] the opportunities for EPA and others to intervene in the regulation of HAP sources."). EPA "may delete [a] source category" from the statutorily-required list only if it determines that "emissions from no source ... exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source." 42 U.S.C. § 7412(c)(9)(B)(ii).

Congress provided both deadlines for listing to be complete, and benchmarks assuring that the listing process achieved the results Congress desired. 42 U.S.C. § 7412(c)(1). For example, EPA was required by November 1995 to list all categories of major sources of hazardous air pollutants and "sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation" under the Clean Air Act. 42 U.S.C. § 7412(c)(3). Congress further required EPA, by that same date, to list source categories emitting certain especially toxic and persistent hazardous air pollutants, such as mercury, dioxins, and polychlorinated biphenyls (PCBs), sufficient to ensure that sources accounting for 90 percent of these pollutants' emissions are subject to emissions standards

under "subsection (d)(2) or (d)(4)" (the standards required for major sources) by no later than November 2000. *Id.* § 7412(c)(6). *See* Leg. Hist. 3344-3346. Each of those benchmarks assumes that EPA's decision to list particular sources within "major" or "area" source categories will reliably "ensure" that those sources are "subject to regulation" as major or area sources. 42 U.S.C. § 7412(c)(3) & (6). *See also Sierra Club v. EPA*, 699 F.3d 530, 531 (D.C. Cir. 2012) ("The obligation [in section 112(c)(6)] comprises both listing *sources* … and promulgating *standards* ….").

B. Maximum Achievable Controls for Major Sources

For the listed categories of major and area sources, section 112 prescribes distinct standard-setting regimes. For the facilities EPA has identified as "major sources" of hazardous air pollutants, the Act requires "specific, strict pollution control requirements on both new and existing sources of HAPs." *New Jersey*, 517 F.3d at 578. These emission controls "shall 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 for new or existing sources." 42 U.S.C. § 7412(d)(2) (emphasis added) (referred to herein as "maximum achievable" standards, and by EPA as "MACT"). Section 112 underscores that mandate by specifying a "floor" for the stringency of EPA's standards for major sources. *Nat'l*

Lime Ass'n v. EPA, 233 F.3d 625, 629 (D.C. Cir. 2000), *as amended on denial of reh'g* (Feb. 14, 2001). Congress again constrained EPA's discretion to backtrack by preventing the Agency, at the standard-setting stage, from exempting any source that it had earlier listed for regulation pursuant to section 112(c), or excluding any hazardous pollutant identified pursuant to section 112(b). *See id.* at 633-34.

C. Residual Risk and Technology Reviews

EPA must review its maximum achievable standards at least every 8 years, "taking into account developments in practices, processes, and control technologies." 42 U.S.C. § 7412(d)(6). Section 112 also requires that EPA evaluate the risks to public health and the environment that remain after technology-based standards for each source category have been implemented. *Id.* § 7412(f)(2)(A). The agency must promulgate new, more stringent, standards for a source category if they are necessary "to provide an ample margin of safety to protect public health" or "to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect." *Id.* EPA has interpreted section 112(f) to only require a residual risk assessment once for each listed category. 81 Fed. Reg. 97,046, 97,048 (Dec. 30, 2016) (noting "one-time review"), JA____.

D. Emissions Controls for Area Sources

Sources listed by EPA as "area sources" are subject to a different standard-setting regime. EPA is not required to establish maximum achievable standards for area sources (except as necessary to satisfy section 112(c)(6)). Instead, EPA may "elect to promulgate standards or requirements" for area sources "which provide for the use of generally available control technologies or management practices," ("generally available control technology" or "GACT" standards). 42 U.S.C. § 7412(d)(5). GACT standards are "in lieu of" both the maximum achievable standards and residual risk standards that section 112 requires for major source categories. *Id. See, e.g.,* 71 Fed. Reg. 17,729, 17,730 (Apr. 7, 2006), JA____.

Congress required EPA to take steps to reduce "the public health risks associated" with area source emissions, including a 75 percent reduction "in the incidence of cancer attributable" to area source emissions. 42 U.S.C. § 7412(k)(1). EPA was required, by 1995, to identify "not less than 30" hazardous air pollutants which pose the greatest risk to public health in large urban areas, to identify the source categories accounting for 90 percent or more of the aggregate emissions of those pollutants, and to "assure" that those sources "are subject to standards" under section 112(d). *Id.* § 7412(k)(3)(A)-(B).

E. Compliance With Section 112 Standards

"After the effective date" of an emissions standard issued under section 112, new sources must confirm their compliance prior to construction. 42 U.S.C. § 7412(i)(1). And "[a]fter the effective date" of an emissions standard that has been "promulgated" and "applicable to a source," "no person may operate such source in violation of such standard," with a narrow exception allowing EPA to extend certain compliance deadlines no longer than four years after the effective date of a standard. *Id.* § 7412(i)(3)(A)-(B).

II. PROCEDURAL BACKGROUND

A. The "Once-In" Policy and EPA's Implementation of Section 112

1. The Once-In Policy

For the past twenty-three years, EPA has administered section 112 pursuant to a rule announced in a memorandum titled "Potential to Emit for MACT Standards—Guidance on Timing Issues" ("Seitz Memo" or "Once-In Policy"), JA____. *See* Opening Brief for Petitioner State of California ("California Br.") at 6-7. Under the Seitz Memo, "facilities may switch to area source status at any time until the 'first compliance date' of the standard," but "facilities that are major sources for HAPs on the 'first compliance date,'" "*are required to comply permanently with the MACT standards* to ensure that maximum achievable

reductions are achieved and maintained." *Id.* at 5, 9, JA____, ____ (describing "once in, always in" policy). *Id.*

No party sought review of this rule. The Once-In Policy remained in effect from 1995 until January of this year. Over those two-plus decades, EPA treated the Policy as binding, and required States and industry to do the same. *See* California Br. 24-25. Though EPA proposed amendments to its implementing regulations that would have altered the Once-In Policy, it never finalized that rule. California Br. 6-7.

In January 2018, EPA took the action challenged here. Memorandum from William L. Wehrum to Regional Air Division Directors (Jan. 25, 2018) (the "Wehrum Memo"), JA____-____. Without providing any public notice or opportunity for comment, or any analysis of potential impacts on air pollution or public health, EPA announced that "the May 1995 Seitz Memorandum is withdrawn, effective immediately," Wehrum Memo 1, JA____. The Agency imposed a new rule: "a major source which takes an enforceable limit on its [potential to emit ("PTE")] and takes measures to bring its HAP emissions below the applicable threshold becomes an area source, no matter when the source may choose to take [those] measures." *Id.* at 4, JA____.

2. *EPA's Implementation of Section 112*

EPA has, over the past two decades, completed its listing of major- and area-source categories, 42 U.S.C. § 7412(c), as well as its promulgation of technology-based standards for those categories, 42 U.S.C. § 7412(d). *See* 40 C.F.R. Part 63, Subparts F-HHHHHHH. As noted above, the Clean Air Act gives EPA discretion to set far weaker standards for all categories of area sources and to set no standards at all for some. *See U.S. Sugar v. EPA*, 830 F.3d 579, 652-653 (D.C. Cir. 2016). For most categories, EPA has done just that. For example, EPA's "generally available control technology" standards for area source industrial boilers require only a "tune-up." *Id.* at 653-654. EPA estimated that requirement would reduce emissions from the boilers to which it applied by just one percent. Environmental Petitioners' Opening Brief at 16-17, 19, American Chemistry Council v. EPA, No. 11-1141 (D.C. Cir. Feb. 18, 2015) (citing EPA-HQ-OAR-2006-0790-2314 ("Impacts Methodology Memo") at 17), JA____-____. For many other area source categories, EPA has not even required those minimal reductions. *See* Environmental Integrity Project, "Toxic Shell Game, EPA Reversal Opens Door to More Hazardous Air Pollution," Stith Decl. Att. C ("EIP Report") at 17 (identifying 21 categories in which only major sources are regulated).

III. PRACTICAL EFFECTS OF THE WEHRUM MEMO

Section 112(d)'s requirement that large industrial polluters undertake the

maximum achievable reductions in their toxic emissions has yielded impressive results for many of the more than 100 categories of major sources that EPA has listed under section 112(c). As pointed out by EPA's own Regional Offices, "[m]any MACT standards require affected facilities to reduce their HAP levels at a control efficiency of 95% and higher." EPA-HQ-OAR-2004-0094-0151, NRDC Comments, Att. ("Regional Comments") at 3, JA____. As a result, EPA's major-source standards have routinely required sources to reduce their emissions well below the major source threshold; at a 95% rate of reduction, even extremely large sources that would otherwise emit 100 tons of hazardous air pollutants each year produce just 5 tons per year.

The Wehrum Memo enables all such sources to escape compliance with the maximum achievable standards prescribed by section 112 for major sources. Any source whose emissions fall below the 10/25 ton-per-year threshold is now eligible to reclassify itself as an "area source" and discard its maximum achievable obligations, as well as associated emissions monitoring and reporting requirements. Because many area source categories are subject to less stringent GACT standards or to no section 112 standards at all, the new policy will allow many formerly major sources to increase their emissions of hazardous pollutants right up to the major source thresholds. Wehrum Memo 4, JA____; Regional Comments at 3, JA____; NRDC Comments at 4, JA____.

The Wehrum Memo does not consider the emissions or public health consequences of allowing these increases to occur. But in 2007, the Chairman of the U.S. House of Representatives Committee on Energy and Commerce asked EPA to assess the effect of removing the Once-In Policy on hazardous emissions. NRDC Comments, Att. 11, ("February 23, 2007 Letter"), at 4-7, JA____. The response from Mr. Wehrum—then and now EPA's Assistant Administrator for Air—confirmed that EPA did not know the answer. Mr. Wehrum confirmed that at least for one category, removing the Once-In Policy would allow a massive increase in emissions, but speculated that other sources would voluntarily reduce their emissions to offset those increases. NRDC Comments, Att. ("March 30, 2007 Letter"), at 2-3 JA____-__. *See also* Regional Comments") at 3-4, JA___-__, ____ (explaining that substantial increase in toxic emissions would result from reversing the Once-In Policy). EPA's former Administrator recently confirmed that EPA has conducted no further analysis of the emissions or health consequences of reversing the Once-In Policy. Testimony of EPA Administrator Scott Pruitt at Senate Environment and Public Works Oversight Hearing (Jan. 30, 2018), https://www.c-span.org/video/?440282-1/epa-administrator-pruitt-testifies-senate-oversight-hearing&live.

To provide some sense of the emissions increase enabled by the Wehrum Memo, Petitioner Environmental Defense Fund evaluated EPA's records to

determine how many major sources are potentially eligible to obtain area status under the Wehrum Memo and increase their emissions. Environmental Defense Fund, "Pruitt's New Air Toxics Loophole, An Assessment of Potential Air Pollution Impacts in the Houston-Galveston Region," Declaration of John Stith ("Stith Decl.") Att B ("EDF Report"). That analysis found 2,617 facilities in EPA's enforcement and compliance database that are identified as major sources for hazardous air pollutants and that emit under the 25 ton-per-year threshold. EDF Report at 4, 5.[2]

Among these facilities are 18 in the Houston area, including 12 chemical plants, which EPA inventories indicate emit below all of the major source thresholds under section 112. *Id.* at 6-7. EDF's report estimated that if these 18 facilities were to take advantage of the Wehrum Memo, they could increase their hazardous emissions by 534,000 pounds (267 tons) per year. *Id.* at 8. The increased pollution would be emitted into the communities surrounding the sources, which include children and elderly people who are especially vulnerable to such pollution, and are made up disproportionately of people of color and poor people. *Id.* at 9-10. EIP Report at 17 (assessing emissions increases enabled by Wehrum

[2] As the report notes, this nation-wide count is subject to some uncertainty because an unknown number of these sources may exceed the 10 ton-per-year threshold for individual toxics and therefore be ineligible to take advantage of the Wehrum Memo. EDF report at 5.

Memo in 12 Midwestern facilities, and noting poverty rates in many adjacent neighborhoods that are "two to more than four times the national average").

The effect of the Wehrum Memo on emissions of mercury, dioxins, and other hazardous air pollutants that are especially toxic in small quantities bears emphasis. Such pollutants are emitted in pounds, grams, or even small fractions of a gram per year, and are dangerous at these levels. *See, e.g.*, 63 Fed. Reg. 17,838, 17,847-48 (Apr. 10, 1998), JA____ (Table 1, showing total aggregate emissions of dioxins ("2,3,7,8-TCDD"), mercury, and other hazardous air pollutants by entire industrial categories amount to pounds, grams, or fractions of a gram); 57 Fed. Reg. 61,970, 61,980-81 (Dec. 29, 1992) (describing "high risk" air toxics for which "high risks of adverse public effects may be associated with exposure to small quantities"), JA____-__; Leg. Hist. 3344-3346 (discussing risks from persistent hazardous air pollutants, including mercury, dioxins, and PCBs). Emissions of such pollutants never even approach the 10/25 ton threshold. The Wehrum Memo allows sources that reduce their emissions of *other* hazardous air pollutants to this threshold to stop controlling their emissions of mercury, dioxins, and other low volume toxics *altogether*.

SUMMARY

In issuing the Wehrum Memorandum without notice and comment, EPA violated the APA. The Memo dramatically alters the compliance requirements for

thousands of industrial facilities across the country, and increases the public's exposure to hazardous air pollutants. These effects—which can only be attributed to the Wehrum Memo, as they have no foundation in the statute's text or EPA's current regulations—render the Wehrum Memo a legislative rule, for which notice and comment was required by the APA. Argument I, *below*.

Even if EPA's violation of the APA could be overlooked, the Agency's claim that the Clean Air Act compelled it to withdraw the Once-In Policy and allow major sources to reclassify themselves as area sources at any time cannot be reconciled with the statutory text and structure. Both show that the statute does not even permit EPA's new interpretation, let alone require it. Argument II.A-C, *below*.

Finally, the Wehrum Memo is arbitrary, capricious and unlawful because EPA failed to consider vitally important aspects of its decision to withdraw the Once-In Policy: increasing public exposure to toxic pollutants, and unwinding EPA's past execution of the statutory scheme. Argument III, *below*.

STANDING

Petitioners' members and their families live, work, and recreate near sources of hazardous air pollutants that have either already switched to area source status under the Wehrum Memo or are now eligible to do so. By switching to area source status, those sources avoid compliance with maximum achievable standards. *See*

Declaration of Susan Poulos ("Poulos Decl."), Att. 1; Declaration of Rebecca Kuiken ("Kuiken Decl.") ¶ 6 & Att. (Sierra Club member living two miles from a major source that emits a wide variety of hazardous air pollutants and has been exempted from compliance with previously applicable standards by the Wehrum Memo); Declaration of Dr. Eric McCloud ("McCloud Decl.") ¶¶ 5-7 (Sierra Club member living ½ mile from a major source exempted from maximum achievable standard by Wehrum Memo); Declaration of Niyaso Cannizzarro ¶ 2-4. Declaration of Veronica Ries ("Ries Decl.") (Member of Hoosier Environmental Council living approximately five miles from major source that has been exempted from compliance with standards by the Memo); Declaration of Katherine Gharrity ("Gharrity Decl.") ¶ 3 (member of Ohio Citizen Action, living in Delaware, Ohio, two miles from Liberty Castings, Inc., a major source that has reported emissions below major source threshold); EIP Report at 15 (identifying Liberty Castings as a major source that would be eligible to seek area source status under the Wehrum Memo); Declaration of Michelle Epstein ¶ 4; Declaration of Amy Ardington ¶ 2-4; Declaration of John Stith ¶ 15 & Att. A (89 EDF members live within three miles of facilities that have changed status as a result of the Wehrum Memo); Declaration of Gina Trujillo ¶ 7 (describing NRDC members affected by Memo).

These members suffer a cognizable injury. Some are, for example, understandably concerned that facilities that have already used the Wehrum Memo

to escape previously applicable air toxics standards will increase their emissions, exposing them to health-harming pollution, diminishing their enjoyment of everyday activities in their homes and gardens, and, in some instances, forcing them to curtail outside activities that they would otherwise enjoy. Kuiken Decl. ¶¶ 4-11; McCloud Decl. ¶¶ 7-12; Ries Decl. ¶¶ 3-4, 8-10. *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) (Individuals who "aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity" show concrete and particularized injury); *NRDC v. EPA*, 489 F.3d 1364, 1371 (D.C. Cir. 2007) (finding standing where pollution threatened to diminish members' enjoyment of certain activities near covered sources).

Other members are concerned that now-eligible plants in their vicinity will take advantage of the Wehrum Memo to switch to area source status and increase emissions of air toxics. *E.g.*, Poulos Decl. at ¶¶ 8-10; Gharrity Decl. at ¶¶ 8-10; Declaration of Jane Williams at ¶¶ 9-10. *See NRDC v. EPA*, 755 F.3d 1010, 1017-18 (D.C. Cir. 2014) (once EPA promulgated regulatory exclusion, "it was 'a hardly speculative exercise in naked capitalism' to predict that facilities would take advantage of it.") (quoting *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006)). These members are concerned about the impacts that such emissions would have on their health and

the health of their families, including exacerbating existing respiratory conditions they or their family members experience. Finnigan Decl. ¶ 11; Declaration of Dr. Patricia Grace Tee Lewis ("Lewis Decl.") ¶¶ 5-12 (Describing range of impacts from hazardous air pollutant exposure to human health); McVay Decl. ¶¶ 3-5 (Hazardous air pollutants can have health impacts for individuals several miles downwind of sources). Such members' concern regarding increased exposure to toxic substances diminish their ability to enjoy gardening, walking, and other outside activities in their community. Gharrity Decl. ¶¶ 4 , 10; Finnigan Decl. ¶ 10. See *Sierra Club v. EPA*, 755 F.3d 968, 973-76 (D.C. Cir. 2014) (finding standing where members were near facilities likely to employ a hazardous gasification process that would release pollution into their environment).

In addition, EPA's failure to provide notice or opportunity to comment on the Wehrum Memo harmed petitioners and their members procedurally by depriving them of an opportunity to object to an action that, at a minimum, threatens Petitioners' members' concrete interest in not being exposed to more toxic pollution. *See* Finnigan Decl. ¶12; *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014).

Finally, the Wehrum Memo also harms both Petitioners and their members by depriving them of information about sources' emissions and compliance status to which they would otherwise be entitled under Title V of the Clean Air Act and

under the compliance and reporting requirements in major source MACT standards. 42 U.S.C. § 7661c(a), 42 U.S.C. §7 6 6 1 b (e); Lewis Decl. ¶¶ 13-14; *see* Kuiken Decl. ¶ 12; Gharrity Decl. ¶ 11; *FEC v. Akins*, 524 U.S. 11, 20 (1998). Depriving Petitioners of this information will reduce their ability to disseminate accurate information about facility emissions and violations to their members and the general public. Lewis Decl. ¶¶ 15-23. *See PETA v. U.S. Dep't of Agriculture.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015); *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). *See Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1262 (D.C. Cir. 2004). Petitioners therefore have standing sufficient to provide this Court with jurisdiction.

STANDARD OF REVIEW

The Administrative Procedure Act and Clean Air Act require a court to set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); 42 U.S.C. §7607(d)(9)(A), (C)-(D).

ARGUMENT

I. EPA'S FAILURE TO PROVIDE OPPORTUNITY TO COMMENT ON THE WEHRUM MEMO VIOLATES THE APA

The Wehrum Memo changed the rights and obligations of companies that operate major sources of hazardous air pollutants as well as the rights of people,

including Petitioners' members, who live near such facilities and are exposed to their toxic emissions. It is, consequently, a legislative rule subject to the APA's notice-and-comment requirements. *See Sierra Club*, 699 F.3d at 534.[3]

Before the Wehrum Memo was issued, "facilities that [were] major sources for HAPs on the 'first compliance date' [were] required to comply permanently with the MACT standard to ensure that maximum achievable reductions in toxic emissions [were] achieved." Seitz Memo 9, JA____; *Accord* Wehrum Memo 2, JA____. Now, "a major source which takes an enforceable limit on its PTE and takes measures to bring its HAP emissions below the applicable threshold becomes an area source, no matter when the source may choose to take measures to limit its PTE." Wehrum Memo 4, JA____. Because it allows sources to stop complying with maximum achievable standards and increase emissions of hazardous air pollutants to levels that were previously unlawful, the Wehrum Memo is "'one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Sierra Club*, 699 F.3d at 534 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

The Wehrum Memo also marks the "'consummation of the agency's decisionmaking process.'" *Id.* (quoting *Bennett*, 520 U.S. at 177-78). Although

[3] The Wehrum Memo was not an action to which the separate procedural requirements in 42 U.S.C. § 7607(d) apply.

EPA "anticipates" it will take comment in the future "on adding regulatory text that will reflect EPA's plain language reading of the statute," Wehrum Memo 2, JA_____, the Memo emphasizes that it is "effective immediately," *id.* at 1, JA____. Indeed, EPA confirmed the Memo's immediate effect to this Court: "once a major source takes an enforceable limit on its potential to emit below the major-source threshold, it is no longer subject to major-source requirements, regardless of when it takes the enforceable limit." Letter from Shea to Langer of January 30, 2018, Sierra Club v. EPA, No. 15-1487 (D.C. Cir. Jan. 30, 2018), JA____. States have, consequently, invited major sources to switch to synthetic minor status, and sources have done so. *See above* at 14-19; Kuiken Decl. ¶ 11 & Att.; Ries Decl. ¶¶ 8-9; Gharrity Decl., Att. A.

"[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*, 699 F.3d at 535 (quoting *NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011)). A rule that has "the force and effect of law" is a legislative rule for which notice and comment is required. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citation omitted). *See also Electronic Privacy Information Ctr. v. U.S. Dep't of Homeland Security*, 653 F.3d 1, 6-7 (D.C. Cir. 2011) (rule is legislative where it "effects 'a substantive regulatory change' to the statutory or regulatory regime") (citation omitted)); *EDF v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983) (agency action that

"jeopardizes the rights and interests of parties … must be subject to public comment prior to taking effect") (*quoting Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980). *See generally Batterton*, 648 F.2d at 704 ("[T]he APA broadly defines rules subject to § 553 procedures, and carves out only limited exceptions."); *Alcaraz v. Block*, 746 F.2d 593, 612 (D.C. Cir. 1984) (exceptions to notice and comment requirements are to be "narrowly construed and only reluctantly countenanced").

That EPA neglected to provide notice and comment for the Seitz Memo, *see above* at 8-9, does not excuse EPA's failure to provide notice and comment prior to issuing the Wehrum Memo. The Seitz Memo, like the Wehrum Memo, was a legislative rule: it compelled sources to either obtain area source status by the "'first compliance date' of the standard," Seitz Memo 5, JA____, or "comply permanently with the MACT standards," *id.* at 9, JA____. As EPA stated the previous year, the function of the Seitz Memo was to "*specify deadlines* by which major sources of HAP would *be required* to establish the Federal enforceability of limitations on their potential to emit in order to avoid compliance with otherwise applicable emission standards or other requirements established in or under part 63"—a function the agency originally acknowledged to be "rulemaking." 59 Fed. Reg. 12.408, 12,410-11 (Mar. 16, 1994), JA____-____ (emphasis added).

Regulated sources, States, and EPA all treated the Seitz Memo as law for 23 years.[4] *See* California Br. 24-25.

In light of the Wehrum Memo's immediate, dramatic effects on sources' compliance with section 112, EPA cannot claim that the Wehrum Memo is merely interpretive, and therefore exempt from the APA's notice and comment requirements, *Perez*, 135 S. Ct. at 1206. *See, e.g.*, Wehrum Memo 3, JA____ (asserting that Once-In Policy "is contrary to the plain language of the CAA"). *See Perez*, 135 S. Ct. at 1204; *Sierra Club*, 699 F.3d at 535. Nor is the Wehrum Memo interpretive just because EPA claims that it is providing a "plain language" interpretation. Wehrum Memo 1, JA____. The Memo observes only that the text of section 112 is silent as to the subject matter it addresses. *Id.* at 3, JA____. Even if that were true, an agency inserting its preferred understanding into statutory silence is exercising its own authority, not merely reciting Congressional instructions. *Peter Pan Bus Lines v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). *Cf. Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979) (Interpretive rules "have no effect beyond that of the statute"). And as set forth below, the Wehrum Memo is not required by section 112's plain text—it is incompatible with it.

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[4] Because the Wehrum Memo revises a prior legislative rule, the Supreme Court's decision in *Perez* addressing amendment of interpretative rules is inapposite. 135 S. Ct. at 1206.

II. THE TEXT, STRUCTURE, AND CONTEXT OF SECTION 112 CONTRADICT THE WEHRUM MEMO.

The Wehrum Memo's rationale, in its entirety, is that because the "statutory definitions" of "major source" and "area source" lack a "reference to the compliance date of a [maximum achievable] standard," the Clean Air Act gives EPA "no authority" to depart from the interpretation the Memo imposes. Wehrum Memo 3-4, JA____ (purporting to adopting the sole interpretation permitted by the "plain language" of the Act). The Memo does not claim to resolve any statutory ambiguity; it therefore receives no deference under *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). *Peter Pan Bus Lines*, 471 F.3d at 1354. Consequently, the only question before the Court is whether the Clean Air Act demonstrates that Congress "'directly addressed' and rejected" the regime by which EPA has administered section 112 for the past twenty-three years. *Sierra Club v. EPA*, 167 F.3d 658, 661 (D.C. Cir. 1999) (describing first *Chevron* step) (citation omitted). If the Act contains sufficient ambiguity to allow a different result, the Agency's action "must be declared invalid." *Arizona v. Thompson*, 281 F.3d 248, 259 (D.C. Cir. 2002); *American Petroleum Inst. v. EPA*, 906 F.2d 729, 740 (D.C. Cir. 1990) (Where "EPA concluded that the terms of the [statute] left it *no choice*,"

action can be upheld if Agency prevails at "*Chevron* step one.").[5] Not only does the Act not compel the rule adopted by the Wehrum Memo—it is flatly inconsistent with it.

A. **The Plain Text of Section 112(i)(3)(A) Establishes that the Requirements Applicable to a Source Are Defined at the Effective Date**

The plain text of the statutory provision addressing compliance with section 112 standards, section 112(i)—which the Wehrum Memo ignores entirely—contradicts the interpretation advanced in the Wehrum Memo. 42 U.S.C. § 7412(i). Section 112(i)(3)(A) states: "After the effective date of any emissions standard, limitation, or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard." 42 U.S.C. § 7412(i)(3).[6] Under that provision, once a standard (a) *has* been "promulgated," (b) and *has* been "applicable" to a source (c) at a time "after [the standard's] effective date," that source is precluded from operating in violation of the promulgated standard. *Id.*

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[5] EPA undertook none of the "formal administrative procedure" that is the usual prerequisite of *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

[6] Section 112(i)(1) uses parallel language to restrict the construction or modification of new major sources. 42 U.S.C. § 7412(i)(1) ("After the effective date of any emissions standard [under, *inter alia*, 112(d)] … no person may construct any new major source or reconstruct any existing major source subject to such emission standard" until compliance determination).

In connecting the date on which standards are promulgated and effective to the applicability of those standards, section 112(i) stands out from other parallel provisions of the Act. Where Congress intended applicability to be assessed in the fashion contemplated by the Wehrum Memo, it separated the question of whether a standard is "applicable" from reference to effective dates and EPA's promulgation of the standard. *E.g.* 42 U.S.C. § 7411(e) ("After the effective date [of a standard] promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard or performance applicable to such source."). *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 241-42 (1989) (term may be given independent meaning, only where term is clearly "independent" of prior reference).

Section 112(i)(3)(A), in contrast, speaks to the question the Wehrum Memo addresses—the standards with which particular sources must comply—in terms that are expressly retrospective, and refer to a particular point in EPA's regulatory process.[7] It asks—in the past tense—whether a standard was both "promulgated" and "applicable to a source," and whether that standard's "effective date" has passed; if the answer is "yes," the prohibition is absolute: "no person" may operate

[7] Like section 112(i)(3), section 112(a)(4) looks back to a distinct prior point in EPA's step-by-step implementation of the statute. It provides that the more stringent "new source" standards apply to a source if EPA has "first propose[d] … an emission standard applicable to such source" prior to the commencement of the source's construction. 42 U.S.C. § 7412(a)(4).

any such source in violation of the standard. 42 U.S.C. § 7412(i)(3)(A). *See Utility Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 440 (D.C. Cir. 2018) (where statute uses "past participle" word "disposed," it applies "even if the act of disposal took place at some prior time"); *Cacieri v. Salazar*, 555 U.S. 379, 388 (2009) (where statute refers to members of an Indian tribe "under federal jurisdiction" at a specific point in time, plain text establishes that whether tribe is under jurisdiction must be made at that time).

Section 112(i)(3)'s strictly limited exceptions to its prohibition on operating in violation of emission standards confirm that section 112(i) does not contain the opt-out provision that the Wehrum Memo seeks to insert. For "an existing source," EPA may establish a compliance date that is "as expeditious as practicable," but "in no event later than 3 years after the effective date." 42 U.S.C. § 7412(i)(3)(A). And EPA (or a State) may give "an existing source up to 1 additional year" to comply, if "necessary for the installation of controls." *Id.* at § 7412(i)(3)(B). By providing these exceptions expressly and in detail, the statutory text shows "Congress considered the issue of exceptions and … limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).

The plain text of section 112(i)(3) thus establishes that sources which are major at any point after a major-source standard becomes effective are bound by that major-source standard (with a limited three- or four-year exception available

for existing sources). At a minimum, that text permits other results than those imposed by the Wehrum Memo—enough, in this context, to require the Memo's vacatur. *American Petroleum Inst. v. EPA*, 906 F.2d at 740 (agency rule relying on plain text rationale is invalid, even if statute is ambiguous).

B. The Wehrum Memo Is Fundamentally Inconsistent With Section 112's Statutory Structure

Other provisions of section 112—all of which go unmentioned in the Wehrum Memo—confirm the statute's emphasis on securing compliance when major-source standards become effective and applicable to a source. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (Court's duty is "to construe statutes, not isolated provisions" (citation omitted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]ords must be read "in their context and with a view to their place in the overall statutory scheme.").

1. The Wehrum Memo Is Inconsistent With Section 112's Mandate of "Maximum Achievable" Controls

The Wehrum Memo effectively replaces section 112's nondiscretionary requirement that major sources be subject to "maximum achievable" controls with an annual emissions cap of 10 tons per year of any one hazardous pollutant, or 25 tons combined. That result cannot be reconciled with section 112's core, technology-based mandate: that large, industrial sources of air toxics implement the "*maximum* degree of reduction in [toxic] emissions" that EPA "determines is

achievable," "*including a prohibition on such emissions, where achievable.*" 42 U.S.C. § 7412(d)(2) (emphasis added) (also requiring application of measures which "eliminate emissions" of hazardous pollutants). *See* California Br. 26-27.

The Wehrum Memo effectively prevents EPA's standards from ever accomplishing that result; any source whose controls are capable of "eliminat[ing] emissions" need only reduce its emissions to just below 25 tons of hazardous pollutants per year (and just below 10 tons of any individual pollutant). At that threshold it would be exempt from any major source standard issued under section 112(d)(2), including any requirement to eliminate emissions or reduce them by the maximum achievable degree. EPA's standards will consequently cease achieving any reduction below these major-source thresholds, let alone "a prohibition on emissions." Congress meant the major-source threshold to be a non-discretionary trigger for maximum achievable control technology-based regulation, Leg. Hist. 176. The Wehrum Memo transforms it into a *de facto* substitute for such technology-based regulation.

The Wehrum Memo is also inconsistent with section 112(d)(3)'s floor provisions, which constrain EPA's discretion to avoid such maximal reductions. 42 U.S.C. § 7412(d)(3). *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 861-62 (D.C. Cir. 2001). The Wehrum Memo replaces these floors—the actual emissions of the best-performing sources—with an effective ceiling. No matter

what the best performers achieve, EPA's major-source standards can securely achieve no more than a reduction to 10 tons per year of a single pollutant (or 25 tons combined). Any source that complies with a standard that brings its emissions below that 10/25-ton threshold will be eligible to invoke the Wehrum Memo, and increase its emissions to that threshold. For many of the most dangerous pollutants listed in section 112(b), a 10-ton threshold requires no pollution controls *at all*. *See* 75 Fed. Reg. 63,260, 63,275-76 (Oct. 14, 2010) ("Sixth highest [mercury] emitting source category," *as a whole*, emits "about 3.1 [tons per year]" of mercury). *Cf. Nat'l Lime Ass'n*, 233 F.3d at 633-34 (section 112(d) prohibits 'no control' floors). That result is fundamentally inconsistent with the text and structure of the statute. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 630 (2018); *Clark v. Rameker*, 134 S. Ct. 2242, 2249 (2014).[8]

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[8] That inconsistency extends to section 112's broader treatment of "major" and "area" sources. Major industrial sources of air toxics are subject to technology-based standards, with subsequent health-based review aimed at eliminating most "risk[s] to public health" from such sources. 42 U.S.C. § 7412(d)(2) & (f). Area sources are addressed through less rigorous, and more discretionary "generally available control technologies or management practices," 42 U.S.C. § 7412(d)(5), with an emphasis on "urban areas" where smaller facilities, like dry-cleaners, might be concentrated, 42 U.S.C. § 7412(k). That architecture makes little sense if "area sources" include any major industrial facility that has adopted effective pollution controls. *See* Leg. Hist. 8491 (area source program designed for "the small, diverse facilities and activities which routinely release toxic air pollutants and may include sources like wood stoves, service stations, dry cleaners, and automobiles, trucks, and buses").

2. *The Wehrum Memo Conflicts with Section 112's Comprehensive Limits on Hazardous Air Pollutants*

Permitting sources to escape major-source standards long after those standards take effect unravels section 112's careful sequencing of regulatory actions. For example, section 112(c)(1) required EPA, by November 1991, to list "all categories and subcategories of major sources and area sources" for the hazardous air pollutants identified in section 112(b). 42 U.S.C. § 7412(c)(1). EPA then had until November 1995 to list "sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation," and set a similar deadline for regulating sources accounting for 90 percent of seven specific pollutants. *Id.* § 7412(c)(3), (6).

These statutory requirements can only be fulfilled if major sources remain reliably subject to continuous, permanent compliance with major-source standards. Section 112(c)(3), for example, instructs EPA to list "sufficient categories and subcategories of area sources" to "ensure" that "90 percent" of particular hazardous pollutants were subject to regulation. 42 U.S.C. § 7412(c)(3). The Wehrum Memo makes fulfillment of that task impossible; EPA cannot "ensure" that 90 percent of area source emissions are subject to regulation, if the quantity of area source emissions can expand at any time due to once-major sources dropping

into area source status (even as many of their emissions *rise* as a result of that shift).

Nor can EPA "ensure" that "sources accounting" for 90 percent of the substances prioritized in section 112(c)(6) "are subject to standards" under sections 112(d)(2) and (d)(4). 42 U.S.C. § 7412(c)(6). Because a major source that drops into an area source category that EPA has not listed for regulation under section 112(c)(6) can escape maximum achievable standards, EPA has no means to "ensure" that sources accounting for any specified percentage of emissions are "subject" to such standards. *See NRDC v. EPA*, 822 F.2d 104, 123-24 (D.C. Cir. 1987) (where statute prescribes "technology-based standards," and "regulatory scheme is structured around a series of increasingly stringent technology-based standards," interpretation that would permit "bypasses" allowing sources to backslide is "at odds with the statutory scheme").[9]

Notably, both of those tasks—the accounting of emissions subject to area source standards under 112(c)(3), and those subject to major-source standards, under 112(c)(6)—were required to be completed, once and for all, by November 2000, the same deadline Congress specified for completion of all major-source standards. 42 U.S.C. §§ 7412(c)(1), (c)(6) & (e)(1). These coordinated deadlines

[9] Congress modeled section 112 on the Clean Water Act provisions described *NRDC v. EPA*. *See* Leg. Hist. 8473-74.

emphasize section 112's dependence upon the continued application of those standards, and Congress' expectation that they would have the reliable effects ensured by the Once-In Policy.

Other provisions of section 112 are also disabled by the Wehrum Memo's interpretation. As previously explained, *above* at 5-7, Congress created a two-step process for regulation of major sources: EPA first implements technology-based MACT standards under section 112(d) for a major-source category; then it evaluates whether additional actions are needed to address residual risks (especially for cancer) under section 112(f). 42 U.S.C. § 7412(f)(2). The Wehrum Memo prevents the residual risk provisions from achieving their purpose. Major sources that become area sources under the Wehrum Memo drop out of the major source "category" for which section 112(f) requires EPA to conduct a residual risk review. These sources will be able to escape section 112(f) regulation even as they increase emissions and present greater risks. *See* 42 U.S.C. § 7412(d)(5). To make matters worse, their emissions will not be counted in EPA's evaluation of the risks presented by the major source category from which they dropped out.

Relatedly, section 112(d)(6) requires EPA to review and revise maximum achievable technology standards, "taking into account developments in practices, processes, and control technologies," at least every 8 years. *Id.* § 7412(d)(6). Under the Wehrum Memo, advances in control technology become irrelevant once

existing controls are sufficiently effective to bring a facility's emissions under the 10/25 ton per year threshold—a milestone that some control technologies passed decades ago.

"A fair reading of legislation demands a fair understanding of the legislative plan." *King*, 135 at 2496. The "legislative plan" of section 112 was for EPA to identify the largest contributors to toxic pollution; maximally reduce, and if possible eliminate, those sources' toxic emissions through non-discretionary technology-based controls; and examine remaining health and environmental risks and take appropriate steps to eliminate the threat they present—once and for all. The Wehrum Memo abandons this precise framework and substitutes a 10-ton/25-ton standard. Wehrum Memo 3-4, JA____-__. Applying this cutoff throughout section 112 "would be inconsistent with—in fact, would overthrow—the Act's structure and design." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014).

C. <u>The "Major Source" Definition Does Not Support the Wehrum Memo's Interpretation</u>

The Wehrum Memo addresses none of the above-described text or context in allowing sources to shift from major- to minor-source compliance at any time. Rather, the Memo's textual analysis, in whole, is the following:

> Notably absent from the statutory definitions is any reference to the compliance date of a MACT standard. Furthermore, the phrase 'considering controls' within the definition of 'major source' indicates

> that measures a source adopts to lower its PTE… must … remove it from the major source category regardless of the time at which those controls are adopted.

Wehrum Memo 3, JA____.

From that spare description of section 112's definitional provisions, EPA concludes, without further analysis, that "Congress placed no temporal limitations on the determination of whether or a source … qualif[ies] as a major source." *Id.* *See also id.* at 2, JA____ (The Act "contains no provision which specifies" the Once-In Policy). That rationale cannot suffice to overcome the clear text and structure of section 112, let alone show that the Act compels the result that the Wehrum Memo now imposes. *See Arizona,* 281 F.3d at 259 (where agency claims statute compels a particular result, agency's action must be held invalid if the statute allows any different result); *American Petroleum Inst.*, 906 F.2d at 740 (Where "EPA concluded that the terms of [statute] left it *no choice*," action can be upheld if Agency prevails at "*Chevron* step one.").

First, that the *definition* of "major source" fails to specify when, and how, a source may escape compliance with a standard is meaningless. Such instructions—when EPA is to identify "major sources," and what standards apply to such sources—are rarely found within statutory definitions.[10] *See Cyan, Inc. v. Beaver*

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[10] For example, section 169 defines "major emitting facility" for purposes of the Act's Prevention of Significant Deterioration program, 42 U.S.C. § 7479(1), without temporal constraints. Section 165, however, provides that permitting

Cty. Emp. Ret. Fund, 138 S. Ct. 1061, 1071 (2016) (distinguishing between "operative provision[s] that could limit a rule," and "mere definition[s] of a statutory term"). It is the *operative* portions of the statute—those which instruct EPA how to identify "major sources" (section 112(c)), explain what standards apply to those standards (section 112(d)), and specify when sources must comply with major-source standards (section 112(i))—that answer such questions. 42 U.S.C. § 7412(c), (d) &(i)). *See Utility Air Regulatory Grp.*, 134 S. Ct. at 2440 (looking to "operative provisions" of Clean Air Act, rather than definitions, to establish "context-appropriate" meaning of term).

As set forth above, all of those operative provisions are antagonistic to the Wehrum Memo's result. If Congress "does not … hide elephants in mouseholes," *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001), it could not have comprehensively re-structured section 112 through silence within one definitional provision. Where an interpretation of definitional provision conflicts with the practical functioning of the Act's operative elements, the interpretation is invalid. *See Utility Air Regulatory Grp.*, 134 S. Ct. 2440.

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requirements apply to those facilities "on which construction is commenced after August 7, 1977." 42 U.S.C. § 7475(a). *Accord* 42 U.S.C. § 7491(g) (defining major source for visibility program) & 7491(b) (instructing that requirements apply to sources "in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date").

Finally, the words "considering controls" in section 112(a)'s major source definition do not compel the Memo's interpretation. Wehrum Memo 3, JA____. Whether EPA considers controls at the compliance date for a standard (as the Once-In Policy provided) or years later—it is still "considering controls." The question of when a source's "potential to emit considering controls" is determined is not answered by the words "considering controls" in section 112(a), but elsewhere by the text and structure of the statute. *See above* at 28-34. *A fortiori*, those words do not require the perverse reading of the Clean Air Act advanced in the Wehrum Memo: that the "controls" required *by* section 112(d) standards must be considered to *exempt* facilities from those same standards. *See Arizona*, 281 F.3d at 259; *American Petroleum Inst.*, 906 F.2d at 740.

III. BY FAILING TO CONSIDER THE EMISSIONS IMPACT OF THE WEHRUM MEMO, OR ITS IMPACT ON THE REMAINDER OF SECTION 112'S REGULATORY PROGRAM EPA HAS FAILED TO CONSIDER VITAL ASPECTS OF ITS DECISION

The Wehrum Memo is arbitrary, capricious and unlawful for an additional reason: it offers no consideration of two critically "important aspects of the problem," *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). First, the Memo fails to address its effect on Section 112's core concern—emissions of air toxics, and such toxics' impact on public health. *See* California Br. 30-31. Second, the Memo disregards its impact on the remainder of section 112's regulatory regime, which has unfolded in reliance upon the Once-In Policy. *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (when reversing a longstanding interpretation, agency must "provide "[a] reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by the prior policy." (citation omitted)). EPA's administration of section 112's core requirements—standard-setting, risk-assessment, and confirmation of its achievement of the statutory benchmarks—has been built upon the foundation of its understanding that major sources could not backslide by escaping compliance with major-source controls.

In listing area sources, and devising standards for them, EPA has not considered the possibility that its area-source standards would routinely apply to

major sources, as soon as those sources complied with major-source standards that bring their emissions below 10 or 25 tons per year. *E.g.*, 75 Fed. Reg. 9648, 9658 (Mar. 3, 2010). EPA has acknowledged that when an area source category includes well-controlled sources of the same basic type as major sources, the Agency should promulgate maximum achievable standards for those area sources. 59 Fed. Reg. 29,750, 29,757 (June 9, 1994) (where there are "no technological or economic reasons why … area sources cannot achieve the same level of control as … major sources," maximum achievable standards should apply to both), JA____; 75 Fed. Reg. 54,970, 54,987-88 (Sept. 9, 2010) (noting that where there is "no essential difference between" area and major sources, EPA should impose "common … limits based on MACT" to area sources), JA____-____. Following the Wehrum Memo, a vastly expanded number of source categories will include a large number of area sources that can potentially "achieve the same level of control" as major sources, 59 Fed. Reg. at 29,757. *See* NRDC Comments, Att. 12 "May 3, 2007 Letter" Att. 1, JA____ (describing synthetic organic source category in which 228 major sources would be eligible to shift to area source standards). Yet most of EPA's area-source standards assume that major and area sources are meaningfully different in their ability to control emissions. *See* EIP Report at 3-4, 7-8 & 17 (describing source categories with no controls at all for area sources). *See also* 57

Fed. Reg. 62,608, 62,612 (Dec. 31, 1992) (declining, with no discussion, to establish any area source standard for same synthetic organic source category.)

Similarly, EPA's section 112(c)(6) determination that it has met the statutory goals of ensuring that particularly high-risk pollutants are subject to MACT standards did not contemplate the possibility that sources could exit those standards in the future. 79 Fed. Reg. 74,656, 74,677 (Dec. 16, 2014) (assuming that major sources will meet major-source standards, without considering backsliding into area source status). *See also* 64 Fed. Reg. 38,706, 38,726 (July 19, 1999) (describing strategy for section 112(k) and 112(c)(3) standards, and relying on prior reductions imposed on major sources).

And EPA's assessments of the health risks remaining after imposition of its major-source standards have not considered the possibility of backsliding out of those standards. *E.g.*, 79 Fed. Reg. 72,874, 72,884-85 (Dec. 8. 2014) (conducting risk assessment on assumption that major sources will not exceed major-source standards). Even EPA's risk-assessments *following* the Wehrum Memo fail to grapple with the possibility of such backsliding. *E.g.*, 83 Fed. Reg. 46,262, 46,272 (Sept. 12, 2018) (basing risk assessment on assumption that major source limits are "the maximum level facilities could emit");

The Wehrum Memo unravels each step of section 112's regulatory goals. And it does so nearly two decades after the congressional deadline for completion

of the section 112(d) standards whose impact the Memo eviscerates. 42 U.S.C. § 7412(e). Yet EPA has not addressed, even in passing, how the Agency would return to each of those steps. *See Utility Air Regulatory Grp.*, 134 S. Ct. at 2444 (that EPA's interpretation of definitional provision "would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it").

CONCLUSION

Petitioners request that the Wehrum Memo be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies that, in accordance with the Federal Rules of Appellate Procedure 32(g)(1) and 32(a)(7)(B)(i), the foregoing **Proof Opening Brief of Petitioners** contains 9,031 words, as counted by counsel's word processing system. The undersigned is informed that the brief filed by Petitioner State of California in this matter contains 6,620 words, so that the briefs comply with the 16,500-word combined limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2016** using **size 14 Times New Roman** font.

DATED: October 1, 2018

/s/ Thomas Zimpleman
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2018, I have served the foregoing **Proof Opening Brief of Petitioners**, including the Addendum thereto, on all registered counsel through the Court's electronic filing system (ECF).

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