ORAL ARGUMENT SCHEDULED FOR APRIL 1, 2019

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 ACTION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

INTERVENOR-RESPONDENTS AIR PERMITTING FORUM, *et al.* FINAL RESPONSE BRIEF TO PETITIONERS' OPENING BRIEF

Leslie Sue Ritts
THE RITTS LAW GROUP, PLLC
620 Fort Williams Parkway
The Carriage House
Alexandria, VA 22304
(703) 823-2292
lsritts@rittslawgroup.com

Counsel for National Environmental Development Association's Clean Air Project

Shannon S. Broome
HUNTON ANDREWS KURTH LLP
50 California Street
Suite 1700
San Francisco, CA 94111
Phone: (415) 975-3718
Fax: (415) 975-3701
SBroome@HuntonAK.com

Charles H. Knauss
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037-1701
Phone: (202) 419-2003
Fax: (202) 778-2201
CKnauss@HuntonAK.com

Counsel for Air Permitting Forum and Auto Industry Forum

Dated: Proof January 14, 2019
Final February 22, 2019

Makram B. Jaber
Andrew D. Knudsen
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037-1701
Phone: (202) 955-1567
Fax: (202) 778-2201
MJaber@HuntonAK.com
AKnudsen@HuntonAK.com

Counsel for Utility Air Regulatory Group

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Intervenor-Respondents the Air Permitting Forum, Auto Industry Forum, National Environmental Development Association's Clean Air Project, and Utility Air Regulatory Group submit this certificate as to parties, rulings, and related cases pursuant to D.C. Circuit Rule 27(a)(4).

(A) Parties, Intervenors, and *Amici*

Petitioners

i. Case No. 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.

ii. Case No. 18-1095: Downwinders at Risk, Hoosier Environmental Council, and Texas Environmental Justice Advocacy Services.

iii. Case No. 18-1096: State of California.

Respondents

U.S. Environmental Protection Agency and Andrew Wheeler, Acting Administrator, U.S. Environmental Protection Agency.

Intervenor-Respondents

Air Permitting Forum, Auto Industry Forum, National Environmental Development Association's Clean Air Project, and Utility Air Regulatory Group.

(iii) ***Amici***

The American Chemistry Council, American Petroleum Institute, American Wood Council, Chamber of Commerce of the United States of America, Council of Industrial Boiler Owners, and the National Association of Manufacturers filed a notice of intent to participate as *amicus curiae* in support of Respondents on October 29, 2018 (Doc. #1757585).

(B) Rulings Under Review

These consolidated petitions for review challenge an EPA guidance memorandum issued by William L. Wehrum on January 25, 2018, notice of which was published in the *Federal Register* on February 8, 2018 at 83 Fed. Reg. 5543, entitled *Issuance of Guidance Memorandum, "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*."

(C) Related Cases

None.

ED_002674_00004799-00004

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Air Permitting Forum, Auto Industry Forum, National Environmental Development Association's Clean Air Project, and Utility Air Regulatory Group (together, "Intervenor-Respondents") make the following disclosures:

The Air Permitting Forum is a trade association, as defined by D.C. Circuit Rule 26.1, that advocates for the appropriate implementation of the Clean Air Act and other relevant statutes on behalf of its member companies. The Air Permitting Forum also participates in administrative proceedings before EPA under environmental statutes and in litigation arising from those proceedings that affect its members. The Air Permitting Forum's members operate manufacturing facilities throughout the United States and as a result would be subject to the requirements at issue in the guidance memorandum challenged in this case. The Air Permitting Forum has not issued shares or debt securities to the public, has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in the Air Permitting Forum.

The Auto Industry Forum is a trade association, as defined by D.C. Circuit Rule 26.1, that advocates for the appropriate implementation of the Clean Air Act and other relevant statutes on behalf of its member companies. The Auto Industry Forum also participates in administrative proceedings before EPA under

environmental statutes and in litigation arising from those proceedings that affect its members. The Auto Industry Forum's members operate manufacturing facilities throughout the United States and as a result would be subject to the requirements at issue in the guidance memorandum challenged in this case. The Auto Industry Forum has not issued shares or debt securities to the public, has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in the Auto Industry Forum.

The National Environmental Development Association's Clean Air Project (NEDA/CAP) is a nonprofit trade association, as defined under Circuit Rule 26.1(b), whose member companies represent a broad cross-section of American industry. NEDA/CAP addresses issues of interest to its members relating to the development and implementation of requirements under federal and state clean air programs. NEDA/CAP does not have any outstanding securities in the hands of the public, nor does NEDA/CAP have a publicly owned parent, subsidiary, or affiliate.

The Utility Air Regulatory Group (UARG) is a not-for-profit association of individual electric generating companies and national trade associations. UARG participates on behalf of certain of its members collectively in Clean Air Act administrative proceedings that affect electric generators and in litigation arising from those proceedings. UARG has no outstanding shares or debt securities in the

ED_002674_00004799-00006

hands of the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in UARG.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES iii
CORPORATE DISCLOSURE STATEMENT v
TABLE OF CONTENTS viii
GLOSSARY xiv
STATEMENT OF JURISDICTION 1
ISSUES PRESENTED 1
STATUTES AND RULES 1
INTRODUCTION 2
STATEMENT OF THE CASE 4
I. CAA §112 4
II. Implementation of CAA §112 Begins 6
III. Wehrum Memo 16
IV. Practical Effects of the Wehrum Memo 18
SUMMARY OF ARGUMENT 21
STANDARD OF REVIEW 22
ARGUMENT 22
I. The Wehrum Memo is not subject to judicial review at this time 22
A. Prudential justiciability is not present as Petitioners' claims are unripe. 23
B. The Wehrum Memo is not "final action." 29
C. The Wehrum Memo is not a legislative rule; it explains to EPA staff how headquarters interprets a CAA provision 29
II. The Wehrum Memo implements the CAA's plain language. 33
III. Respondents appropriately seek remand should the Court find statutory ambiguity. 39
CONCLUSION 40
CERTIFICATE OF COMPLIANCE 42
CERTIFICATE OF SERVICE 43

ED_002674_00004799-00008

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) 24

Am. Mining Cong. v. Mine Safety & Health Admin.,
995 F.2d 1106 (D.C. Cir. 1993) 30

Am. Petroleum Inst. v EPA,
683 F.3d 382 (D.C. Cir. 2012) 28, 29

Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.,
474 U.S. 361 (1986) 34

Bennett v. Spear,
520 U.S. 154 (1997) 23

Carcieri v. Salazar,
555 U.S. 379 (2009) 34

Chevron, U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984) 22, 33, 34

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 23, 29

Cronin v. FAA,
73 F.3d 1126 (D.C. Cir. 1996) 25

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 33

Eagle-Picher Indus. v. EPA,
759 F.2d 905 (D.C. Cir. 1985) 24, 28

Encino Motorcars, LLC v. Navaro,
136 S. Ct. 2117 (2016) 32

ED_002674_00004799-00009

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 32

Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Compensation Programs, Dept. of Labor,
519 U.S. 248 (1997) 33

La. Envtl. Action Network v. Browner,
87 F.3d 1379 (D.C. Cir. 1996) 23, 25

Marcum v. Salazar,
694 F.3d 123 (D.C. Cir. 2012) 29

Nat'l Mining Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014) 22, 30

Nat'l Mining Ass'n v. EPA,
59 F.3d 1351 (D.C. Cir. 1995) 7, 35

NRDC v. EPA,
643 F.3d 311 (D.C. Cir. 2011) 22

Ohio Forestry Ass'n, Inc. v. Sierra Club,
523 U.S. 726 (1998) 24, 25

Paralyzed Veterans of America v. D.C. Arena L.P.,
117 F.3d 579 (D.C. Cir. 1997) 16, 17

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) 17, 31

Pub. Citizen Health Research Grp. v. Comm'r, FDA,
740 F.2d 21 (D.C. Cir. 1984) 28

Rapanos v. United States,
547 U.S. 715 (2006) 31

Sierra Club v. EPA,
873 F.3d 946 (D.C. Cir. 2017) 29

Syncor Int'l Corp. v. Shalala,
127 F.3d 90 (D.C. Cir. 1997) 29, 30

Whitman v. American Trucking Ass'ns., Inc.,
531 U.S. 457 (2001) 34

Statutes

5 U.S.C. §553(b)(3)(A) 29

42 U.S.C. §7401(a)(3) 9

42 U.S.C. §7401(b)(1) 4

42 U.S.C. §7401(c) 9

42 U.S.C. §7412(a)(1) 2, 4, 5, 35, 39

42 U.S.C. §7412(a)(2) 2, 5, 36

42 U.S.C. §7412(b) 11

42 U.S.C. §7412(b)(1) 4

42 U.S.C. §7412(c)(1) 4, 5

42 U.S.C. §7412(c)(3) 5

42 U.S.C. §7412(c)(5) 5

42 U.S.C. §7412(d) 4, 38

42 U.S.C. §7412(d)(2) 5

42 U.S.C. §7412(d)(5) 5

42 U.S.C. §7412(d)(10) 38

42 U.S.C. §7412(e) 5

42 U.S.C. §7412(f) 4

42 U.S.C. §7412(i)(3)(A) 36, 37

42 U.S.C. §7607(b)(1) 22, 29

42 U.S.C. §7661a(b)(6) 26

ED_002674_00004799-00011

42 U.S.C. §7661d(a) 6

42 U.S.C. §7661d(b) 6

42 U.S.C. §7661d(b)(2) 26

Regulations

40 C.F.R. pt. 63, subpart A 12

40 C.F.R. pt. 70 5

40 C.F.R. pt. 71 6

40 C.F.R. §63.2 5

40 C.F.R. §70.3(c)(1) 6

Federal Register

58 Fed. Reg. 63,941 (Dec. 3, 1993) 6

58 Fed. Reg. 49,354 (Sept. 22, 1993) 6

59 Fed. Reg. 19,402 (Apr. 22, 1994) 7

60 Fed. Reg. 4948 (Jan. 25, 1995) 6

68 Fed. Reg. 1888 (Jan. 14, 2003) 28

68 Fed. Reg. 26,249 (May 15, 2003) 12

72 Fed. Reg. 69 (Jan. 3, 2007) 12, 13, 27

83 Fed. Reg. 5543 (Feb. 8, 2018) 17

Other Authorities

Claudia Copeland, Congressional Research Serv., *Clean Air Permitting: Implementation and Issues* (Sept. 1, 2016) 8

Letter from Beverly Banister, Dir. Air Pesticides & Toxics Mgmt. Div., EPA Region 4, Applicability Determination Index Control No. M090018 (Aug. 26, 2008) 11, 12

ED_002674_00004799-00012

Letter from Ginger Jordan-Hillier and G. Vinson Hellwig, Quicksilver Caucus to Lisa Jackson, EPA Adm'r, *Reducing Mercury Emissions in the United States* (Jan. 5, 2011) 39

Letter from Michael Kenyon, Air Branch Chief, EPA to Arthur McMannus, Associated Spring, EPA Applicability Determination Index Control No. M040001 (July 24, 2001) 11

Laurel Brinton, *The Structure of Modern English: A Linguistic Introduction* (2000) 37

Mem. from John Seitz, Dir. Office of Air Quality Planning & Standards and Robert Van Heuvelen, Office of Regulatory Enforcement to EPA Reg'l Offices, *Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act* (Jan. 25, 1995) 10

Mem. from John S. Seitz, Dir. Office of Air Quality Planning & Standards to EPA Reg'l Offices, *Potential to Emit for MACT Standards–Guidance on Timing Issues* (May 16, 1995) 2, 3, 7, 8, 9, 35, 36

Mem. from John Seitz, Dir. Office of Air Quality Planning & Standards, and Robert Van Heuvelen Office of Regulatory Enforcement to EPA Reg'l Offices, *Extension of January 25, 1995 Potential to Emit Transition Policy* (Aug. 27, 1996) 10

Mem. from John Seitz, Dir. Office of Air Quality Planning & Standards and Eric Schaeffer, Dir. Office of Regulatory Enforcement, to EPA Reg'l Offices, *Second Extension of January 25, 1995 Potential to Emit Transition Policy and Clarification of Interim Policy* (Jul. 10, 1998) 10

Mem. from John Seitz, Dir. Office of Air Quality Planning & Standards and Eric Schaeffer Dir. Office of Regulatory Enforcement to EPA Reg'l Offices, *Third Extension of January 25 1995 Potential to Emit Transition Policy* (Dec. 20, 1999) 10

U.S. General Accounting Office, Status of Implementation and Issues of the Clean Air Act Amendments of 1990 (Apr. 2000). 8

ED_002674_00004799-00013

GLOSSARY

CAA or Act	Clean Air Act
EPA or Agency	United States Environmental Protection Agency
UARG	Utility Air Regulatory Group

STATEMENT OF JURISDICTION

Petitioners challenge a U.S. Environmental Protection Agency ("EPA" or the "Agency") policy memorandum. Mem. from William L. Wehrum, Assistant Adm'r, EPA to Reg'l Air Div. Dirs., *Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act* (Jan. 25, 2018) ("Wehrum Memo"),_JA1-JA4. This Court lacks jurisdiction, due to lack of final agency action and because the challenges are not ripe for review.

ISSUES PRESENTED

1. Whether the petitions should be denied because the claims are unripe.

2. Whether the petitions should be denied because the Wehrum Memo is not final agency action.

3. Whether the Petitioners' procedural challenge should be denied because the Wehrum Memo is not a legislative rule.

4. If determined by the Court to be final agency action ripe for review, whether the Wehrum Memo effectuates Clean Air Act §112's definitions of "major source" and "area source," which include no temporal restrictions.

STATUTES AND RULES

Intervenor-Respondents' incorporate by reference the Statutory and Regulatory Addendum to the Respondents' brief and include additional materials referenced herein as a separate Statutory and Regulatory Addendum.

INTRODUCTION

In January 2018, EPA's Assistant Administrator for the Office of Air and Radiation signed an internal memorandum, addressed to EPA's regional offices. Wehrum Memo,_JA1-JA4. The Wehrum Memo informed regional staff that EPA headquarters, charged with administering the Clean Air Act ("CAA" or the "Act"), had reevaluated a 1995 EPA staff interpretation of the "major source" and "area source" definitions in §112(a) and was withdrawing that interpretation because Congress had specifically declined to place a temporal limitation on determining when a source is "major" or "area." *Id.* at 3,_JA3.

CAA §112(d) requires EPA to adopt emission limitations for both "major" and "area" sources of hazardous air pollutants ("§112(b) pollutants"). "Major sources are stationary sources that "emit[] or ha[ve] 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," while "area sources" emit or have the potential-to-emit amounts less than the 10/25 ton major source thresholds. 42 U.S.C. §7412(a)(1)-(2). In the 1995 interpretation, the director of the office that was developing §112 emission standards for categories of stationary sources issued his memorandum to EPA regional staff, the "Seitz Memo," which the Wehrum Memo withdrew. Mem. from John S. Seitz, Dir. Office of Air Quality Planning & Standards to EPA Reg'l

Offices, *Potential to Emit for MACT Standards–Guidance on Timing Issues* (May 16, 1995 (the "Seitz Memo"),_JA232-241. The Seitz Memo read into the statute a one-way lever that would allow facilities to change from area source status to major source status at any time, but prohibit them from going the other direction at any time after the first substantive compliance date of a given, applicable CAA §112(d) standard.

The impact of Mr. Seitz's memo was to add language to the Act:

> "area source" means any stationary source of hazardous air pollutants that is not a major source <u>at the time of the first substantive compliance date for the standard that applies to major sources for the particular source category to which it applies</u>.

The Wehrum Memo strikes this extra-textual approach and implements Congress's unambiguous definitions. The Seitz Memo's interpretation created inconsistencies within the application of the statute, requiring EPA to develop workarounds and caveats to implement the CAA and creating disincentives for facilities to innovate and reduce emissions. Not only does EPA's refreshed interpretation in the Wehrum Memo adhere to plain statutory language, it is sound policy reflecting statutory goals.

The petitions for review should be denied.

STATEMENT OF THE CASE[1]

I. CAA §112

The twin goals of the CAA are "to promote the public health and welfare *and* the productive capacity of [the] population." 42 U.S.C. §7401(b)(1) (emphasis added). EPA implements all provisions considering these goals. Under §112(b), Congress identified 189 hazardous air pollutants and directed EPA to identify categories of stationary sources that emit them for purposes of establishing technology-based standards, followed in eight years by evaluation of whether further controls are necessary to bring source category residual risk within acceptable levels. 42 U.S.C. §§7412(b)(1), (c)(1), (d), (f). Congress distinguished the level of required emissions control according to the size of the §112(b) pollutant-emitting sources. Specifically, §112 establishes two types of sources—"major" and "area." A "major source" is:

> any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

[1] Intervenor-Respondents adopt Respondents' Statement of the Case and highlight points below.

42 U.S.C. §7412(a)(1). An "area source" is "any stationary source of hazardous air pollutant that is not a major source." 42 U.S.C. §7412(a)(2); *see also* 40 C.F.R. §63.2 (essentially mirroring statutory definitions).

The statute required EPA to list all categories of major sources of listed §112(b) pollutants, and some area source categories, and then to set a schedule for and issue standards by category. 42 U.S.C. §§7412(c)(1), (3), (5), (e). "Major source" standards must obtain the "maximum degree of reduction in emissions" achievable through current technology, often called "MACT" (**M**aximum **A**chievable **C**ontrol **T**echnology) standards.[2] 42 U.S.C. §7412(d)(2). For "area source" categories, however, standards need not be as stringent, recognizing the economic or technical limitations smaller-emitting facilities may face. Thus, EPA may set area source standards at the major source standard (or MACT) level but also may impose less stringent limits, referred to as "GACT" (**G**enerally **A**vailable **C**ontrol **T**echnology). 42 U.S.C. §7412(d)(5).

Importantly, both §112 major and area sources also must obtain CAA Title V federal operating permits.[3] Title V permits record CAA applicable requirements

---

[2] Where the term "MACT" or "GACT" is used in a cited document, Respondent-Intervenors leave it as used in that original document. Elsewhere in this brief, Respondent-Intervenors reference as appropriate "major source" or "area source" standards, §112 standards, or §112(d) standards, depending on context of the reference.

[3] *See* 40 C.F.R. Part 70. EPA may determine particular area source categories do not need Title V permits, but even if exempted as §112 area sources, many such

in a single document and are typically issued by state or local permitting authorities,[4] under EPA oversight. Specifically, state/local permitting authorities must submit to EPA copies of proposed permits or proposed permit modifications for review, and EPA must object if the permit does not comply with the CAA. 42 U.S.C. §7661d(a); 7661d(b). Similarly, removing an applicable requirement requires Title V permit revision and is subject to EPA review and potential objection. *Id.* On each occasion, the public's ability to petition EPA to object to a permit applies.

II. Implementation of CAA §112 Begins

EPA set to work implementing §112 shortly after enactment of the 1990 CAA Amendments. EPA released its list of source categories under §112(c) and schedule for standards under §112(e), 58 Fed. Reg. 63,941 (Dec. 3, 1993), and began issuing the first Maximum and Generally Achievable Control Technology standards, addressing both major and area sources. *See, e.g.*, 60 Fed. Reg. 4948 (Jan. 25, 1995)_(JA272) (promulgating chromium electroplating and anodizing tanks applying §112(d) major source standards to both major and area sources),_JA289; 58 Fed. Reg. 49,354 (Sept. 22, 1993) (promulgating

---

plants trigger Title V permitting for emissions of other pollutants; then, the Title V permit would also list the applicable area source standards. 40 C.F.R. §70.3(c)(1).

[4] In certain areas, *e.g.*, tribal lands, EPA may issue the Title V operating permit under 40 C.F.R. Part 71, or delegate Part 71 implementation, *e.g.*, to the tribal authority.

perchloroethylene dry cleaning facility standards for major sources and area sources),_JA271; 59 Fed. Reg. 19,402 (Apr. 22, 1994),_JA286 (promulgating synthetic organic chemical manufacturing industry source standards only for major sources).

A. The Seitz Memo

In 1995, as EPA was issuing many major and area source §112 standards, EPA's department responsible for developing §112 standards released a memorandum from its then-director, John Seitz, to clarify EPA policy regarding sources that sought to become "area sources." One issue of concern was that many plants' actual emissions were at area source levels (*i.e.,* below 10/25 ton thresholds) even though their potential-to-emit was higher. EPA regulations stated that to qualify as an area source, any restrictions on potential emissions must be federally-enforceable,[5] but the typical method of obtaining such restrictions, the Title V operating permit program, was just launching. Thus, even though many plants had applied for state, local, or Title V permits to formally restrict their §112(b) pollutant emissions and memorialize their area source status,[6] permitting

[5] This Court struck down EPA's position on federal enforceability of such limits. *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995).

[6] *See* Seitz Memo at 7,_JA238 ("compliance date deadline approach would give small emitters ... time to limit their potential emissions rather than comply with major source requirements.").

authorities were not yet able to issue them.[7] Indeed, EPA had not yet approved most states' Title V permit programs.

The Seitz Memo was transmitted, like the Wehrum Memo, to EPA regional staff without seeking public comment. It stated that EPA was interpreting §112 to allow facilities to change from "major" to "area" source status by the "first compliance date" of a given source category standard, meaning the "first date a source must comply with an emission limitation or other substantive regulatory requirement." Seitz Memo at 5,_JA236. In general, §112 standards provide one to three years to achieve compliance. *See id.* at 7,_JA238 ("Under this approach, a facility will have the same amount of time to comply whether it chooses to meet the standard or limit its potential to emit."). Although the Seitz Memo conceded the statute "does not directly address a deadline for a source to avoid requirements applicable to major sources through a reduction of potential to emit," it nevertheless opined that its interpretation "is consistent with the language and

[7] Historically, few states had any permitting/regulatory authority over §112(b) pollutant emissions, the extensive list of which was added to the Act in 1990. States had developed their own air toxics programs before 1990 but their coverage did not match with new §112. Thus, existing permits were largely insufficient to formalize restrictions on emissions even if §112(b) pollutant emissions were low. Claudia Copeland, Congressional Research Serv., *Clean Air Permitting: Implementation and Issues*, at 1 (Sept. 1, 2016),_JA397. Further, states were overwhelmed given resources being devoted to developing Title V programs and the needed authorization from state legislatures to expand permit programs to include §112(b) pollutants. U.S. General Accounting Office, *Status of Implementation and Issues of the Clean Air Act Amendments of 1990*, at 11 (Apr. 2000),_JA335.

structure." *Id.* at 5,_JA236. This policy—the so-called "once-in-always-in" policy—purported to "ensure[] ... that the health and environmental protection provided by MACT standards is not undermined." *Id.* at 9,_JA240. The Seitz Memo did not explain whether the policy was consistent with other §112 provisions or address the disincentives it would create for reducing §112(b) pollutants by process changes or other pollution prevention measures, or whether the interpretation squared with CAA §101(c), 42 U.S.C. §7401(a)(3), (c) (a "primary [statutory] goal" to "encourage or otherwise promote reasonable ... governmental actions ... for pollution prevention" defined as "reduction or elimination, through any measures, of the amount of pollutants produced or created at the source").

B. The Transition Policies Rendering the Seitz Memo Largely Inapplicable

Although the Seitz Memo purported to require a major source that wished to become an area source to do so before the first substantive compliance date of a §112(d) major source standard, in fact, EPA did not impose that requirement until years later and then did so inconsistently. Notably, also in 1995, EPA adopted a separate "transition policy," which treated as area sources those sources that were operating with actual emissions meaningfully below the 10/25 ton major source threshold, even though the sources had not obtained permits to restrict their

emissions.[8] That guidance also recognized state emission limits for sources with higher emissions (but below major source thresholds). EPA extended the two-year transition policy *three* times,[9] such that the deadline of the first substantive compliance date for becoming an area source was not fully implemented for many years. Petitioners here did not challenge these transition policies as final agency actions, nor have Respondent-Intervenors discovered any evidence that Petitioner California pursued enforcement or that other Petitioners challenged through citizen suit or in permit proceedings a source's reliance on these transition policies.

EPA implementation of the Seitz Memo was also inconsistent. For example, EPA declined to apply the Seitz Memo in a 2001 determination for a facility

---

[8] Mem. from John Seitz, Dir. Office of Air Quality Planning & Standards and Robert Van Heuvelen, Office of Regulatory Enforcement to EPA Reg'l Offices, *Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act*, at 8-10 (Jan. 25, 1995), https://www.epa.gov/sites/production/files/documents/limit-pte-rpt.pdf, JA185-JA187.

[9] Mem. from John Seitz, Dir. Office of Air Quality Planning & Standards and Robert Van Heuvelen Office of Regulatory Enforcement to EPA Reg'l Offices, *Extension of January 25, 1995 Potential to Emit Transition Policy* (Aug. 27, 1996), https://www.epa.gov/sites/production/files/2015-07/documents/pte-mem2.pdf, JA242; Mem. from John Seitz, Dir. Office of Air Quality Planning & Standards and Eric Schaeffer, Dir. Office of Regulatory Enforcement to EPA Reg'l Offices, *Second Extension of January 25, 1995 Potential to Emit Transition Policy and Clarification of Interim Policy* (Jul. 10, 1998), https://www3.epa.gov/ttn/atw/pte/ext3.pdf, JA246; Mem. from John Seitz, Dir. Office of Air Quality Planning & Standards and Eric Schaeffer, Dir. Office of Regulatory Enforcement to EPA Reg'l Offices, *Third Extension of January 25 1995 Potential to Emit Transition Policy* (Dec. 20, 1999), https://www.epa.gov/sites/production/files/2015-08/documents/4thext.pdf, JA250.

previously subject to the major source standard for halogenated solvent cleaning category due to §112(b) pollutant emissions from its vapor degreasing operations. *See* Letter from Michael Kenyon, Air Branch Chief, EPA to Arthur McMannus, Associated Spring, EPA Applicability Determination Index Control No. M040001 (July 24, 2001),_JA258. EPA allowed the source to switch to area source status, in light of the facility's decision to no longer use material with the hazardous air pollutant that had caused it to be classified as a major source. *Id.* at 1,_JA258. And, in 2008, EPA determined a source could be reclassified as an area source where a particular pollutant had been the cause of a source being treated as major (*i.e.*, emissions of that particular hazardous air pollutant tripped the 10/25 ton threshold) and the pollutant was no longer considered a hazardous air pollutant.[10] EPA reached this conclusion even though the source had become subject to the major source §112(d) standard many years earlier. Letter from Beverly Banister, Dir. Air Pesticides & Toxics Mgmt. Div., EPA Region 4, Applicability Determination Index Control No. M090018 (Aug. 26, 2008),_JA259. EPA reasoned that "it is appropriate to allow facilities to look back to the first substantive compliance date ... and determine what the facility's potential to emit hazardous air pollutant on that date would have been without counting emissions

[10] Under §112(b), EPA may remove a pollutant from its list if certain criteria are met. 42 U.S.C. §7412(b).

of the delisted pollutant." Thus, EPA determined that the plant was no longer subject to the major source standard. *Id.*

C. Attempts at Correction

Over time, the Seitz Memo's flawed approach became apparent to EPA, and EPA explored revising the policy. *See* 72 Fed. Reg. 69, 71 (Jan. 3, 2007),_JA311 (explaining EPA has received "recommendations to revise [the once-in-always-in] policy" since it was issued). In 2000, an association of state and local air permitting officials (which included officials from Petitioner California) wrote EPA with concerns over the policy, explaining the disincentives it created for implementing pollution prevention measures to reduce hazardous air pollutants. *Id.* Responding to these officials' concerns, EPA in 2003 took comment on amending the General Provisions of its §112 regulations, 40 C.F.R. Part 63, Subpart A, to change its interpretation to lessen its burden on regulated sources. 68 Fed. Reg. 26,249, 26,253-59 (May 15, 2003),_JA298-JA304. EPA proposed to allow a source to cease being subject to major source standards if it eliminates hazardous air pollutant emissions for the source affected by the standard and/or to request alternative compliance requirements if undertaking pollution prevention measures. *Id.*; *see also* Wehrum Memo at 3,_JA3 (noting only limited parts of proposal were finalized).

Then in 2007, EPA proposed to amend the General Provisions to codify replacement of the "once-in-always-in" policy and formally abandon the Seitz Memo. 72 Fed. Reg. at 69,_JA309. The proposal would have allowed major sources subject to major source §112(d) standards to become area sources at any time (*i.e.*, after the first substantive compliance date), and end applicability of the major source standards, by accepting enforceable permit limits on hazardous air pollutant emissions below the major source threshold. *Id.* at 70,_JA310. Like the Wehrum Memo, EPA proposed to remove the "first compliance date" temporal limitation that it concluded "does not exist on the face of the statute." *Id.* at 73,_JA313. EPA explained the counterproductive results the policy had created, highlighting examples of facilities "willing to substantially reduce ... [hazardous air pollutants] to achieve area source status, but [that] would not do so as long as the [once-in-always-in] policy applied." *Id.* at 71-72,_JA311-312. Further, EPA explained why reversing the Seitz Memo policy would not be expected to increase hazardous air pollutant emissions. *Id.* at 73,_JA313 (including, *inter alia*, permitting authorities' ability to include advanced monitoring, recordkeeping, and reporting requirements in permits; continued operation of air pollution control devices; and existing area source standards); *see also* Letter from William L. Wehrum to Chairman of the U.S. House of Representatives Committee on Energy and Commerce, Rep. John D. Dingell, EPA-HQ-OAR-2004-0094-0106, at 6-7

(Mar. 30, 2007),_JA15-JA16 (detailed explanations of continued efficacy of existing air pollution control devices).

Numerous stakeholders, including state agencies, commented in support of the proposal. *See, e.g.*, Comments of Ohio EPA, Office of Compliance Assistance & Pollution Prevention at 3, (Apr. 30, 2007), EPA-HQ-OAR-2004-0094-0168,_JA137 (highlighting an example of the unfair burden of the Seitz Memo policy on a small family business and supporting proposal based on belief that "revisions will have a positive, rather than negative, effect on the environment by providing small businesses a strong incentive to limit emissions voluntarily"); Comments of the Virginia Dep't of Envtl. Quality, at 1 (Apr. 26, 2007), EPA-HQ-OAR-2004-0094-0116,_JA28 (expressing support for proposal because the once-in-always-in policy "discourages pollution prevention or other voluntary actions that might reduce hazardous air pollutant emissions"); Comments of Texas Comm'n on Envtl. Quality, at 1 (Mar. 8, 2007), EPA-HQ-OAR-2004-0094-0079,_JA7 ("support[ing] the proposal to allow major sources to become area sources by limiting emissions to area source emission levels at any time, regardless of the compliance date"); Comments of Iowa Dep't of Nat. Res., at 2-3 (Apr. 30, 2007), EPA-HQ-OAR-2004-0094-0119,_JA32-JA33 (generally supporting proposal and explaining several scenarios where the once-in-always-in policy produces unfair or counterproductive results for facilities: (1) source lacking

knowledge of the §112 program failed to obtain a potential-to-emit limit despite never operating above major source threshold; (2) formerly-major source's emissions plummet below thresholds (*e.g.*, lower production, cleaner processes or materials, or equipment removal) but it cannot obtain a potential-to-emit limit before its compliance date and is forever subject to major source §112 standards; and (3) source is major on the major source standard compliance date but implements drastic changes to method of operation or removes equipment to reduce emissions well below major source thresholds, yet cannot leave major source standard).

Similarly, regulated entities supported the proposal.[11] One commenter explained the Seitz Memo created a one-sided test, meaning a source that is an area

---

[11] *See, e.g.*, Comments of Air Permitting Forum and American Petroleum Institute, at 3 (May 4, 2007), EPA-HQ-OAR-2004-0094-0124,_JA37 (discussing "unintended incentives for sources to maintain high emissions and removed incentives for technological innovations" from the once-in-always-in policy); Comments of NEDA/CAP, at 7-8 (May 4, 2007), EPA-HQ-OAR-2004-0094-0143,_JA65-JA66 (contesting concerns that sources reclassified as area sources will increase emissions from "substantially below 'major source' thresholds ... up to 24.9 tons," stating Association "not aware of a single plant covered by a MACT rule where this would be the case" and explaining proposal's incentives to reduce emissions); Comments of Utility Air Regulatory Group, at 2 (May 4, 2007), EPA-HQ-OAR-2004-0094-0136,_JA55 (supporting proposal's removal of "'once-in-always-in' policy['s] temporal condition to source classification that is not found in the CAA or in EPA's §112 regulations"); Comments of Alliance of Automobile Manufacturers, at 2, (May 4, 2007), EPA-HQ-OAR-2004-0094-0163,_JA123 ("once-in-always-in policy had the net effect of discouraging sources from pursuing less resource intensive pollution prevention strategies and compliance options with long-term environmental and energy benefits").

source on the first compliance date could become a major source if emissions increased, but could not become an area source if pollution prevention or controls were instituted to move from major source status to minor status. Air Permitting Forum, *et al.* comments at 2, EPA-HQ-OAR-2004-0094-0124,_JA36. Likewise, commenters explained the incentives that would be created by withdrawing the Seitz Memo, and the basis for concluding that this was sound environmental policy. They explained the great advances in technologies underway, including moving from solvent-based to powder-based paints and coatings for many products (*e.g.*, automobiles, appliances), which dramatically reduce hazardous air pollutant content of the coating itself, whereas the major source §112 standard would require installation of end-of-pipe controls. If end-of-pipe controls would be required anyway, regardless of these pollution prevention efforts, commenters explained, the cost of running them would preclude the pollution prevention investment to convert to the less toxic paints. Alliance of Automobile Manufacturers comments, at 4-5, EPA-HQ-OAR-2004-0094-0163,_JA125-JA126. EPA has not taken final action on the proposal. Wehrum Memo at 3,_JA3.

III. Wehrum Memo

Prior to 2015, this Court's precedent held that an agency must use notice-and-comment rulemaking procedures to issue a new interpretive rule that deviates significantly from one it has previously adopted. *Paralyzed Veterans of America v.*

D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997). In 2015, the Supreme Court overturned that precedent, holding "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015). As a result, EPA gained the option to depart from the Seitz Memo's statutory interpretation in the same way it was adopted—via an internal policy guidance memorandum.

Recognizing the fraught nature of EPA's earlier misinterpretation of CAA §112 EPA's Assistant Administrator for Air and Radiation, William Wehrum issued a memo in 2018 to EPA regional staff to correct the Seitz Memo and conform EPA policy to the statutory language.[12] As discussed in Respondents' brief, the Wehrum Memo stated that "a major source becomes an area source at such time that the source takes an enforceable limit on its potential-to-emit hazardous air pollutants below the major source thresholds." Wehrum Memo at 1,_JA1. The Agency explained that its interpretation is "compel[led]" by the statute's plain language definitions of "major source" and "area source, which "contains no provision" prohibiting a major source from switching to area source status by taking an enforceable limit on its potential-to-emit after the "first compliance date" or specifying "that a major source MACT standard will continue

[12] EPA published notice of the Wehrum Memo in the *Federal Register*. 83 Fed. Reg. 5543 (Feb. 8, 2018),_JA5.

to apply to a former major source that, subsequent to the first compliance date, takes an enforceable limit on its [potential-to-emit] to below the applicable thresholds." *Id.* at 1-2,_JA1-JA2. "Congress placed no temporal limitations on the determination of whether a source emits or has the [potential-to-emit hazardous air pollutants] in sufficient quantity to qualify as a major source," it continued, and "[t]o the extent the [once-in-always-in] policy imposed such a temporal limitation, EPA had no authority to do so under the plain language of the statute." *Id.* at 3,_JA3.

The Wehrum Memo also states that EPA plans "to take comment on adding regulatory text that will reflect EPA's plain language reading of the statute" in the near future. *Id.* at 2,_JA2.

IV. Practical Effects of the Wehrum Memo

Petitioners' descriptions of the Wehrum Memo's "practical effects" are a series of conjectures, and as discussed below, are not based in fact, which Petitioners admit. Envtl. Pet'rs Br. at 13 n.2. Although the Wehrum Memo's interpretation derives directly from the statutory text, given Petitioners' representations, Intervenor-Respondents note that the Wehrum Memo's practical effects are entirely consistent with the CAA's goals of pollution prevention and promoting the productive capacity of the population. As explained by commenters on the 2007 proposal, the Wehrum Memo will incentivize companies to continue

to innovate and drive pollution prevention even after the compliance date for a major source standard. The Wehrum Memo provides the opportunity for companies to reap the benefits of step changes in technologies, *e.g.*, by developing products that fundamentally alter the nature of their facilities' emissions profiles. *See, e.g.*, Comments of the National Paint and Coatings Association, at 5-7, (May 4, 2007), EPA-HQ-OAR-2004-0094-0159,_JA110-JA112. It also recognizes the practical (and arbitrary) constraints that the Seitz Memo placed on companies managing compliance with a series of §112 regulations. As one public comment explained:

> Consider the miscellaneous metal parts and products coating MACT, 40 CFR Part 63, Subpart MMMM, and the industrial-commercial-institutional boiler MACT, 40 CFR Part 63, Subpart DDDDD. The compliance date for Subpart MMMM was January 2, 2007 while the compliance date for Subpart DDDDD is September 13, 2007. If a plant's coal-fired boiler potential emissions are the emissions making the plan[t] a major source and it also has a small coating operation with low HAP emissions (say 8 tpy of combined HAP), [the Seitz Memo] would subject the plant to [the coating MACT] unless the facility was able to retire the *boiler* prior to the January 2, 2007 compliance date for that MACT. Otherwise the facility would forever be considered "major" for purposes of the coating MACT even if it retired the boiler in time to avoid applicability of Subpart DDDDD.

Air Permitting Forum, *et al.* comments at 5-6, EPA-HQ-OAR-2004-0094-0124,_JA39-JA40. The commenter explained that retiring a boiler is "not a simple proposition," noting that because the coating standard at issue had a compliance date in the middle of the winter, a source may need that boiler to be available to

heat the plant for employees to work. Further, obtaining the permits for a new gas-fired boiler (the replacement for coal that would make the source an area source) can be a lengthy process not within the source's control. Against the backdrop of what are often short compliance windows for the "first compliance date," the Wehrum Memo encourages replacement of the coal-fired boiler with a lower-emitting unit even after the applicable compliance date whereas the Seitz Memo did not. *Id.*

Another practical effect of the Wehrum Memo is that sources that become area sources as a result of government action will no longer be required to meet a standard that was designed for a pollutant they no longer emit. An example is EPA's ban of methyl tertiary-butyl ether as a gasoline additive. EPA had determined that gasoline loading racks and pipeline breakout stations, which were only subject to the major source standard due to that additive, nonetheless remained subject to that standard even though the additive was prohibited and no longer used. NEDA/CAP comments at 4-5, EPA-HQ-OAR-2004-0094-0143,_JA62-JA63. But under the Wehrum Memo, facilities that stopped using the additive would be emitting less and therefore not required to maintain the burdensome recordkeeping and reporting associated with the major source standard. Even though the source had become an area source and even though the

pollutant of concern had been eliminated from the operation, the Seitz Memo had compelled these unnecessary costs.

Regulators had even required companies that removed all of the emissions units subject to a particular standard from their facility to become an area source to nonetheless continue keeping records under the major source standard. The Wehrum Memo eliminates this wasteful result. *Id.* at 5,_JA63.

SUMMARY OF ARGUMENT

1. The Wehrum Memo is a policy statement that is neither final agency action nor ripe for review, leaving this Court without jurisdiction. As Respondent explains, EPA was not required to follow notice-and-comment procedures to carry out the change in policy embodied in the Wehrum Memo.

2. The interpretation reflected in the Wehrum Memo is compelled by and entirely consistent with the statutory language. Petitioners' haphazard textual analysis is fundamentally flawed because it creates anomalous results and does not reconcile the statutory text. The statutory provisions defining "major source" and "area source" make no mention of any temporal limitation on when those classifications take hold. Congress's decision must be presumed intentional. If the Court reaches the merits of Petitioners' claims, it should deny them.

3. Further supporting the Wehrum Memo's plain language interpretation is that its consequences makes sense: it is sound policy that promotes pollution

prevention and continuous technological improvement. Moreover, it addresses and resolves the absurd results created by the Seitz Memo.

STANDARD OF REVIEW

If the Court reaches the merits, the two-step review articulated in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) applies. Intervenor-Respondents' adopt and incorporate by reference the standard of review described in Respondents' brief at 18-19.

ARGUMENT

I. The Wehrum Memo is not subject to judicial review at this time.

The Court must first decide whether it should review these claims at all. It should not. Petitioners' challenges are unripe, and there has been no final agency action to invoke CAA §307(b)(1). 42 U.S.C. §7607(b)(1). Further, Petitioners are wrong that the Wehrum Memo is a legislative rule that required notice-and-comment rulemaking.

These three inquiries—ripeness, finality, and if a rule is legislative—are closely entwined. *NRDC v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011); *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-53 (D.C. Cir. 2014). Petitioners' claims are unripe because EPA's mere statement of statutory interpretation is unfit for judicial decision absent application to a particular case; delaying review until final agency action occurs causes no hardship to Petitioners, who may then seek

judicial review. As Respondents explain, the Wehrum Memo is also not final agency action "mark[ing] the consummation of the agency's decisionmaking process" or "by which rights or obligations have been determined." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). Nor is it a legislative rule carrying the "force and effect of law," *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). Here, these threshold inquiries counsel against judicial review: the claims are unripe, concern no final agency action, and do not concern a legislative rule.

A. Prudential justiciability is not present as Petitioners' claims are unripe.

The Court should dismiss the petitions as unripe; the time for judicial review has not yet arrived. The Wehrum Memo is internal guidance, informing EPA's regional staff how headquarters interprets CAA §112. It effects no change in the obligations or operations of sources subject to regulation under §112, nor does it impact nearby communities. It does not guarantee any future change will occur, as it does not bind permitting authorities who will act on any applications to reclassify from major to area source. The "classic institutional reason to postpone review" applies here, where "we need to wait 'for a rule to be applied [to see] what its effect will be.'" *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996) ("*LEAN*") (alteration in original) (citation omitted). Review may be appropriate if and when a permitting authority grants a permit to reclassify a formerly major source as area source or once EPA promulgates a rule establishing

regulatory rights or obligations, but not now when the "effect" of EPA's interpretation is still unknown.

Determining ripeness requires examining "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The Court considers "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). The "primary focus" of the prudential ripeness inquiry is to balance petitioners' interest in immediate consideration of the agency action at issue "against the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985). That scale tips heavily in favor of finding these petitions unripe, as delaying judicial review will prevent inappropriate interference in administrative action, allow concrete facts to benefit the Court in future review, and cause Petitioners no hardship.

First, the hardship inquiry includes whether legal and practical harm will ensue from delayed review. *Ohio Forestry*, 523 U.S. at 733-34. Petitioners will suffer neither and thus face no hardship from waiting until factual context is presented to decide their claims. Legal harm exists where challenged actions command or prohibit action, give or take away power or authority, expose persons to legal liability, or create legal rights or duties. *Id.* (finding no practical harm from delayed review of challenge to Forest Service plan since additional regulatory steps necessary). In *LEAN*, this Court dismissed a petition as unripe upon finding petitioner would not suffer hardship because the "the primary injury it alleges 'is not a present hardship resulting from the regulations themselves, but rather a future injury that may result' from programs that are approved under the regulations." 87 F.3d at 1385 (quoting *Cronin v. FAA*, 73 F.3d 1126, 1133 (D.C. Cir. 1996)).

LEAN is applicable here. The harm Petitioners allege will flow from EPA's statutory interpretation in the Wehrum Memo is not caused directly by the guidance itself but by potential future actions of permitting authorities determining whether a given source may become an area source. Even if a major source's actual §112(b) pollutant emissions are already below the major source thresholds, such a source must still comply with major source requirements until its permitting authority determines they no longer apply and removes them from, or revokes, the Title V permit.

Moreover, Petitioners will then have the opportunity to challenge any such action in the Title V permit revision proceedings, since all major sources have Title V permits, and the removal of requirements or revocation of those permits would be subject to Title V procedures in which these concerns could be raised and evaluated. Petitioners in this case would have the opportunity to comment on any draft permit revision. *See* 42 U.S.C. §7661a(b)(6). If the permitting authority follows the Wehrum Memo's interpretation and approves a permit revision reclassifying the major source as area and removing any major source standards, Petitioners could petition EPA to object to the permit revision as unlawful. *Id.* §7661d(b)(2). Petitioners would make their arguments about the applicability and legality of the statutory interpretation set forth in the Wehrum Memo in any such petition, and if EPA denies the petition, that denial is subject to judicial review. *Id.* Thus, the Wehrum Memo itself states policy but the application of that policy will be the subject of subsequent proceedings.

Petitioners' arguments regarding the effect of the Wehrum Memo illustrate the speculative nature of their concerns. Petitioners rely on their own estimation that 2,617 facilities in EPA's database identified as §112(b) pollutant major sources actually emit below the 25 ton-per-year threshold. Envtl. Pet'rs Br. at 13 (citing Stith Decl., Attach. B (EDF Report at 4, 5)). But that figure does not establish that any particular facility will in fact increase its emissions, and, indeed,

there is reason to believe that the speculated concerns will not materialize. Petitioners bury in a footnote that these facilities are likely not even eligible to use the Wehrum Memo because the so-called "report" admits it did not analyze whether the sources' emissions triggered the 10 ton individual §112(b) pollutant major source threshold. *Id.* at n.2. Further, Petitioners provide no basis for concluding that sources reclassified to area source status would increase their §112(b) pollutant emissions at all, let alone up to the statutory major source thresholds (or why that would be possible under their operations).

Petitioners' assumption that owners of reclassified area sources will "turn off" control devices is both speculative and misguided. As commenters explained, many of the control strategies used to reduce emissions involve specification of raw material composition—which is integral to process operation and product quality—or may include shutdown and removal of equipment—rather than add-on emission control equipment. Air Permitting Forum, *et al.* comments at 4, EPA-HQ-OAR-2004-0094-0124,_JA38; NEDA/CAP comments at 7, EPA-HQ-OAR-2004-0094-0143,_JA65. Petitioners also ignore that current emission controls used to reduce §112(b) pollutant emissions are often required for compliance with other emission standards anyway, even if the major source standard no longer applies.[13]

[13] For example, volatile hazardous air pollutant controls also reduce volatile organic compounds, otherwise required by the CAA to reduce smog. *See* 72 Fed. Reg. at 73,_JA313.

Many area source categories are themselves subject to the technology standards applicable to major or area sources standards limiting their §112(b) pollutant emissions under the CAA, and may also be subject to state §112(b) pollutant emission limits. And importantly, the same emission control systems used to reduce §112(b) pollutants are frequently also used to meet non-§112(b) pollutant emission standards that would still apply after area source reclassification. For example, the major source standards for formaldehyde emissions from stationary combustion turbines are based on use of oxidation catalyst technology, which is also used to limit emissions of carbon monoxide (which is not a §112(b) pollutant). *See* 68 Fed. Reg. 1888, 1896, 1899 (Jan. 14, 2003),_JA295-JA296 (stating rationale for proposed turbine major source standard). Determining the effects of the Wehrum Memo necessarily requires an understanding of its application in a given case. Thus, Petitioners' own briefing belies that their claims are unripe. As we explained, *see, supra* Statement of Case, at 6, the Title V permitting process provides that opportunity for review.

Second, as Respondents have discussed, finding Petitioners' claims unripe will allow the interpretation to be "crystalliz[ed]" in the form of a rulemaking or through individual application. *Eagle-Picher Indus.*, 759 F.2d at 915; *see also Pub. Citizen Health Research Grp. v. Comm'r, FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984). Third, reviewing the petitions would waste judicial resources. *Am.*

Petroleum Inst. v EPA, 683 F.3d 382, 387 (D.C. Cir. 2012) ("[P]rudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once."). Accordingly, even if the Court finds the Wehrum Memo to be final action, it should still dismiss the petitions as unripe. *Marcum v. Salazar*, 694 F.3d 123, 129 (D.C. Cir. 2012).

B. The Wehrum Memo is not "final action."

Petitioners in this case rely exclusively on CAA's §307 for jurisdiction, Cal. Pet'rs Br. at 1, Envtl. Pet'rs Br. at 1. Yet, for the reasons described in Respondent EPA's brief, the Wehrum Memo does not meet that provision's jurisdictional prerequisite of "final action." *See* Resp'ts Br. at 26-32; 42 U.S.C. §7607(b)(1); *Sierra Club v. EPA*, 873 F.3d 946, 948 (D.C. Cir. 2017). To avoid duplication of argument, Respondent-Intervenors rely on the arguments made by Respondents regarding the lack of final action.

C. The Wehrum Memo is not a legislative rule; it explains to EPA staff how headquarters interprets a CAA provision.

Only legislative rules require notice-and-comment; interpretive rules do not. 5 U.S.C. §553(b)(3)(A); *Chrysler Corp.*, 441 U.S. at 301-02. Interpretive rules "typically reflect[] an agency's construction of a statute that has been entrusted to the agency to administer." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). "[T]he crucial distinction" between a legislative and an interpretive rule is that the former "*modifies* or *adds* to a legal norm based on the agency's *own*

authority." *Id.* at 95 (emphases in original). An interpretive rule "merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties." *Nat'l Mining Ass'n*, 758 F.3d at 252-53 (EPA guidance document not legislative rule). Petitioners are mistaken that the Wehrum Memo, which merely advises EPA regional staff of a statutory interpretation but directs no action, is a legislative rule.

This Court has applied four factors to determine whether a "purported interpretive rule has legal effect":

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993). The first factor is "another way of asking whether the disputed rule really adds content to the governing legal norms." *Syncor Int'l Corp.*, 127 F.3d at 96 (applying *American Mining Congress* factors to find Food and Drug Administration notice imposing regulation on certain drug manufacturers legislative rule). EPA's guidance only restates what the CAA's plain language requires; it "adds" no legal obligations or rights. It was not published in the Code of Federal Regulations. Nor did EPA "invoke[] its general legislative authority"

where it concluded that "the plain language of the definitions ... compels the conclusion" articulated in the Wehrum Memo. Wehrum Memo at 1,_JA1.

Finally, the Wehrum Memo is not rendered a legislative rule simply because it changed a prior interpretation of the same text, nor was EPA required to undertake notice-and-comment rulemaking to revise its earlier take on the language of CAA §112(a)(1).[14] Under *Perez*, agencies need only "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." 135 S. Ct. at 1206-07. The Seitz Memo and the Wehrum Memo stand on equal footing. Both interpreted the statutory text. Petitioners' attempts to construe the Seitz Memo as a legislative rule, Envtl. Pet'rs Br. at 22, Cal. Pet'rs Br. at 25, fail for reasons similar to why their Wehrum Memo legislative rule argument fails. The Seitz Memo bound neither states nor regulated entities (as evidenced by EPA's years-long failure to follow it and reliance on transition policies, and then its failure to consistently apply it). *See, supra* Statement of Case, at 9-12. That it was bad policy inconsistent with the statute and, if applied in a particular case,

[14] Petitioners cite to the 23-years the Seitz Memo existed as a basis for sustaining it. Envtl. Pet'rs Br. at 8; Cal. Pet'rs Br. at 7, 25. First, though written in 1995, the Seitz Memo's effect was delayed for years through "transition memos." Second, as discussed in the Statement of the Case, *see supra* 10-12, EPA inconsistently applied the Seitz Memo. Finally, it is "a curious appeal to entrenched Executive error" to make something of the fact that EPA erroneously applied a policy inconsistent with not only the statute but sound environmental policy for many years. *Rapanos v. United States*, 547 U.S. 715, 753 (2006) ("curious appeal" to entrenched executive error unavailing).

could have been challenged does not transform it into a legislative rule. Therefore, the Wehrum Memo falls squarely within *Perez*; an interpretive rule altering another interpretive rule need not undergo notice-and-comment. Under *American Mining Congress*, the Wehrum Memo is an interpretive rule in name and effect.

That the Wehrum Memo changes a prior EPA interpretation also is of no moment. Agencies change policies all the time. They are "free" to do so, provided they supply "a reasoned explanation for the change." *Encino Motorcars, LLC v. Navaro*, 136 S. Ct. 2117, 2125 (2016). An agency meets that threshold where it "display[s] awareness that it is changing position" and "show[s] that there are good reasons for the new policy." *Id.* at 2126 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). EPA has certainly met that burden. The Wehrum Memo explains why the Seitz Memo interpretation was "contrary to the plain language of the CAA." Wehrum Memo at 3-4,_JA3-JA4. The Wehrum Memo provides "good reasons" for EPA's policy shift, supplemented by public comments received on the 2007 Proposal, as EPA's previous "policy created a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce HAP emissions." *Id.* at 4,_JA4.

II. The Wehrum Memo implements the CAA's plain language.[15]

The Wehrum Memo implements what the relevant CAA provisions plainly state—that the §112(a) "major source" and "area source" definitions include no cut-off date. Because the statute is clear and the Wehrum Memo implements it, the Court should uphold the Wehrum Memo at Step 1 of *Chevron*. *Chevron*, 467 U.S. at 842. Petitioners' arguments to the contrary represent a desperate attempt to justify a policy that does not comport with the statutory language and has not withstood the test of implementation.

The *Chevron* Step 1 analysis must begin with the statutory language in question. Tellingly, Petitioners bury their discussion of the "major" and "area" source definitions because a review of the plain text does not support their position; it precludes it.

The definition of "major source," *see supra* at 4, itself plainly lacks any date or other temporal restriction. Contrary to Petitioners' claims, careful grammatical review shows Congress used the *present* tense in drafting these definitions. Use of present tense is an element of a plain meaning interpretation of statutory text. *Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Compensation Programs, Dept. of Labor*, 519 U.S. 248, 255 (1997); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) (explaining statutory interpretation required by "plain

[15] Intervenor-Respondents adopt the arguments in Section II of Respondents' brief and highlight the below in addition.

text" derived from present tense). Congress's use of present text recognized that, over time, companies may increase (*e.g.*, due to market demand–the productive capacity of the population) or decrease their emissions (*via, e.g.,* technological advances, pollution prevention techniques). Thus, §112 is worded to refer to levels at which sources, area or major, *currently* emit rather than what they *emitted* at some past point in time. Environmental Petitioners' attempts to diminish the statutory definitions' relevance fail. Envtl. Pet'rs Br. at 35-36. Congress does not "hide elephants in mouseholes," *Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001), and it did not do so here. If Congress had intended to restrict the time when a source could reduce emissions to achieve area source status, it plainly could have done so and would have been explicit. *See Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (refusing to "nullify the plain meaning of the definition" in light of arguments based on related, but separate provisions). Statutory text is critical, as "the final language of ... legislation may reflect hard-fought compromises." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). Such is the case for the CAA, which entailed many compromises between economic and environmental values. *Chevron*, 467 U.S. at 847.

Petitioners' arguments not only ignore clear definitional language, they would create internal inconsistency. As Petitioners concede, their interpretation

requires addition of several words to the statute that Congress neither wrote nor intended. It creates a one-way lever, by which sources can move up from area to major source status after the compliance date, but never convert or return to area source status.[16] The statutory text countenances no such result. The Wehrum Memo reads the statute, *i.e.*, that the major and area source definitions operate in the present tense without unwritten time limits, respecting text *and* intent.

Another illogical consequence of reading the CAA to lock in major/area source status at the first compliance date is that a facility could be considered "major" for some source categories and "area" for others. A single facility may fall into several different source categories, each with different emission standards and substantive compliance dates. *See* 42 U.S.C. §7412(a)(1) ("major source" a "group of stationary sources located within a contiguous area and under common control"); *Nat'l Mining*, 59 F.3d at 1361 (definition encompasses all §112(b) pollutant-emitting activities at the site and cannot be limited on a source-category basis). The Seitz Memo stated that sources must evaluate their status as "major" separately for each source category located at a given facility. Seitz Memo at 9-10,_JA240-JA241. As a result, if application of the major source standard for one source category reduces the facility's potential emissions below major source

[16] Petitioners' interpretation of §112(i)(3)(A), discussed below, is absurd as it would require area sources to forever comply with Generally Available Control Technology even after becoming major and subject to major source standards.

thresholds, then the facility would be considered an area source for any standard that becomes applicable later for other source categories, even as it continues to be treated as major for the first category. *See id.* at 10,_JA241 (providing example). Such a result is hopelessly inconsistent with congressional intent and the plain language of the statute. The only logical interpretation of the statutory text is that at any given time, a source is *either* a major *or* an area source, since Congress defined one by exclusion of the other. *See* 42 U.S.C. §7412(a)(2)). But under Petitioners' interpretation, a plant can be both major and area simultaneously.

We address the remaining piecemeal arguments offered by Petitioners in support of their interpretation below:

"***After-the-Effective-Date" Argument:*** Petitioners argue that the §112(a) text is overridden by §112(i)(3). Their tortured construction reveals the logical flaws in their approach. Section 112(i)(3)(A) provides:

> 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, limitation or regulation ....

42 U.S.C. §7412(i)(3)(A). Petitioners assert that use of the word "after" means that major source status is frozen in time as of the effective date. This makes no sense. It simply indicates that *prior* to the effective date, the prohibition in question is inoperative. Tellingly, Petitioners must resort to inserting past tense language not present in the statute for their reading of §112(i)(3)(A) to work; they

claim that provision applies "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." Envtl. Pet'rs Br. at 25 (alterations in original). Contrary to Petitioners' claim that §112(i)(3)(A) is "expressly retrospective," *id.* at 26, these past tense terms are absent from the statute itself.

"***Promulgated" Argument:*** Petitioners further assert that §112(i)(3)(A)'s use of "promulgated" is in the "past tense" and thus requires reading "applicable" in reference to the past to freeze in time a source's major source status (but apparently not its area source status). *Id.* This grammatical contortion plucks the word "promulgated" out of its adjective phrase to cast it as a verb. *Id.* at 26. "[P]romulgated under this section and applicable to a source" is an adjective phrase, not a verb; it modifies the noun phrase "emissions standard, limitation or regulation" to indicate under what authority the referenced standard was adopted. *See* 42 U.S.C. §7412(i)(3)(A); Laurel Brinton, *The Structure of Modern English: A Linguistic Introduction* at 172 (2000)_JA388. The *only* verb in the relevant portion of this sentence is the present tense phrase "may operate." 42 U.S.C. §7412(i)(3)(A). The provision's prohibition on operating in violation of a standard is therefore limited to §112 standards (and not other CAA sections) and only to standards that apply to the source. Properly construing §112(i)(3)(A) is simple: if a §112 standard applies to a source and is already effective, the source may not

operate in violation of it. If a source is not major on a given date, then the standard is not "applicable" to it, so no violation can occur.

"Effective-Date" Argument: While asserting that §112(i)(3)(A) establishes that the requirements applicable to a source are defined at the effective date, Envtl. Pet'rs Br. at 44, they conspicuously fail to cite §112(d)(10), which makes standards "effective" upon promulgation. 42 U.S.C. §7412(d)(10). If the effective date determines applicability, the Seitz Memo interpretation cannot be compelled as using the first compliance date would also be invalid.

"Implications-for-§112(d)(2)" Argument: Petitioners' argument that the Wehrum Memo renders §112(d)(2) "legally meaningless" by creating a "MACT ceiling" is similarly off-base. Cal. Pet'rs Br. at 26-27. Petitioners' quarrel is really with the process Congress established for regulating area sources, and this Court should not allow them to do an end-run around that process. First, Congress set the major source thresholds but allowed EPA to regulate area sources (using either the major or area source standard-setting criteria, as appropriate). 42 U.S.C. §7412(d). EPA could thus issue a standard that applies to area sources that prohibits emissions if appropriate under §112(d)(2)-(3) or (5). Accordingly, EPA already has authority to regulate area sources without running roughshod over the statutory major and area source definitions.

Petitioners further suggest their interpretation is compelled because of the "effect of the Wehrum Memo on emissions of mercury, dioxins, and other hazardous air pollutants that are especially toxic in small quantities." Envtl. Pet'rs Br. at 14. Again, Congress provided a mechanism to address these concerns and placed it right in the definition of "major source," by authorizing EPA to establish "lesser quantity" major source thresholds than the 10/25 ton based pollutant potency, persistence, bioaccumulation, other characteristics, or other relevant factors. 42 U.S.C. §7412(a)(1).

Petitioners here seek to avoid complying with statutorily-available procedures. They have always been and remain free to petition EPA to regulate area sources under §112(d) or establish lower major source thresholds. Indeed, others have shown awareness of these avenues, as EPA was petitioned for a mercury "lesser quantity" threshold. Letter from Ginger Jordan-Hillier and G. Vinson Hellwig, Quicksilver Caucus to Lisa Jackson, EPA Adm'r, *Reducing Mercury Emissions in the United States* (Jan. 5, 2011),_JA263-JA265.

III. Respondents appropriately seek remand should the Court find statutory ambiguity.

The statute compels the Wehrum Memo's conclusion. If the Court disagrees and finds the statutory language ambiguous, EPA correctly argues the proper remedy would be remand, not vacatur, particularly because application of the

Wehrum Memo can be challenged in Title V proceedings and given EPA's rulemaking to clarify the regulations.

CONCLUSION

The Court should deny the petitions for review.

Respectfully submitted,

s/ Shannon S. Broome

Shannon S. Broome
HUNTON ANDREWS KURTH LLP
50 California Street
Suite 1700
San Francisco, CA 94111
Phone: (415) 975-3718
Fax: (415) 975-3701
SBroome@HuntonAK.com

Charles H. Knauss
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037-1701
Phone: (202) 419-2003
Fax: (202) 778-2201
CKnauss@HuntonAK.com

Counsel for Air Permitting Forum and Auto Industry Forum

Makram B. Jaber
Andrew D. Knudsen
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037-1701
Phone: (202) 955-1567
Fax: (202) 778-2201
MJaber@HuntonAK.com
AKnudsen@HuntonAK.com

Counsel for Utility Air Regulatory Group

Leslie Sue Ritts
THE RITTS LAW GROUP, PLLC
620 Fort Williams Parkway
The Carriage House
Alexandria, VA 22304
(703) 823-2292
lsritts@rittslawgroup.com

Counsel for National Environmental Development Association's Clean Air Project

February 22, 2019

ED_002674_00004799-00055

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Intervenor-Respondents' Final Response Brief complies with Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1) because it contains 9,097 words (as counted by the Microsoft Word software used to produce it), which is consistent with the limitation set forth in this Court's Order of August 17, 2018, Doc. #1746150, (allotting Intervenor-Respondents' brief 9,100 words), and has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

s/ Shannon S. Broome
SHANNON S. BROOME

February 22, 2019

CERTIFICATE OF SERVICE

I certify that the foregoing Intervenor-Respondents' Final Response Brief was electronically filed with the Clerk of Court on February 22, 2019 using the CM/ECF system and thereby served upon all ECF-registered counsel.

s/ Shannon S. Broome
SHANNON S. BROOME