ORAL ARGUMENT SCHEDULED FOR APRIL 1, 2019

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

No. 18-1085 (and consolidated cases)

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

FINAL REPLY BRIEF OF PETITIONERS

DATED: February 22, 2019

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv
GLOSSARY OF ACRONYMS AND ABBREVIATIONS viii
SUMMARY 1
ARGUMENT 1
I. THE WEHRUM MEMO IS A FINAL LEGISLATIVE RULE 1
II. THE WEHRUM MEMO CONFLICTS WITH SECTION 112 2
A. Section 112's Major Source Definition Does Not Require the Wehrum Memo. 2
B. Section 112's Compliance Provision Contradicts the Wehrum Memo. 9
C. The Wehrum Memo Ignores Section 112's Structure. 12
III. EPA'S FAILURE TO ADDRESS ITS DECISION'S CONSEQUENCES IS ARBITRARY AND CAPRICIOUS 17
CONCLUSION 18
CERTIFICATE OF COMPLIANCE 21
CERTIFICATE OF SERVICE 22

ED_002674_00004822-00003

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Am. Bus Ass'n v. Slater,
231 F.3d 1 (D.C. Cir. 2000) 5

Am. Mining Cong. v. Mine Safety & Health Admin.,
995 F.2d 1106 (D.C. Cir. 1993) 1

* *Arizona v. Thompson*,
281 F.3d 248 (D.C. Cir. 2002) 2, 4

Backcountry Against Dumps v. EPA,
100 F.3d 147 (D.C. Cir. 1996) 4

* *Bennett v. Spear*,
520 U.S. 154, 178 (1997) 2

Bruesewitz v. Wyeth, LLC,
562 U.S. 223 (2011) 10

Carcieri v. Salazar,
555 U.S. 379 (2009) 8

Cement Kiln Recycling Coal. v. EPA,
255 F.3d 855 (D.C. Cir. 2001) 14

Children's Hosp & Research Ctr. v. NLRB,
793 F.3d 56 (D.C. Cir. 2015) 4

City of Arlington v. FCC,
569 U.S. 290 (2013) 6

Clark v. Rameker,
573 U.S. 122 (2014) 7

Culbertson v. Berryhill,
139 S. Ct. 157 (2019) 11

Encino Motorcars v. Navarro,
136 S. Ct. 2117 (2016) 18

* *Authorities chiefly relied upon marked with an asterisk.*

ED_002674_00004822-00004

Harris v. FAA,
353 F.3d 1006 (D.C. Cir. 2004) 12

Harrison v. PPG Indus.,
446 U.S. 578 (1980) 8

Humane Soc'y v. Zinke,
865 F.3d 585 (D.C. Cir 2017) 19

* *MCI Telecomm. v. Am. Tel. & Tel. Co.*,
512 U.S. 218 (1994) 15

McNeill v. United States,
563 U.S. 816 (2011) 7

Michigan v. EPA,
135 S. Ct. 2699 (2015) 17

Nat'l Mining Ass'n v. EPA,
59 F.3d 1351 (D.C. Cir. 1995) 6

Nat'l Rifle Ass'n v. Reno,
216 F.3d 122 (D.C. Cir. 2000) 3

New Jersey v. EPA,
517 F.3d 574 (D.C. Cir. 2008) 16

North Carolina v. EPA,
550 F.3d 1176 (D.C. Cir. 2008) 19

NRDC v. EPA,
777 F.3d 456 (D.C. Cir. 2014) 6

Railway Labor Executives' Ass'n v. National Mediation Board,
29 F.3d 655 (D.C. Cir. 1994) 5, 14

Sec'y of Labor v. Nat'l Cement Co.,
494 F.3d 1066 (D.C. Cir. 2007) 18

* *Sierra Club v. EPA*,
699 F.3d 530 (D.C. Cir. 2012) 2

Sierra Club v. EPA,
863 F.3d 834 (D.C. Cir. 2017) 15

* *Sierra Club v. EPA*,
873 F.3d 946 (D.C. Cir. 2017) 1

Tataranowicz v. Sullivan,
959 F.2d 268 (D.C. Cir. 1992) 3

* *Utility Air Regulatory Grp. v. EPA*,
573 U.S. 302 (2014) 3, 13

STATUTES

42 U.S.C. § 7411(a) 17

42 U.S.C. § 7412(a)(1) 17

42 U.S.C. § 7412(a)(2) 9

42 U.S.C. § 7412(a)(3) 17

42 U.S.C. § 7412(a)(4) 7

* 42 U.S.C. § 7412(c)(1) 5, 6, 7, 9

42 U.S.C. § 7412(c)(2) 15

42 U.S.C. § 7412(c)(3) 15

* 42 U.S.C. § 7412(c)(6) 15, 16

42 U.S.C. § 7412(c)(9) 16

42 U.S.C. § 7412(d) 9

42 U.S.C. § 7412(d)(1) 7

* 42 U.S.C. § 7412(d)(2) 13

42 U.S.C. § 7412(d)(3) 14

42 U.S.C. § 7412(d)(5) 7

ED_002674_00004822-00006

* 42 U.S.C. § 7412(f) 9

42 U.S.C. § 7412(i)(3) 8

* 42 U.S.C. § 7412(i)(3)(A) 9, 10, 11, 12

42 U.S.C. § 7412(i)(3)(B) 9

LEGISLATIVE HISTORY

A Legislative History of The Clean Air Act Amendments of 1990 (1993) 15

OTHER AUTHORITY

Chicago Manual of Style (15th Ed. 2003) 10

ED_002674_00004822-00007

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

* These abbreviations are used commonly in the record, but not in this brief.

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SUMMARY

The Wehrum Memo changes a prior legislative rule, and decisively alters rights and obligations; it is consequently a final legislative rule, unlawfully issued without notice and comment. The Wehrum Memo also conflicts with the Clean Air Act. Contrary to EPA's claims, silence within one isolated provision of section 112 cannot override that section's contrary text and context. Furthermore, EPA has arbitrarily failed to address critical consequences of its decision. For each of these reasons, the Wehrum Memo should be vacated.[1]

ARGUMENT

I. THE WEHRUM MEMO IS A FINAL LEGISLATIVE RULE

EPA contends that the Wehrum Memo is interpretive rather than legislative. Respondents' Brief ("Resp.") 20-22. But the Wehrum Memo withdraws a clearly legislative rule: the Seitz Memo, which governed major sources of air toxics for over two decades. Opening Brief of Environmental Petitioners ("Envtl. Br.") 8-9, 22-23 & n.4; Reply Brief for State of California ("Calif. Reply") 11-15. The Wehrum Memo therefore "must itself be legislative." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993); *Sierra Club v. EPA*, 873 F.3d 946, 952 (D.C. Cir. 2017).

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[1] This Reply adopts the arguments in California's briefs, and uses short forms introduced in Environmental Petitioners' Opening Brief.

EPA says the Wehrum Memo "simply interprets a statutory provision" and is not binding on States. Resp. 20, 23-24. The Memo, States' application of it, and the limited authority conferred on States by the relevant portions of the Clean Air Act, all contradict that assertion. Calif. Reply 2-11. *See, e.g.*, McCloud Decl. Att.; Finnigan Decl. Att. A (state agencies treating Wehrum Memo as decisive). The Wehrum Memo has already excused major sources from compliance with previously applicable pollution-reduction requirements. Envtl. Br. 15-17. Even if the Wehrum Memo merely *allows* States to release sources from major-source obligations—something they could not do under the Seitz Memo—it alters "rights or obligations" and has "legal consequences." *Sierra Club v. EPA*, 699 F.3d 530, 534 (D.C. Cir. 2012) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

II. THE WEHRUM MEMO CONFLICTS WITH SECTION 112

EPA provides no grounds by which the Memo could be reconciled with section 112's text and step-wise design, much less defended—as it must be—as the only permissible interpretation of the statute. *Arizona v. Thompson*, 281 F.3d 248, 259 (D.C. Cir. 2002) (decision premised on statute's unambiguity must be vacated if statute is ambiguous).

A. Section 112's Major Source Definition Does Not Require the Wehrum Memo.

EPA answers primarily that section 112(a)(1)'s "definition of 'major source' lacks any deadline or other language" requiring a major source to continue

complying with a maximum achievable standard after the source first complies. Resp. 32. The Agency leaps from that definition's unsurprising silence on "when a major source can reclassify as an area source," to unambiguous Congressional intent that industrial facilities must be permitted to "do[] so" at any time. *Id.* at 35. Indeed, EPA claims "[t]his silence" in the definition section is so "meaningful" that the Agency may disregard the remainder of section 112's text and context, *id.* at 33. *See, e.g.*, *id.* at 42 ("plain language" negates need to address legislative plan), 43 (dismissing "contextual arguments" because silence is "unambiguous"), 44 (no need to address statutory goals because "the statute is clear").

Section 112(a)'s definitions cannot bear that weight, for two reasons. First, a statute cannot be declared unambiguous based upon "a particular statutory provision in isolation." *Nat'l Rifle Ass'n v. Reno*, 216 F.3d 122, 127 (D.C. Cir. 2000). *See also Tataranowicz v. Sullivan*, 959 F.2d 268, 276 (D.C. Cir. 1992) ("[C]ongressional intent can be understood only in light of the context in which Congress enacted a statute and of the policies underlying its enactment."). Statutory definitions, in particular, rarely specify the substance and timing of substantive obligations; such details are provided elsewhere, in a statute's "operative provisions." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 319 (2014). Yet the Wehrum Memo examines *none* of the statute, beyond section 112(a)'s definitions; it fails to even address those sub-sections featuring the term—

"major source"—whose meaning EPA finds so unambiguous. Wehrum Memo 2-4, JA0002-04. EPA's failure to grapple with the entirety of section 112 is, of itself, fatal to its claim to have discerned that section's "plain language" meaning. *Id.* at 4, JA0004. *See Children's Hosp. & Research Ctr. v. NLRB*, 793 F.3d 56, 59 (D.C. Cir. 2015) ("When an agency fails to wrestle with the relevant statutory provisions, we cannot do its work for it.").

Second, even if EPA had examined the whole of the statute and found silence as to "when a major source can reclassify as an area source," Resp. 35 (*but see* below at 9-17), *silence* could not provide the *unambiguous* answer needed to uphold the Wehrum Memo. *See Arizona*, 281 F.3d at 259. In support of its effort to equate the statute's purported failure to specify an answer with the opposite—the provision of a clear answer—EPA cites *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 150 (D.C. Cir. 1996). But *Backcountry* did not transmute silence into clarity; it scrutinized the statutory text and context, which expressly defined "Indian tribes" as "municipalities" rather than "States." *Id.* at 151. Because of that explicit textual constraint, the court held that EPA could not subject Indian tribes to requirements that applied only to "States." *Id. Backcountry* does not suggest that "silence" made this result "clear," Resp. 33; the court held that the statute was *not* "silent," *Backcountry*, 100 F.3d at 151 ("The statute here is neither silent nor ambiguous.").

In *Railway Labor Executives' Ass'n v. National Mediation Board*, the agency—like EPA here—sought to defend its interpretation, despite contrary text and context, because the statute did not "*expressly forbid*" it. 29 F.3d 655, 666 (D.C. Cir. 1994); Envtl. Br. 24-37 (describing contrary text, context); Resp. 32 (responding that statute "lacks any deadline or other language" forbidding EPA's view). In rejecting that argument, the court did not equate the absence of express language with unambiguous statutory instruction. It carefully examined specific language, and "the structure of the [statute]," to find that—like section 112 here—the statute overall "belied" the Agency's interpretation. *Railway Labor*, 29 F.3d at 667-8. *See Am. Bus Ass'n v. Slater*, 231 F.3d 1, 6, 7 (D.C. Cir. 2000) (examining text and context indicating that "Congress has not granted [the agency] the power to impose money damages," and rejecting agency's invocation of "general power" to impose damages).

Nor does this case involve the addition of some novel agency authority to the statutory scheme. *Id.* at 8-9 (Sentelle, J., individually opining, "silence on the granting of [the] power" to impose money damages unambiguously means "the statute … does not grant [the agency] that power"). The statute authorizes (indeed, obligates) EPA to regulate major and area sources. 42 U.S.C. §§ 7412(c)(1) (requiring EPA to list categories of major and area sources), (d)(1)-(5) (empowering EPA to apply maximum achievable standards to all categories).

Whether EPA requires large industrial facilities to comply with major-source standards (as before the Wehrum Memo) or the major-source threshold (as prescribed by the Memo), it is exercising "statutory authority." *See NRDC v. EPA*, 777 F.3d 456, 466-67 (D.C. Cir. 2014) (exempting areas from compliance with Clean Air Act is an exercise of "statutory authority"). As in "every case," the question is whether EPA's action is adequately grounded in "the statutory text." *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013) (rejecting distinctions based on whether interpretation extends agency authority).

EPA asserts that "Congress could easily have" specified in section 112(a)(1) that a "major source" is one that exceeds the 10/25-ton threshold "when emission standards promulgated pursuant to subsection (d) … first apply." Resp. 35. The portions of section 112 that employ the term "major source" demonstrate otherwise. "Major source" appears first (and most crucially) in section 112(c), which requires EPA to list the categories of "major sources" that Congress targeted for technology-based maximum achievable standards. 42 U.S.C. § 7412(c)(1). That listing necessarily occurs before emissions standards for the categories are promulgated. *See Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1353-54 (D.C. Cir. 1995). The language Congress "could easily have" added, according to EPA, would in fact render the statute nonsensical; section 112(c)(1) would require EPA

to list sources for which standards had already been "promulgated," Resp. 35, before promulgating any standards for those sources. 42 U.S.C. § 7412(c)(1).[2]

Nor does the Wehrum Memo follow from section 112(a)(1)'s use of "the present tense" in defining "major source." Resp. 37; Intvn. 33. Definitions, by their nature, generally use the present tense. *See McNeill v. United States*, 563 U.S. 816, 822 (2011) ("Congress [has] used the present tense to refer to past convictions."). Even if EPA were correct that the words "major source" must be understood to mean a source that currently "has" emissions exceeding the threshold, that understanding could only extend to sub-sections *containing* the term "major source." Those sub-sections say nothing about who must comply with section 112 standards, or which standards they must comply with. *See, e.g.*, 42 U.S.C. § 7412(c)(1) (requiring EPA to publish "list of categories … of major sources").[3]

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[2] EPA also notes that section 112(a)(4)'s "new source" definition includes a temporal constraint, 42 U.S.C. § 7412(a)(4). But the term "new" requires temporal definition, to divide "old" from "new." The absence of a similar constraint elsewhere signifies nothing further. *See Clark v. Rameker*, 573 U.S. 122, 131-32 (2014) ("different manner" in which term operates explains why "Congress had no need to" include elsewhere).

[3] Section 112(d)(1) instructs EPA to create maximum achievable standards for the "categor[ies]" of "major sources" listed pursuant to section 112(c), cutting against the Wehrum Memo's inquiry into whether every individual source *within* a category remains a "major source" after compliance with those standards (and emphasizing that the term "major source" is primarily relevant to section 112(c)'s listing provisions). 42 U.S.C. §§ 7412(d)(1) & (d)(5).

Cf. 42 U.S.C. § 7412(i)(3) (governing compliance, without reference to "major source").

Section 112 sets out a careful sequence of regulatory events, not a single event that can be described in any one tense. The use of the present tense in section 112(a)(1)'s definition of "major source" cannot override the language of provisions that do not contain that term, or section 112's step-by-step structure. Envtl. Br. 34-35. *Carcieri v. Salazar*, 555 U.S. 379, 389, 391 (2009) (holding that interpretation of definition must harmonize "with the natural reading of the word *within the context of the [statute]*," and looking to "statutory context" and text to discern temporal restrictions (emphasis added)).

The Agency's brief (but not the Wehrum Memo) emphasizes that section 112(a)(1) defines "any" source with emissions over the 10/25-ton threshold as a major source. Resp. 37. Yet that "expansive" word fits poorly with the Wehrum Memo; if anything, it suggests that a source whose emissions exceed the 10/25 threshold at any time (even once) is a "major source." *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980) (word "any" provides "no indication whatever that Congress intended … a limiting construction"). Section 112(a) conspicuously fails to state that "any" source with emissions "below the 10/25 tons-per-year thresholds," Resp. 40, is an area source (let alone one whose emissions drop below

that threshold at any time). 42 U.S.C. § 7412(a)(2) (area sources are those residual sources that are "not a major source").

Finally, EPA suggests that the Once-In Policy undermined "Congress's choice of specific emission thresholds." Resp. 38. Not so. That Policy used those thresholds in a fashion concordant with the design and intent of the statute—to identify the large sources of pollution that Congress targeted for non-discretionary, technology-based controls, so as to reduce air toxics to a level that would not threaten human health. 42 U.S.C. §§ 7412(c)(1), (d) & (f). The Wehrum Memo substitutes the major-source threshold for both the maximum achievable and health-based standards at the heart of section 112. The statute precludes that perverse result.

B. Section 112's Compliance Provision Contradicts the Wehrum Memo.

Section 112(i)(3)(A), directly addressing compliance with section 112(d)'s standards, contradicts the Wehrum Memo: if a standard has been "promulgated" that is "applicable" to a source, that source must thereafter comply with it (solely subject to the express exception that follows). 42 U.S.C. § 7412(i)(3)(A)-(B); Envtl. Br. 25-28. EPA complains that this "read[s] 'has been'" into the statute. Resp. 39. But that is a quarrel with grammar. The statute identifies a time—the "effective date of any emissions standard … promulgated under this section and applicable to a source"—"[a]fter" which the prohibition applies. 42 U.S.C.

§ 7412(i)(3)(A). To describe conditions "[a]fter" that date, one says that a standard "has been" promulgated and applicable to the source, maintaining the tense of the statute itself.[4] *See Chicago Manual of Style* §§ 5.108, 5.120 (15th Ed. 2003) (describing past participle and perfect tense, both denoting "completed" actions).

EPA insists that "as actually written," section 112(i)(3)(A) requires compliance with only the standard that would be applicable to a source if EPA re-categorized that source based on what it "is" currently emitting. Resp. 40. But that ignores Congress's placement of the term "applicable" within section 112(i)(3)(A). "Applicable" appears once, and *only* within an expressly retrospective phrase: "[a]fter the effective date" of a standard "promulgated" (past tense) "*and* applicable" to a source, the source cannot violate that standard. 42 U.S.C. § 7412(i)(3)(A) (emphasis added). The question of "applicab[ility]" thus exists solely in conjunction with a "promulgated" standard, and that standard's "effective date." *See Bruesewitz v. Wyeth, LLC*, 562 U.S. 223, 236 (2011) ("[L]inking [otherwise] independent ideas is the job of a coordinating junction like 'and ....'"). EPA's interpretation severs "applicable" from the "effective date" of a "promulgated" standard; adds "is," a present-tense verb conflicting with the

[4] The instruction "after the bell rings, stand up" requires one to stand up after the bell "has been" rung—not to stand only if the bell "is" continuously, permanently ringing.

retrospective phrase in which "applicable" appears; and thereby manufactures an independent, continuous enquiry at odds with the statutory text. *Cf.* Envtl. Br. 26 (noting other provisions in which "applicable" is placed independently).

Intervenors object that petitioners' reading "plucks" the word "promulgated" from the first "adjective" phrase of section 112(i)(3)(A), and "cast[s]" it into the second phrase's prohibition on "operat[ions]." Intvn. 37. Section 112(i)(3)(A)'s prohibitory phrase, however, describes the sources that must comply, and the standards with which they must comply, by express and exclusive reference to its first phrase: "no person may operate *such* source in violation of *such*" standard. 42 U.S.C. § 7412(i)(3)(A) (emphasis added). The statutory term "such" requires reference to that which has been "already described." *Culbertson v. Berryhill*, 139 S. Ct. 157, 522 (2019). Here, the only referents of the words "such" are the words with which section 112(i)(3)(A) begins. The resulting prohibition is unambiguous: "After" a standard is "promulgated" and "applicable" to a source, *that* source cannot violate *that* standard. 42 U.S.C. § 7412(i)(3)(A).[5]

That the Seitz Memo required compliance after the "first compliance date," rather than the effective date, does not rescue the Wehrum Memo. Resp. 40-41.

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[5] An area source whose emissions exceeded the major-source threshold "after the effective date" of a major-source standard would be required to comply with that major-source standard. 42 U.S.C. § 7412(i)(3)(A). *Cf.* Resp. 40 n.18 (suggesting otherwise).

The Seitz Memo is not before this Court (nor is it likely to be, *see Harris v. FAA*, 353 F.3d 1006, 1009 (D.C. Cir. 2004) (suit challenging agency action under APA "must be commenced within six years")). If it were, it would present a different, far narrower question: whether the statute gives EPA discretion to decide *which* constraints limit a source's ability to escape maximum achievable obligations (rather than whether any such constraints exist at all). *See* Seitz Memo 3-5, JA0234-36 (Section 112 "strongly suggests certain outer limits for when a source may avoid" a standard by changing status, but "may be flexible enough to allow the Agency to reach different results through rulemaking.").[6] Even if the Seitz Memo misconstrued the breadth of EPA's discretion, that would not allow the Agency to now implement a rule completely untethered from the statute.

C. The Wehrum Memo Ignores Section 112's Structure.

The Agency offers no means of reconciling the Wehrum Memo with the remainder of section 112. Under the Wehrum Memo, any source that reduces its emissions to 10 (or 25) tons per year—even as a result of compliance with the standards mandated by Congress—is exempted from those same standards, undermining Congress's stated goal, in section 112(d), of "maximum" reductions to far lower levels. Envtl. Br. 28-30. EPA responds only that "logically" the

[6] The Seitz Memo's emphasis on compliance dates has some grounding in section 112(i)(3)(A)'s explicit "except[ion]." 42 U.S.C. § 7412(i)(3)(A).

Agency's view of "the pool of sources to which [maximum achievable control technology] applies" must override Congress's direction as to what reductions are required from those sources. Resp. 43. But the Supreme Court has squarely rejected that proposition: the Clean Air Act's "definition[s]," like any other statutory element, cannot be read in a fashion "incompatible … with [a] program['s] regulatory structure." *Utility Air*, 573 U.S. at 320. As in *Utility Air*, EPA "insist[s] that it cannot possibly give" a term (here, "major source") a "reasonable, context-appropriate meaning" (even though "it has been doing precisely that for decades"), *id.* at 317. *E.g.* Resp. 43 ("Congress has … defin[ed] 'major source' without any cut-off," and "[t]hat unambiguous choice must be honored."). As in *Utility Air*, that claim betrays the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 320 (citation omitted).

Intervenors claim that the Wehrum Memo comports with section 112(d)(2) because EPA "could" issue an area-source standard which "prohibits emissions." Intvn. 38. But Congress specified that standards under section 112(d)(2) "shall" require the "maximum" reductions, including a "prohibition" whenever "achievable." 42 U.S.C. § 7412(d)(2). That strongly compulsory language is emphatically underscored by section 112(d)(3)'s "floor" requirements. 42 U.S.C.

§ 7412(d)(3). *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 860-62 (D.C. Cir. 2001). This detailed, mandatory structure refutes an interpretation that would—at most—give EPA the discretion to seek out the "maximum achievable" reductions, when the Agency believes them "appropriate." Intvn. 38. No legislature that wished to impose a cap of 10/25 tons per year, leaving open the mere possibility that EPA *might* demand more, would bother with the precise, non-discretionary instructions of section 112(d). *See Railway Labor*, 29 F.3d at 667 (statute that "provide[s] a 'who, what, when, and how' laundry list governing the [agency's] authority" is "utterly inconsistent with the notion" that an agency has discretion to act "at will.").

Moreover, in the vast majority of its rules, EPA has *not* required area sources to meet the maximum achievable standard. *See, e.g.*, Envtl. Br. 10, 38-41.[7] The Wehrum Memo therefore effectively exempts the vast majority of sources from any obligation to reduce their emissions below the major-source threshold, eviscerating the technology-based, maximum achievable controls that Congress made section 112's centerpiece.[8] Leg. Hist. 8473 (noting that standards "based on

[7] Though amici proffer one area-source standard including some "protective" limits, Brief of Amici Curiae in Support of Respondents 12, they do not meaningfully dispute that the vast majority of EPA's standards contain minimal, or no, area-source requirements.

[8] It also undermines section 112(f)'s residual-risk provisions, Envtl. Br. 33—a point no respondent contests.

the maximum reduction in emissions" are "the principal focus of activity under section 112"). *See MCI Telecomm. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230-31 (1994) (that requirement is at "heart" of statute makes it "highly unlikely that Congress would leave the determination of whether an industry will be" subject to requirements to agency discretion).

EPA does not dispute that the Wehrum Memo would additionally jeopardize the Agency's ability to ensure that certain sources are "subject to" particular standards, as required by sections 112(c)(3) and (c)(6), 42 U.S.C. §§ 7412(c)(3) & (c)(6). Resp. 41. *See* Envtl. Br. 31-32. EPA instead re-characterizes those sections as demanding only "findings," Resp. 42. But the statute does not require "findings." Under section 112(c)(6), *e.g.*, EPA must "*assure[]*" that the sources EPA identifies as accounting for 90 percent of the enumerated pollutants will be "subject to" maximum achievable standards, by November 15, 2000 (the same date by which EPA was required to promulgate those standards, 42 U.S.C. §§ 7412(c)(2)-(3)). 42 U.S.C. § 7412(c)(6) (emphasis added). *See Sierra Club v. EPA*, 863 F.3d 834, 835 (D.C. Cir. 2017) (noting these requirements are mandatory). EPA's interpretation makes that "assur[ance]" meaningless; the "sources"

described in section 112(c)(6) may backslide out of maximum achievable standards at any time.[9]

EPA argues that section 112(c)(1)'s requirement that EPA revise its categories demonstrates that Congress "recognized that 'categories and subcategories of major sources and area sources'" would change over time. Resp. 42. But EPA's obligation to revise its categories does not imply that Congress "recognized" that sources could backslide out of compliance with maximum achievable standards, so that such compliance would never be "assur[ed]." 42 U.S.C. § 7412(c)(6). Indeed, as this Court has recognized, EPA's power to revise its categories is constrained by explicit anti-backsliding requirements, precisely so that such revisions do not relieve regulated sources of their pollution-reduction obligations in a manner that frustrates section 112's statutory goals. *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (noting that EPA has limited ability to delist source categories, pursuant to 42 U.S.C. § 7412(c)(9)).

[9] EPA observes that regulating the specified sources will reduce their emissions below the stated percentages. Resp. 41-42 n.20. But absent the Wehrum Memo the "sources" that accounted for those emissions would remain "subject to [maximum achievable] standards" as the statute requires (even as their emissions change). 42 U.S.C. § 7412(c)(6).

Intervenors contend the Wehrum Memo is needed to prevent a single facility from containing some major sources and other area sources. Intvn. 35.[10] The Wehrum Memo does not offer that rationale; it is consequently immaterial. *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015). Regardless, the Clean Air Act contains nothing to suggest that every source within a given industrial facility must receive the same major/area classification. On the contrary, it expressly recognizes that a major source may contain a "group of stationary sources," 42 U.S.C. § 7412(a)(1). *See also* 42 U.S.C. §§ 7412(a)(3) & 7411(a) (defining "stationary source"). That eliminates any implication that every facility must be just *one* source, "either major or … area." Intvn. 35.

III. EPA'S FAILURE TO ADDRESS ITS DECISION'S CONSEQUENCES IS ARBITRARY AND CAPRICIOUS

EPA acknowledges that it did not consider the Wehrum Memo's "impact on emissions" of air toxics, Resp. 44 (administrative record "does not provide a basis" to assess emissions). EPA also does not contend that it assessed the impact of the Memo on its past administration of section 112's requirements. EPA was obligated to address these critically important aspects of its decision. Envtl. Br. 38-41. Its

[10] Intervenors simultaneously attack the Once-In Policy because it could *prevent* a single facility from containing some major sources, and other area sources. Intvn. 19 (complaining that existence of "major source" boiler subjects adjacent "coating operation" to major-source standard).

failure to do so cannot be cured by comments in past rulemakings, speculating that "voluntary pollution abatement" would reduce pollution below the maximum achievable levels, Intvn. 32; Resp. 10—especially when EPA's own regional offices, state agencies, and other stakeholders expressed the opposite opinion, Envtl Br. 12; California Br. 7-8; Calif. Reply 16-18. *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (where agency does "not explain what (if anything) it found persuasive in [supportive] comments," it fails to assess consequences of change). Nor can it be ignored because EPA might remedy it later. Resp. 41-42, 44-45 (inviting "petition," and noting "planned rulemaking").

CONCLUSION

The Wehrum Memo should be vacated. EPA asks to "have the first opportunity to construe [any] ambiguous text." Resp. 44. Vacatur will leave the Agency that opportunity, within the boundaries of this Court's decision. *See Sec'y of Labor v. Nat'l Cement Co.*, 494 F.3d 1066, 1069 (D.C. Cir. 2007) (vacating for agency "to interpret … ambiguous language"). The Memo should not continue to enable major sources of hazardous air pollution to escape maximum achievable standards in the meantime. Envtl. Br. 9-14, 15-19.

Intervenors request remand without vacatur, Intvn. 39 (belying their insistence that the Memo "effects no change in [their] obligations," Intvn. 23). They do not, and cannot, make the showing necessary to avoid the normal remedy

of vacatur. *Humane Soc'y v. Zinke*, 865 F.3d 585, 614-15 (D.C. Cir 2017). EPA "wholly failed to address" crucial text and context; those "major shortcomings" make "vacatur appropriate." *Id.* The Wehrum Memo overturns over two decades of Agency practice, removing the foundation of EPA's fulfillment of section 112's core duties; vacatur prevents those "disruptive consequences." *Id.* And vacatur serves the "environmental values" underlying section 112. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (citation omitted).

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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)(ii), and the Court's August 17, 2018 briefing order, the foregoing **Proof Reply Brief of Petitioners** contains 4,149 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 fewer than 4,050 words, so that the briefs comply with the 8,250-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: February 22, 2019

/s/ James S. Pew
James S. Pew

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2019, I have served the foregoing **Final Reply Brief of Petitioners** on all registered counsel through the Court's electronic filing system (ECF).

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