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Proposed Action Memo: EPA Withdrawal of the Once In/Always In Policy

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I. Summary:

The Environmental Protection Agency (EPA) has reversed its 25-year old "once in, always in" ("OIAI") policy. This reversal permits a vast number of "major sources" to reclassify as "area sources," and thereby be subject to less stringent regulation of Hazardous Air Pollutants (HAPs).

Rollback

- Memorandum, Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (January 2018) [2018 Guidance]
- Proposed Rule, Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,304 (July 2019)
- Final Rule, Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 85 Fed. Reg. 73,854 (November 2020) [November Rule]

Agency

- Environmental Protection Agency

Impact

- At least 3,900 major sources will be permitted to reclassify as area sources and thereby increase their emissions above what they could traditionally emit.
- In California alone, this could mean over 900 tons of additional toxic air pollution annually. The EPA has failed to provide a national aggregate emissions estimate.
- The EPA's own data shows that the additional emissions of HAPs will occur predominantly in minority and low-income communities.

Recommended Action

- Issue interim guidance reinstating the OIAI policy while highlighting the substantive and procedural deficiencies of the 2018 Guidance and the November Rule.
- Initiate notice-and-comment rulemaking to rescind the November Rule and codify the longstanding OIAI policy.

II. Background

Section 112 of the Clean Air Act ("CAA") regulates Hazardous Air Pollutants (HAPs), or pollutants that are known carcinogens or cause other serious health effects. EPA was originally given the authority to assess and define HAPs after considering health effects and costs, but after only defining seven pollutants in twenty years, Congress amended Section 112 in 1990, explicitly requiring EPA to regulate almost two hundred pollutants as HAPS.[1]

Section 112 requires different stringency of pollution control depending on whether the source is classified as a "major source" or an "area source." A major source is "any stationary source . . . that emits or has the *potential to emit* . . . 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."[2] Area sources are any sources not

[1] New Jersey v. E.P.A., 517 F.3d 574, 578 (D.C. Cir. 2008)
[2] 42 U.S.C.A. § 7412(a)(1).

classified as a major source.[3] The EPA is statutorily obligated to establish technology-based standards for major sources that result in "the maximum degree of reduction in emissions of the hazardous air pollutants"[4] while considering costs as well as health and environmental effects. This maximum achievable control technology (MACT) standard cannot be any less stringent than "the emission control that is achieved in practice by the best controlled similar source."[5] Major sources also face other permitting requirements, which result in increased monitoring, reporting and recordkeeping requirements.[6]

In contrast, standards for area sources only necessitate the use of generally available control technology—a much less stringent standard than MACT.[7] Area sources also are not usually required to obtain Title V permits, which exempts them from many of the monitoring, reporting, and recordkeeping requirements of major sources.

In 1995, the EPA issued guidance ("1995 Guidance") establishing that sources needed to reduce their emissions below the "major source" threshold before the "first compliance date" to be regulated as an "area source." After the first compliance date has passed, a source would be permanently regulated as a major source even if it subsequently changed its processes or equipment to keep emissions below the major source threshold.[8] This policy is commonly known as the "Once In, Always In" (OIAI) policy. The EPA in the past has justified the policy noting a contrary reading of the CAA would allow a facility installing MACT to backslide from MACT control levels by operating only enough to reduce emissions below the major source threshold thereby transitioning to area-source status and eliminating the MACT requirement. Currently, EPA estimates around 7,200 facilities are subject to major source standards.

III. Current Status

On **January 25, 2018**, EPA issued a guidance memorandum ("2018 Guidance") repealing the OIAI policy.[9] The memorandum noted that when "a major source which takes an enforceable limit on its potential to emit and takes measures to bring its HAP emissions below the applicable threshold," it may be reclassified as an area source, and therefore will no longer be required to use MACT.[10] The 2018 Guidance asserts that the longstanding interpretation OIAI policy established by the 1995 Guidance "is contrary to the plain language of the CAA" for establishing a temporal limitation by which a source can qualify as an "area source" as opposed to a "major source."[11]

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[3] 42 U.S.C.A. § 7412(a)(2) (emphasis added).
[4] 42 U.S.C.A. § 7412(d)(2).
[5] 42 U.S.C.A. § 7412(d)(3).
[6] 42 U.S.C.A. § 7466(a)(a).
[7] 42 U.S.C.A. § 7412(d)(5).
[8] Potential to Emit for MACT Standards – Guidance on Timing Issues, John Seitz, Director, Office of Air Quality Planning and Standards, U.S. EPA, p. 5 (May 16, 1995).
[9] *See* Memorandum from William L. Wehrum, Assistant Adm'r, EPA to Reg'l Air Div. Dirs. (Jan. 25, 2018), *available at* https://www.epa.gov/sites/production/files/2018-01/documents/reclassification_of_major_sources_as_area_sources_under_section_112_of_the_clean_air_act.pdf .
[10] *Id.*
[11] *Id.*

In **April 2018,** California Attorney General Xavier Becerra filed suit against EPA for repealing the OIAI policy. The lawsuit requested that the D.C. Circuit Court of Appeals nullify EPA's repeal of the policy, arguing it was an arbitrary and capricious reversal of the agency's 25-year old policy, and it contravened Congress' intent in adopting the Clean Air Act.[12] AG Becerra's lawsuit came on the heels of a number of lawsuits filed by environmental groups in the D.C. Circuit challenging the guidance memo. The court later consolidated the cases as *California Communities Against Toxics, et al. v. EPA*. On **August 20, 2019**, the D.C. Circuit ruled against the challenge to the 2018 Guidance on procedural grounds, finding it did not constitute a "final agency action" because the 2018 Memo "itself does not revoke or amend a single permit."[13] The petition for rehearing filed by California and the environmental groups was subsequently denied on **January 22, 2020.**

On **July 26, 2019,** EPA published a proposed rule to codify the 2018 Guidance retracting the OIAI policy. On **November 19, 2020**, EPA published a final rule ("November Rule") to go into effect on **January 18, 2021**.[14] Multiple environmental groups have expressed they will file suit challenging the November Rule.

V. Justification to Reverse Rollback

Increased Emissions of HAPs

Failure to reverse the repeal of the OIAI policy would allow major sources such as chemical plants and petroleum refineries to "switch to less effective pollution controls, or operate [their] controls less frequently or at lower removal efficiencies, and release more HAPs up to the major source threshold amounts."[15] EPA has acknowledged as much itself: in the proposed rule, it admits that there are possible scenarios in which emissions could increase upon reclassification.[16] For decades, the 187 listed HAPs have been known or suspected to cause cancer, gene mutations, reproductive effects, birth defects, respiratory issues, and severe environmental effects.[17] These substances have both long term and short term health and environmental affects.[18]

When it first proposed the rule, the EPA estimated that around 3,900 emitters could be reclassified and subjected to weaker standards than before. California itself has identified 42 sources of air pollution that are emitting below the 10 ton per year or 25 ton per year limits that would be allowed to reclassify under the new rule, which could result in an additional 935 tons per year of additional toxic air pollution in California communities—bearing in mind that California already has some of

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[12] *See* State of California Department of Justice, Attorney General Becerra Sues EPA Over Illegal Decision to Let Polluters off the Hook (Apr. 10, 2018), *available at* https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-epa-over-illegal-decision-let-polluters-hook.

[13] *See* Cal. Cmties. Against Toxics v. Envtl. Prot. Agency, 934 F.3d 627, 639 (D.C. Cir. 2019).

[14] Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 85 Fed. Reg. 73,854 (Nov. 19, 2020) [hereinafter November Rule] (to be codified at 40 C.F.R. Part 63), *available at* https://www.govinfo.gov/content/pkg/FR-2020-11-19/pdf/2020-22044.pdf.

[15] EELP Staff, *Once in Always In Guidance for Major Sources under the Clean Air Act,* Environmental & Energy Law Program (Feb. 2, 2018), *available at* https://eelp.law.harvard.edu/2018/02/once-in-always-in-guidance-for-major-sources-under-the-clean-air-act/.

[16] EPA, Regulatory Impact Analysis for the Final Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act 108–09 (Sep. 2020), *available at* https://www.epa.gov/sites/production/files/2020-10/documents/mm2a_final_ria_2020-09.pdf.

[17] *See* Jane C. Caldwell et al., *Application of Health information to Hazardous Air Pollutants Modeled in EPA's Cumulative Exposure Project*, 14 TOXICOLOGY AND INDUS. HEALTH 429 (1998).

[18] *Id.*

the most stringent state standards.[19] In other states with less rigid standards than California (i.e., in states where federal regulations are more likely to stand alone), the proportional increases of toxic air pollutants could be even higher.[20] The EPA itself estimates this rule could increase total HAP emissions between 919 to 1,258 tons per year[21], and this number has been critiqued by many as an underestimate.[22]

Environmental Justice Impacts

The effects of the withdrawing the OIAI policy will be felt predominately in minority and low-income populations. A joint study by the Environmental Defense Fund and the Sierra Club, relying on the EPA's data released with its proposed rule, found that over 90 percent of the facilities projected to increase their emission of HAPs due to the withdrawal of the OIAI policy are located in minority communities.[23] Additionally, over 70 percent of these facilities, are located in low-income communities.[24] EPA's withdrawal of the OIAI policy therefore violates Executive Order 12,898 which requires agency actions to account for environmental justice impacts. In the November Rule, the EPA claims that the executive order does not apply because "this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low income populations, and/or indigenous peoples . . . because it does not establish an environmental health or safety standard." EO 12,898, however, establishes a broader mandate to consider environmental justice impacts including deregulatory actions like the one the EPA has taken with the November Rule.

IV. Proposed Action:

1. Issue Interim Guidance

The EPA should immediately issue interim guidance reinstating the 1995 OIAI policy. The guidance should highlight the substantive and procedural deficiencies (expounded below) of the November Rule and the 2018 Guidance, and note the EPA's intention to initiate notice-and-comment rulemaking to repeal the November Rule and codify the 1995 OIAI policy as a rule. Because the November Rule goes into effect on January 19, 2021, no sources have been reclassified. The sooner EPA acts, the less likely there will be compelling reliance interests favoring repeal of the OIAI policy. The interim guidance can serve as a clear regulatory signal for industry. Lastly, if there is any

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[19] Harvard Energy & Environmental Law Program, Once in Always In Guidance for Major Sources under the Clean Air Act (last updated Nov. 19, 2020), *available at* https://eelp.law.harvard.edu/2018/02/once-in-always-in-guidance-for-major-sources-under-the-clean-air-act/.

[20] *Id.*

[21] *See* EPA, Documentation of the Illustrative Emissions Analysis for the Rule "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" 32 (Aug. 2020), *available at* https://www.epa.gov/sites/production/files/2020-10/documents/mm2a_final_illustrative_emission_impact_analysis_tsm.pdf.

[22] *See* Xavier Becerra, Attorney General, State of California et al., Comment Letter on EPA's Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act 13–15 (September 24, 2019), *available at* https://beta.regulations.gov/comment/EPA-HQ-OAR-2019-0282-0339.

[23] Environmental Defense Fund & Sierra Club, Supplemental Comment Regarding the Environmental Protection Agency's Proposed Rule: "Reclassification Of Major Sources As Area Sources Under Section 112 Of The Clean Air Act," 84 Fed. Reg. 36,304 (July 26, 2019), Docket No. EPA-HQ-OAR-2019-0282-0449, at 3 (Sept. 9, 2019), available at https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0282-0449.

[24] *Id.* at 4.

pending litigation at the time the guidance is issued, the EPA should note its intent to petition the court for abeyance.

i. Substantive Deficiencies in Repealing the OIAI Policy

The repeal of the OIAI policy frustrates the purpose of Sec. 112 of the CAA. As a group of state attorneys general expressed, the November Rule "in effect creates a MACT ceiling of 9.9 tons per year/24.9 tons per year" by allowing any sources that emit HAPs below that threshold to be regulated as area sources, undermining Sec. 112's "requirement that MACT standards require emission reductions to the maximum level achievable." Additionally, the guidance should emphasize the discernible environmental justice impacts described above and the need to reconsider the repeal of OIAI policy for its violation of EO 12,898.

ii. Procedural Deficiencies in Repealing the OIAI Policy

The interim guidance should highlight that in promulgating the November Rule, the EPA failed to undertake an adequate cost-benefit analysis, violating both Executive Order 12,866 and the Administrative Procedure Act (APA). The EPA eschewed estimating the aggregate emissions impact of the final rule and instead provided an illustrative analysis of three analytical scenarios.[25] As a result, the EPA also failed to adequately monetize the health and environmental harms resulting from the repeal of the OIAI policy. Given the inadequacy of its own emissions impact analysis, the EPA states that "quantification of effects of these emissions increases would not be reliable or informative" and accordingly provides a "qualitative discussion" of the harms.[26] As commenters point out, "Executive Order 12,866, Circular A-4, and EPA's own emissions guidelines require the agency to monetize impacts whenever feasible. And for at least four pollutants implicated by the Proposed Rule, EPA cannot reasonably contend that monetization is infeasible, because the agency has monetized their per-ton effects in past rulemaking."[27]

2. Initiate Notice-and-Comment Rulemaking

EPA should initiate notice-and-comment rulemaking to rescind the November Rule and codify the OIAI policy. Codifying the OIAI policy in a rulemaking as opposed to simply withdrawing the November Rule will ensure its durability. The EPA should make special note in its regulatory impact analysis that it is reverting to a longstanding policy that regulated parties have complied with for over two decades.

A new rulemaking and interim guidance will be on strong legal footing. In particular, the D.C. Circuit's ruling against challenges to the 2018 Guidance bodes well for the proposed interim guidance. The rulemaking will need to be performed through standard notice-and-comment procedures and must meet basic requirements, including that a rule rescission must contain reasoned analysis and justification to not be arbitrary and capricious. Federal courts have long upheld the ability of an agency to reconsider and revise its own policies and decisions—so long as

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[25] *See* November Rule at 73856 ("The unique nature of each source's decision process makes it difficult for the EPA to determine the number and type of sources that may choose to reclassify under this rule. Because of this, the EPA is limited to presenting illustrative analyses concerning the impacts of this final rule.").

[26] *Id.* at 73879.

[27] Institute for Policy Integrity at New York University School of Law, Comment Letter on Proposed Rule: Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,304 (proposed July 26, 2019), Docket No. EPA-HQ-OAR-2019-0282, at 9 (Sep. 24, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0282-0316.

reconsideration is not barred by statute, the new policy is supported by good reason, and the agency acknowledges and accounts for the change of direction.[28] Here, the impermissible interpretation of the statute and risk of increased emissions (that were not considered in the November Rule) should be enough for the agency to show a permissible reconsideration.

[28] See Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 US. 29 (1983); F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502 (2009), Sang Seup Shin v. INS, 750 F.2d 122, 130 (D.C. Cir. 1984).