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The Honorable Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID Number EPA-HQ-OAR-2019-0282
Submitted to the Federal eRulemaking Portal (www.regulations.gov)

RE: Comments on “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act: Proposed Rule,” 84 Fed. Reg. 36,304 (July 26, 2019)

Dear Administrator Wheeler:

The American Public Power Association (APPA or Association) supports EPA’s proposed rule allowing major sources to reclassify as area sources for purposes of Clean Air Act (CAA or Act) section 112 and promulgating regulatory language to govern this reclassification (the MM2A Proposal).¹ The MM2A Proposal would amend the General Provision of the National Emission Standards for Hazardous Air Pollutants (NESHAP), codified at 40 C.F.R. Part 63, Subpart A, to allow major sources to reclassify as area sources at any time by limiting their potential to emit (PTE) hazardous air pollutants (HAPs) to below the statutory major source threshold of 10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAPs.² The Proposed Rule would implement EPA’s prior withdrawal of the “Once In, Always In” (OIAI) policy that prevented such reclassification and provide guidance on the process for

¹ 84 Fed. Reg. 36,304 (July 26, 2019).

² See 42 U.S.C. § 7412(a)(1).

reclassifying from a major source to an area source.³ EPA has provided in this proposal a strong legal basis for its determination that the CAA allows a major source to take area source status after it has already become subject to the substantive requirements of a major source maximum achievable control technology (MACT) standard. These comments do not address this legal basis further. Instead, APPA's comments respond to EPA's solicitation of comments on issues regarding what emission limits and other requirements are sufficient to limit a source's HAP emissions below the major source thresholds and justify reclassification as an area source. Those issues are addressed in detail below.

The Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power. The Association participates on behalf of its members collectively in EPA's rulemakings and other CAA proceedings that affect the interests of public power utilities. Many of our members are small entities of state and local government, thus, codifying the MM2A Proposal will reduce the regulatory impact to APPA's members particularly from recordkeeping and reporting all while our members continue to make measurable improvements in air quality. APPA members own and operate electric generation units in many states and are subject to various NESHAPs to which the OIAI policy applied, including the Industrial, Commercial and Institutional Boilers

³ The OIAI policy was set forth in a memorandum dated May 16, 1995, entitled Potential to Emit for MACT Standards – Guidance on Timing Issues (“1995 Seitz Memorandum”). EPA superseded the 1995 Seitz Memorandum and withdrew the OIAI policy in Memorandum dated January 25, 2018, from William L. Wehrum, EPA Assistant Administrator for the Office of Air and Radiation, entitled Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (2018 Wehrum Memorandum).

and Process Heaters NESHAP for major sources; the Reciprocating Internal Combustion Engines (RICE) NESHAP; and the Stationary Combustion Turbines NESHAP for major sources.⁴ Accordingly, APPA members would be directly affected by finalization of the MM2A Proposal.

APPA believes allowing major sources to reclassify promotes the use of different control techniques and emerging technologies and advances future control technology research and development. The OIAI policy ensured major sources had no incentive to reduce their emissions below the major source threshold after the first substantive compliance date because the policy prevented the potential benefits that would be available to reclassifying as an area source, particularly the reduced burden of record keeping, monitoring and reporting. Further, the OIAI policy limited a source's ability to reclassify after installing new control measures, thus making it less likely for a source to voluntarily pursue additional controls. The MM2A Proposal, on the other hand, incentivizes a major source to spend capital on improved and additional controls to reduce HAP emissions.

I. Provisions to Address Post-Reclassification Emission Increases (Comments C-3, C-4, C-6, C-8, C-9)

EPA solicits comment on “to what extent will theoretical emission increase scenarios actually occur [after reclassification]” and “whether the EPA should adopt regulatory text to establish safeguards to prevent emissions increases following reclassification.”⁵ APPA's response depends on what type of emission increase EPA is referring to. If the Agency wishes to address the possibility that a source might increase its actual emissions or PTE above the CAA's major source thresholds after reclassification, APPA believes that EPA can adopt requirements

⁴ 40 C.F.R. Part 63, Subpart DDDDD, 40 C.F.R. Part 63, Subpart ZZZZ and 40 C.F.R. Part 63, Subpart YYYY.

⁵ *Id.* at 36,312.

that prevent a source from exceeding these thresholds without complying with major source requirements. APPA addresses these types of “safeguards” below (at the end of Section I).

However, EPA appears to be referring to the possibility that reclassified sources may increase their emissions to levels that are “above what they could emit if they continued to be major sources,” but that are still below the major source thresholds of 10 tpy of any individual HAP and 25 tpy of total HAPs.⁶ EPA has no authority under section 112 to require these kind of “safeguards” limiting the emissions of area sources. Rather, the Agency’s sole authority to limit HAP emissions from area sources is to list an area source category for regulation under 112(c)(3) or (c)(6) and adopt emission limits under section 112(d).⁷ Nothing in the CAA allows EPA to require the kind of “anti-backsliding” limits for individual area sources that the Agency appears to be contemplating.

EPA solicits comment on whether the statutory language directing it to determine major source status based on a source’s “potential to emit considering controls” can be reasonably interpreted to grant it authority to adopt these kind of anti-backsliding limits as a way to ensure the “sufficiency” of the PTE limits used to reclassify a major source as an area source.⁸ As support for this premise, EPA claims the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held in *National Mining Association v. EPA* that the term “considering controls” is ambiguous, and that it therefore has discretion to interpret that term to allow for imposition of “safeguards” preventing HAP emission increases after reclassification.⁹

As an initial matter, *NMA* dealt with a different issue (whether EPA may require that HAP PTE limits be federally enforceable), and the court did not definitively resolve whether the statutory term “considering controls” is ambiguous on that issue. But, in any event, neither *NMA*

⁶ *Id.*

⁷ See 42 U.S.C. § 7412(c)(3), (c)(6), (d).

⁸ 84 Fed. Reg. at 36,312-13; see 42 U.S.C. § 7412(a)(1) (defining major source).

⁹ 84 Fed. Reg. at 36,312-13 (citing *Nat’l Mining Ass’n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (*NMA*)).

nor the CAA can be reasonably interpreted to provide for the kind of “safeguards” EPA inquiries about. In evaluating whether federal enforceability was a permissible criterion for a HAP PTE limit, the D.C. Circuit indicated that the limiting factor in that analysis is whether EPA’s interpretation gives effect to Congress’s intent to base HAP PTE on “effective” controls.¹⁰ In other words, in interpreting the statutory phrase “considering controls,” any constraints EPA places on the types of controls or limits that qualify a source for area source status must be based on ensuring those controls or limits are effective.

The focus of *NMA*, however, is whether those controls are effective at limiting the source’s HAP emissions and PTE *below the major source thresholds*—not whether they are effective at holding the source’s emissions below the level it would emit if it were subject to major source MACT requirements. Because the term “considering controls” occurs in section 112’s definitional provisions defining “major source,” the only relevant context in which to “consider[]” those controls is to assess whether they effectively prevent the source from exceeding the 10/25 tpy thresholds.¹¹ So long as a source’s emissions and PTE for HAP are below those thresholds, the CAA unambiguously classifies it as an area source, regardless of how much less it *might have* emitted if it were subject to MACT. As the court stated in *NMA*, “[i]t is not apparent why a state’s or locality’s controls, when demonstrably effective, should not be credited in determining whether a source subject to those controls should be classified as a major or area source.”¹²

Indeed, requiring “safeguards” to prevent any post-reclassification increases in HAP emissions would undermine the very premise of EPA’s MM2A Proposal altogether. It would arbitrarily treat a synthetic area source differently based on when it took that status, which is

¹⁰ See *NMA*, 59 F.3d at 1365 (remanding federal enforceability requirement because EPA “has not explained why [it is] related to ensuring the practical effectiveness of state controls”).

¹¹ 42 U.S.C. § 7412(a)(1).

¹² 59 F.3d at 1364.

precisely the “timing” distinction that EPA believes the plain text of the CAA resolves. Before becoming subject to major source MACT requirements, a source could take synthetic area source status through HAP PTE limits allowing it to emit up to the 10/25 tpy thresholds. But after becoming subject to MACT, the approach EPA discusses would only allow the source to take synthetic area source status if it accepted PTE HAP limits constraining it to levels *below* the 10/25 tpy thresholds. EPA’s withdrawal of the 1995 “Once In, Always In” policy and its present MM2A Proposal are based on the position that “Congress has spoken by defining ‘major source’ without any temporal limitation.”¹³ Requiring “anti-backsliding” safeguards would reintroduce those temporal limitations.

As noted above, EPA *does* have the authority to require that a major source reclassifying to area source status accept PTE HAP limits that effectively prevent it from increasing HAP emissions beyond major source thresholds. Such safeguards, however, will not always be necessary. As EPA recognizes in the MM2A Proposal, there are three general categories of major sources that could seek reclassification as area sources: (1) major sources that need to obtain PTE HAP limits; (2) sources already classified as major for a specific MACT that have obtained PTE HAP limits for purposes of a different MACT; and (3) sources already classified as major for a specific MACT “that are no longer physically or operationally able to emit HAP in amounts that exceed the major source thresholds”—for example, because they have retired a source at the facility that emits HAPs in large quantities.¹⁴

For most APPA members seeking reclassification as area sources, this third category is the most likely. APPA members own and operate electric generating units that are often co-located with equipment in other source categories regulated under separate MACT standards. In

¹³ 84 Fed. Reg. at 36,312.

¹⁴ *Id.* at 36,315.

many cases, these members have retired or are planning to retire one or more electric generating units, and any remaining sources (such as combustion turbines or internal combustion engines) at the facility are not physically capable of emitting HAPs in excess of the major source thresholds—even without controls required by any currently applicable MACT. An illustrative example is the Holland Board of Public Works James DeYoung Generating Station and Wastewater Treatment Plant, discussed in the MM2A Proposal.¹⁵ Once the Holland Board of Public Works retired the three coal-fired boilers at the James DeYoung Generating Station, the remaining sources at the Wastewater Treatment Plant (which had been grouped together with the Generating Station as part of the same source) qualified for reclassification because by themselves they were not physically capable of exceeding 10/25 tpy of HAP emissions.

In cases such as these, where a source formerly classified as “major” is no longer physically or operationally capable of emitting above the major source thresholds, no special provisions or “safeguards” should be necessary for reclassification as an area source. EPA appears to recognize this, noting in the MM2A Proposal that “sources that no longer have the capacity to emit HAP above the major source thresholds, unaided by added controls or operational limitations, may have additional options” for taking area source status that are unavailable to other sources.¹⁶

In cases where a source must rely on PTE HAP limits based on emission controls or operational limitations in order to take area source status, APPA believes that if “safeguards” are needed to prevent those sources from increasing HAP emissions beyond the major source thresholds after reclassification, those requirements should be developed on a case-by-case basis and not embedded into the regulatory text of the Part 63 general provisions. There can be

¹⁵ *Id.* at 36,312.

¹⁶ *Id.* at 35,315.

multiple ways to define an effective safeguard, including process limits, capacity limits, or other requirements. The precise measures needed to guard against exceeding the major source thresholds will likely vary based on the type of emission controls or operational restrictions the source plans to use, the circumstances that have led the source to seek reclassification, or other factors. The regulatory text should not dictate how sources keep their HAP PTE below 10/25 tpy, as to do so would undermine the purpose of this MM2A Proposal by stifling innovation and weakening incentives to eliminate higher-emitting equipment or use less expensive control systems.

II. Criteria for Assuring Legal Enforceability (Comments C-22, C-23)

EPA proposes to eliminate the requirement that PTE HAP limits be “federally enforceable” and instead require that they be “legally enforceable,” meaning they must identify the legal authority under which they are being issued and provide the right for the issuing authority to enforce them.¹⁷ EPA also solicits comment on whether state-only and local-only enforcement authority is sufficient to ensure a credible risk of enforcement, and whether enforceability by EPA or by the public (through citizen suits) is necessary.¹⁸

APPA supports the proposed “legal enforceability” criteria and the elimination of the “federally enforceable” requirement. EPA states that to be effective, PTE limits “must carry with them a credible risk for enforcement if they are violated, that sources be on notice of their legal obligation to comply, and that sources are cognizant of the consequences of non-compliance.”¹⁹ Nothing in the MM2A Proposal provides any reason to question that limits established and enforced exclusively by state and local authorities are incapable of meeting these requirements.²⁰

¹⁷ *Id.* at 36,318, 36,337.

¹⁸ *Id.* at 36,318.

¹⁹ *Id.*

²⁰ *See NMA*, 59 F.3d at 1364 (finding “federal enforceability” requirement unlawful where EPA “*has not explained* ... how its refusal to consider limitations other than those that are ‘federally enforceable’ serves the statute’s directive”) (emphasis added).

Indeed, state- and local-only enforcement authority provides a credible risk of enforcement, just as local police are fully able to enforce criminal and civil codes without federal assistance. As Congress made clear, moreover, “air pollution prevention ... and air pollution control at its source is the primary responsibility of States and local governments.”²¹ In most instances, EPA has already had ample opportunity to review the effectiveness of state and local enforcement programs in the context of other CAA programs, and should be able to evaluate whether a particular authority is not credible. In its 1995 guidance document on establishing PTE HAP limits, the Agency concluded that “most State and local programs should have broad capabilities to handle the great majority of situations for which a potential to emit limitation on HAP is needed.”²² Where a state or local program cannot provide a credible threat of enforcement, EPA can deal with such isolated examples on a case-by-case basis through application of the “legally enforceable” criterion without requiring that *all* PTE HAP limits be federally enforceable.

Further, the CAA already provides a compliance incentive to keep area sources from exceeding major source thresholds that is enforceable by both EPA and citizen plaintiffs. If a source exceeds its state or local PTE HAP limit and exceeds the major source thresholds of 10/25 tpy without complying with major source requirements under section 112, it may be subject to enforcement under the CAA. As the court stated in *NMA*, “should a source claim to have lowered its emissions below major source levels, but fail to conform to that claim, it will nonetheless be a major source if its actual emissions exceed the designated thresholds. A major source that fails to observe applicable requirements is subject to sanctions under § 113 of the Act, 42 U.S.C.

§ 7413.”²³

²¹ 42 U.S.C. § 7401(a)(3).

²² Memorandum from John S. Seitz, Dir., EPA Office of Air Quality Planning and Standards (“OAQPS”), “Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)” at 6 (Jan. 25, 1995) (“Seitz 1995”).

²³ 59 F.3d at 1364 n.20.

III. Criteria for Assuring Practicable Enforceability (Comments C-12, C-17, C-18, C-19, C-26, C-27, C-39)

EPA solicits comment on “the proposed criteria required for effective HAP PTE limits for purposes of determining whether a source is a major source under 40 CFR 63.2 and whether the EPA’s proposed criteria and their corresponding elements are necessary and sufficient to ensure HAP PTE limits are effective to support reclassification of a major source to an area source.”²⁴ The Agency proposes to require that PTE HAP limits be “practicably enforceable,” meaning that they specify “(1) a technically accurate limitation and identify the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as 12-month rolling limits); and (3) the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting (MRR).”²⁵

APPA agrees with EPA’s “overarching goal,” which is to “achieve a clear and simple implementation process to motivate area sources to maintain reduced HAP emissions and ensure that sources of HAP comply with CAA requirements.”²⁶ APPA also agrees that “[a]voiding unreasonable burden on industry or states is also an important objective under this goal.”²⁷ In pursuing these goals, EPA should provide state and local authorities with broad flexibility to craft PTE HAP limits that effectively ensure area source status rather than proscribing the requirements for effective limits in extensive detail. In particular, EPA’s regulations should not mandate specific requirements for what information a permitting authority must require to ensure technical accuracy, what averaging periods are appropriate for specific types of limits, or what MRR requirements are necessary.

²⁴ 84 Fed. Reg. at 36,333.

²⁵ *Id.* at 36,318-19.

²⁶ *Id.* at 36,318.

²⁷ *Id.*

As EPA recognizes in the MM2A Proposal, the Agency has already issued a “substantial body of EPA guidance and administrative decisions relating to PTE and PTE limits,” many of which explicitly address the HAP limits necessary to establish area source status.²⁸ This body of guidance includes direction on matters such as how to determine appropriate averaging times, methods of calculating compliance, frequency of reporting, the need for operational requirements for controls used to establish PTE limits, and other issues influencing the practicable enforceability of these limits. Indeed, EPA’s proposed criteria for “practicable enforceability” are drawn directly from these materials.²⁹ While some portions of those materials address “federal enforceability” and are no longer useful in light of *NMA*, their other contents remain relevant.

State and local authorities can rely on this guidance to inform their development of practicably enforceable HAP PTE limits without the need for EPA to incorporate excessively proscriptive requirements in the Code of Federal Regulations. As EPA has previously stated in upholding permit limits adopted consistent with EPA’s body of existing guidance, “the [CAA] and the implementing regulations allow for a flexible, case-by-case evaluation of appropriate methods for ensuring practical enforceability of PTE limits.”³⁰ Limiting this flexibility could preclude states from exploring regulatory options that would otherwise be effective at limiting HAP emissions.

In practice, there may be many different ways in which state and local authorities can effectively limit a source’s PTE to below the major source thresholds of 10/25 tpy without mandating the use of permit limits or MRR requirements for every HAP that a source emits. For example, a source that emits five different HAPs may only be physically or operationally capable

²⁸ *Id.* at 36,317 n.22 (citing examples).

²⁹ See Seitz 1995 at 6 (listing general criteria for evaluating “practicable enforceability”).

³⁰ *In the Matter of Orange Recycling & Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Order on Petition No. II-2001-05 at 5 (Apr. 8, 2002).

of emitting one of those HAPs in excess of 10 tpy, while its total PTE of the other four HAPs combined is less than 1 tpy. In that case, the permitting agency could adequately ensure the source's area source status by only adopting those emission or operational requirements necessary to limit the source's PTE for the first HAP below 10 tpy, without the need for emission limits or MRR requirements for the other four HAPs. In light of the countless permutations of sources and emission scenarios that may be impacted by this rule, EPA should not impose any restraints on the types of HAP PTE limits a permitting authority uses to reclassify a major source as an area source other than those strictly necessary to ensure the 10/25 tpy thresholds are not exceeded.

At the very least, any criteria EPA adopts for practicable enforceability should be written to preserve the flexibility currently given to state and local authorities in crafting PTE limits. For example, EPA should not restrict the scenarios in which different averaging times (hourly, daily, 365-day or 12-month rolling) may be used for emission limits. Current EPA policy recognizes that there are many scenarios in which emission limits with longer averaging times (such as 365-day or 12-month rolling averages) can effectively limit a source's HAP PTE and are appropriate based on the source's operating or design characteristics. For example, for electric generating units, "historically unpredictable variations in emissions" over the course of a year owing to varying levels of demand for generation will often justify use of longer averaging periods.³¹ Likewise, regulatory authorities should have the discretion in some cases to base HAP PTE limits on restrictions of a valid surrogate pollutant.³² Notably, EPA, in the MM2A Proposal,

³¹ See Seitz Memo Attachment 4 at 10.

³² See Seitz Memo at 6-7 (noting limits on criteria pollutant can effectively limit HAP emissions).

appears to support use of surrogates to limit a source's HAP PTE.³³ The Final MM2A Rule should affirm EPA's support for the use of surrogates as outlined in the Proposal.

By allowing states flexibility in crafting HAP PTE limits, EPA can best promote its goal of encouraging sources to pursue and maintain HAP reductions efficiently.

IV. Conclusion

The Association appreciates the opportunity to comment on the MM2A Proposal. APPA supports the withdrawal of the OIAI policy and EPA's proposed revisions to the NESHAP General Provisions. The Association believes that allowing a major source to reclassify to an area sources by limiting their PTE will facilitate the reduction in HAP emissions while reducing the regulatory burden without compromising the NESHAP program's effectiveness. Please contact Ms. Carolyn Slaughter (cslaughter@publicpower.org) should you have any questions regarding these comments.

Sincerely,



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³³ 84 Fed. Reg. at 36,320 (“In practice monitoring for a surrogate (*e.g.*, particulate matter (PM)) can adequately estimate or provide the actual emissions for a group of HAP at the unit, provided there exists a validated relationship between the surrogate and the HAP emissions....”).