

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

_____)	
In the Matter of the Final Rule:)	
)	OAR-2003-0048
National Emission Standards for Hazardous Air)	A-98-44
Pollutants: Plywood and Composite Wood)	
Products; Effluent Limitations Guidelines and)	
Standards for the Timber Products Point Source)	
Category; List of Hazardous Air Pollutants, Lesser)	
Quantity Designations, Source Category List)	
_____)	

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act,¹ the Natural Resources Defense Council and the Environmental Integrity Project hereby petition the Administrator of the Environmental Protection Agency (“the Administrator” or “EPA”) to reconsider the National Emission Standard for Hazardous Air Pollutants (NESHAP) captioned above and published at 69 Fed. Reg. 45,944 (July 30, 2004).

The Clean Air Act (CAA) requires that EPA establish, for each category of major sources of hazardous air pollutants (HAPs), emission standards reflecting the maximum achievable control technology (MACT), which essentially require that each source in the category limit its emissions to a level commensurate with the best performers in the industry. In this rule, however, EPA has decided to allow numerous sources – over half of the industry – to avoid controls if they demonstrate to the agency’s satisfaction that they are “low risk.” Specifically, the agency has attempted to evade MACT by creating a subcategory of plywood and composite wood products (PCWP) facilities that pose a “low” risk to nearby populations, and then removing that newly-created subcategory from

¹ 42 U.S.C. § 7607(d)(7)(B)

the list of industries for which EPA must issue MACT standards, attempting to rely on separate authority in the Act to “de-list” categories of sources that pose minimal risk to public health and the environment. By creating risk-based exemptions from MACT, this approach fundamentally subverts the Act’s basic structure, which demands that EPA regulate HAP sources in two phases: first, the agency is to establish technology-based MACT standards; second, EPA must establish emission standards to address any residual risk remaining after the application of MACT.

We seek reconsideration of nine principal elements of these new exemptions from the final rule: (1) the risk assessment methodology that sources can use to become exempt from controls; (2) EPA’s decision to ignore several sources of risk in its exemption criteria (specifically, the risks from background pollution and co-located emission sources); (3) the agency’s reliance on an industry evaluation of the risks of formaldehyde and its decision to ignore recent government studies linking the chemical to leukemia; (4) EPA’s conclusion that the exemptions should proceed despite its own data indicating that an exemption-free rule would result in greater health benefits than compliance costs; (5) the agency’s virtually unsupported conclusion that PCWP facilities do not pose a risk of ecological harm; (6) the lack of a legal basis for the risk-based exemptions; (7) the rule’s grant of an unlawful three-year compliance extension for sources previously qualifying for the low-risk exemption; (8) the rule’s startup, shutdown and malfunction provisions; and (9) the Title V implementation approach for the risk-based exemptions.

Today, we also have filed a petition for review of this rule in the U.S. Court of Appeals for the D.C. Circuit and, among other things, we will ask that court to invalidate these risk-based exemptions altogether.

Reconsideration of the issues listed above is appropriate because the objections raised in this petition could not have been practicably raised during the public comment period and are of central relevance to the outcome of the rule. The Administrator must therefore “convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.”² We expect that EPA will neither be surprised by, nor legitimately be able to deny, this petition, as an internal EPA briefing for Administrator Leavitt frankly acknowledges that the agency may have “[p]ossible ‘logical outgrowth’ problems regarding criteria details” concerning the risk-based approach.³ Similarly, Assistant Administrator Holmstead stated:

there is a legal concern regarding notice and comment procedures and whether including risk-based approaches in final rule could be considered a logical outgrowth from the proposal. * * * Mr. Holmstead noted that the CAA section 307(d) petition for reconsideration process could be used to resolve any logical outgrowth problems.⁴

Accordingly, EPA must – as Mr. Holmstead predicted it might need to – immediately grant our reconsideration request and provide the public with the opportunity to comment upon these issues.

² 42 U.S.C. § 7607(d)(7)(B).

³ U.S. EPA, Plywood and Composite Wood Products MACT and Turbines MACT: Using Risk to Delist Certain Subcategories, Briefing for Administrator Leavitt, at 11 (Jan. 5, 2004) (attached).

⁴ U.S. EPA, Meeting Minutes for the December 12, 2003 Meeting Between the U.S. Environmental Protection Agency and the American Forest & Paper Association, Memorandum to Docket OAR-2003-0048 (“Dec. 12, 2003 AFPA-EPA Meeting Minutes”).

We also request that EPA stay the effectiveness of the rule’s exemptions. It is important that the agency do so, because the final rule calls for sources to begin to take action to opt out of the new requirements immediately. EPA’s rule commits the agency to individually review and approve each facility’s exemption request, and states, “[t]o facilitate the review and approval process, EPA encourages facilities to submit their assessments as soon as possible.”⁵ Sources should not invest time and resources in demonstrating that they are “low risk” under EPA’s criteria, when those criteria will need to be re-evaluated because of this petition. Thus, EPA should grant a stay of the exemption provisions at least consistent with its authority in section 307(d)(7)(B) of the CAA.

Indeed, EPA should not only grant a limited stay, but should undertake rulemaking action to indefinitely stay the exemptions in light of the likely success of our petition for review; the risk-based approach to MACT is simply unlawful, and is completely at odds with the D.C. Circuit’s recent explanation of the basic purpose and structure of the MACT requirements:

[T]he 1990 Amendments established a two-phase approach to promulgating emission standards. The first phase — at issue in this case — requires a technology-based approach. *See* 42 U.S.C. § 7412(d). The second phase occurs eight years later and involves a risk-based approach. *See id.* § 7412(f)(2)(A) (“Emissions standards promulgated under this subsection shall provide an ample margin of safety to protect public health. . . .”). That risk-based analysis requires EPA to consider, *inter alia*, public health and adverse environmental effects, *id.* — precisely what Sierra Club contends EPA must consider now with respect to non-air quality impacts. Sierra Club’s interpretation would collapse the technology-based/risk-based distinction at the heart of the Act, undermining the central purpose of the 1990 Amendments — to facilitate the near-term implementation of emission standards through technology-based solutions. In doing so, that interpretation would reintroduce the very problem Congress sought

⁵ 69 Fed. Reg. at 45,955

to exorcize — that the pursuit of the perfect (risk- based standards) had defeated timely achievement of the good (technology-based standards).⁶

EPA should not, therefore, ask sources to embark on a fool’s errand of making their “low risk” demonstrations in the hopes that these illegal exemptions will survive judicial review, nor should the agency waste limited federal resources reviewing and approving these demonstrations.

1. EPA Must Reconsider Its Methodology For Classifying Sources As “Low Risk.”

EPA’s description of the low-risk assessment methods in the proposal was vague and generic. As a result, it was not possible to provide meaningful comments on any aspect of the risk assessment. This low risk idea is a new concept, and therefore a credible explanation of the methodology would require a comprehensive analysis of the: (1) hazard identification, exposure and dose-response methodologies, (2) input data to the air dispersion models, (3) output data from the models⁷, (4) appropriateness of risk management criteria, (5) risk characterization, and (6) associated sensitivity and uncertainty analyses of dispersion modeling, human exposure modeling, and quantitative risk estimates.

Unfortunately, EPA’s proposal did not provide the key details that would allow the public to adequately comment upon what the agency intended to do. This fundamental defect is evident when one examines some of the elements of the final rule’s risk methodology – contained in a brand-new appendix occupying most of six Federal Register pages – that the proposal did not mention. To take a few obvious examples:

⁶ *Sierra Club v. EPA*, 353 F.3d 976, 990 (D.C. Cir. 2004).

⁷ EPA provided raw output data from the models but these are essentially meaningless if the methods and assumptions used to derive these values are not provided.

- EPA’s rule references a website – apparently changeable at the agency’s whim – listing the relevant carcinogenic and non-carcinogenic chronic risk factors for PCWP pollutants, as well as acute risk values for acrolein and formaldehyde.⁸
- The appendix contains detailed instructions on how monitoring data that do not detect PCWP pollutants (so-called “nondetect data”) should be handled in calculations aimed at estimating the risks from individual plants.⁹
- The agency requires low risk applicants to make highly specific assumptions about the species of HAPs they emit; in particular, they “must assume that 17 percent of . . . total chromium . . . is chromium VI . . . [and] 65 percent of . . . total nickel . . . is nickel subsulfide.”¹⁰

This list is a clear indication that it was impracticable to raise substantive comments on the agency’s risk assessment methodology during the period for public comment. But this methodology is obviously centrally relevant to the final rule, as EPA expects nearly 150 sources to be able to use the process to escape CAA-mandated pollution controls.

EPA’s proposal itself characterized its original risk assessment repeatedly as “rough.” See, *e.g.*, 68 Fed. Reg. at 1297/3, 1300/3, 1301/1. In a September 26, 2003 internal EPA briefing for Assistant Administrator for Air & Radiation, Jeff Holmstead, EPA staff bluntly acknowledged the “legal issues” associated with the inadequacy of the proposal’s risk assessment in providing fair notice for public comment purposes:

Opportunity for public comment

- NPRM left technical gaps, including low-risk emission levels
- “Rough assessment” in NPRM did not provide findings under 112(c)(9)
- Formaldehyde reassessment ongoing, new info suggests higher risks

September 26, 2003 “PCWP – Risk in MACT” briefing to Jeff Holmstead, presented by Mary Tom Kissell, Dave Guinnup & Mike Thrift (“September 26, 2003 PCWP – Risk in MACT briefing”) (attached); *see also* Dec. 12, 2003 AFPA-EPA Meeting Minutes (Assistant Administrator Holmstead acknowledging legal concerns regarding notice and

⁸ 40 C.F.R. part 63, subpart DDDD, app. B, §§ 4(b)(1) & (2).

⁹ *Id.* § 5(f).

¹⁰ *Id.* § 5(g)

comment opportunity for risk-based approaches, and noting availability of petition for reconsideration process to address those concerns).

Accordingly, EPA must reconsider its risk assessment methodology, especially because, as discussed below, there are a number of particular elements of the rule that are significantly flawed and must be changed on reconsideration.

First, EPA bases its calculations on the average stack height of sources' multiple emission points.¹¹ However, this approach may significantly understate the risks from any given source. For instance, if a source is configured such that its lowest, but most highly-polluting, stack is located closest to the facility's neighbors, the risk to those people may not be reflected in a calculation that estimates risk by averaging with another emission point that is much taller, lower-polluting, and farther away from the population. Similarly, EPA concedes that "[i]nvariant facility parameters built into the look-up tables are either *average values* or biased toward health-protective values, based on available data."¹² Allowing a source to use average values in assessing its risk does not present an accurate picture of the facility's danger and, more importantly, undermines the direction in section 112's delisting provision that EPA is supposed to ensure, for categories of carcinogens, that the "*individual in the population who is most exposed*" is protected. CAA § 112(9)(B)(i) (emphasis added).

Second, EPA concedes that its risk assessment methodology does not account for the dangers posed by several chemicals. For example, EPA admits that its calculations will not account for emissions of propionaldehyde, one of the "predominant" HAPs

¹¹ *Id.* §§ 6(b) & (c).

¹² 69 Fed. Reg. at 46,001.

emitted by PCWP sources.¹³ The agency's explanation? It lacks any current risk values for the chemical.¹⁴ EPA's exemption methodology likewise fails to include propionaldehyde emissions.¹⁵ Similarly, EPA's methodology would assign a zero cancer risk to any HAP for which EPA has yet to estimate such a value, even if such HAP may well be carcinogenic.¹⁶ This is a simply arbitrary and capricious—EPA is going to allow sources to be called low risk without having any estimate, much less a full and adequate estimate, of their risks.

Third, EPA's methodology fails to account for known and relevant differences between sources. “For example, topography and weather patterns can trap pollution and prolong exposure to its deadly effects. But these and other factors are not reflected in the mechanical process establish[ed] to exempt plants from emission controls.”¹⁷

Nevertheless, EPA's methodology treats all PCWP plants as though their local topography and climate are identical, such that obvious and simple factors like prevailing winds are ignored. Similarly, although different topographical features may exacerbate

¹³ *Id.* at 45,946.

¹⁴ *Id.* at 45,995 (“Development of an IRIS assessment for propionaldehyde is currently underway. Once available, it will be used in future risk analyses. In the meantime, this HAP was not included in the assessment conducted for PCWP affected sources.”).

¹⁵ See 40 C.F.R. part 63, subpart DDDD, app. B, §§ 4(b)(1) & (directing that EPA-listed values be used for the risk assessment); U.S. EPA, Table 1, Prioritized Dose-Response Values, available online at <http://www.epa.gov/ttn/atw/toxsource/table1.pdf> (visited Sept. 26, 2004) (list of values does not include one for propionaldehyde).

¹⁶ See Memorandum from Scott Jenkins, U.S. EPA, to Dave Guinnup, U.S. EPA, “Risk Assessment for the Final Maximum Achievable Control Technology (MACT) Rule for the Plywood and Composite Wood Products (PCWP) Source Category,” at 3 (Feb. 18, 2004) (“HAP were not considered in the cancer risk analysis if there was either no available weight of evidence on potential human carcinogenicity or there was no adequate quantitative potency estimate.”); *id.* at 4-5, table 1 (listing 17 HAPs for which cancer value was not included); U.S. EPA, Table 1, Prioritized Dose-Response Values, available online at <http://www.epa.gov/ttn/atw/toxsource/table1.pdf> (visited Sept. 26, 2004) (listing several PCWP HAPs without cancer risk value).

¹⁷ Environmental Integrity Project, *Stacking the Deck: How EPA's New Air Toxics Rules Gamble with the Public's Health to Benefit Industry* (May 2004).

HAP exposures, and although PCWP plants are located at widely varying altitudes (see the attached chart), EPA’s methodology does not take such factors into account.

Fourth, by relying on pre-existing cancer potency estimates, EPA’s methodology did not adequately account for the sensitivities of children to environmental stressors, which further underestimates the cancer risks to exposed populations. For example, Gary Ginsberg of the Connecticut Department of Health found that “[f]or the vast majority of chemicals that have cancer potency estimates. . . , the underlying database is deficient with respect to early-life exposures. This data gap has prevented derivation of cancer potency factors that are relevant to this time period, and so assessments may not fully address children's risks.”¹⁸ Dr Ginsberg further found that “short-term exposures in early life are likely to yield a greater tumor response than short-term exposures in adults, but similar tumor response when compared to long-term exposures in adults. This evidence is brought into a risk assessment context by . . . an approach that: (1) does not prorate children's exposures over the entire life span or mix them with exposures that occur at other ages; (2) applies the cancer slope factor from adult animal or human epidemiology studies to the children's exposure dose to calculate the cancer risk associated with the early-life period; and (3) adds the cancer risk for young children to that for older children/adults to yield a total lifetime cancer risk.”¹⁹ Dr. Ginsberg’s approach should be included in EPA’s analyses, especially for such ubiquitous pollutants as formaldehyde.

Fifth, EPA fails to ensure – as the CAA requires – that the “individual in the population who is most exposed”²⁰ to HAPs from PCWP sources is protected by its

¹⁸ G.L. Ginsberg, “Assessing Cancer Risks for Short-Term Exposures in Children,” 23 Risk Analysis 19 (Feb. 2003).

¹⁹ *Id.*

²⁰ 42 U.S.C. § 7412(c)(9)(B)(i).

delisting mechanism. The agency's risk calculation depends upon the distance any given source is to the nearest residence.²¹ That approach ignores the possibility that there may be exposed people far closer to the facility; to take a simple example, if the nearest residence is two miles away, but a school abuts a PCWP property line, EPA allows the source to base its risk estimates on the distance to the residence rather than the school. Similarly, EPA does not explain why a person beyond the facility fenceline should be the focus of a risk inquiry, when it is perfectly reasonable to believe that the most exposed individual is a person who actually works at the PCWP plant.

Finally, EPA gives sources the ability to make source-specific demonstrations with a number of open-ended criteria giving sources tremendous freedom to decide exactly how to characterize the risks from their plants. For instance, the agency's risk assessment appendix says that a source "may use any scientifically accepted peer-reviewed assessment methodology for [its] site-specific risk assessment."²² Likewise, sources are instructed to "[u]se health-protective default assumptions wherever site-specific data are not available."²³ Thus, the owner of the source seeking the exemption has extreme control over how to assess its risks, and the agency provides few bounds on its discretion to approve such assessments as sufficiently "scientifically accepted" or "health protective," yielding an arbitrary and capricious rule.

2. EPA Must Reconsider Its Failure To Require Sources to Account for Background Pollution and Co-Located Sources.

²¹ 40 C.F.R. part 63, subpart DDDD, app. B, tables 3 & 4.

²² 40 C.F.R., part 63, subpart DDDD, app. B, § 7(a).

²³ *Id.* at § 7(b)(6).

EPA's final rule allows sources to demonstrate that they are supposedly "low risk" by examining the risks caused by emissions from the PCWP facilities themselves, but ignoring risks from other HAP sources located at the same plant site (so called "co-located" sources), as well as those from background ambient HAP concentrations.²⁴ As a consequence, a facility with both PCWP manufacturing equipment and other HAP-emitting units, located in an area with high background concentrations of HAPs, could pose a significant risk to its neighbors, yet still be exempted from MACT as "low risk." This decision is centrally relevant to how the rule's exemptions will work and, as discussed below, is both unlawful and unreasonable.

EPA made clear in the proposal that such risks from background pollution and co-located sources must be included in a credible assessment of whether PCWP facilities pose an unacceptable risk to the public. First, EPA explained that it would use the concept of a hazard index (HI) to quantify the risk from a plant – an HI is the sum of several individual hazard quotients (HQs), and a hazard quotient for any given HAP is "the estimated concentration [of a HAP] in air at a location where people could be exposed . . . [divided] by the pollutant's inhalation Reference Concentration (RfC)."²⁵ Second, EPA sought comment on a range of HI values that, if exceeded at any particular plant, would indicate an unacceptable risk posed by one or more HAP emissions affecting a given health endpoint. According to the agency, HI "values below one would generally be considered to be without appreciable risk of adverse health effects, and values above

²⁴ *Id.* § 3 ("You are not required to include process units outside of the affected source in the low-risk demonstration."); 69 Fed. Reg. at 45,998 ("For the purposes of this rulemaking, we are not considering background HAP emissions as part of the CAA section 112(c)(9) delisting of the low-risk PCWP subcategory.").

²⁵ 68 Fed. Reg. at 1,298.

one would generally be cause for concern.”²⁶ Third, EPA recognized that simply ensuring that the risks caused by PCWP sources themselves were below an HI of one – without accounting for other sources of exposure – would be underprotective. The agency stated:

One option is to allow the hazard index posed by all threshold HAP emitted from PCWP sources at the facility to be no greater than one. This approach is protective if no additional threshold HAP exposures would be anticipated from other sources in the vicinity of the facility or through other routes of exposure (e.g., through ingestion).²⁷

Thus, EPA believed that an HI limit of one could only defensibly “protect public health with an ample margin of safety,” as EPA is required to do before de-listing a source category,²⁸ if there are no other sources of risk. However, in the final rule, EPA decided to use an HI limit of one, but did not require sources to account for background pollution or emissions from co-located source, thus failing to ensure – on the agency’s own terms – that sources are truly low risk. By doing so, the agency adopted an arbitrary and capricious procedure.

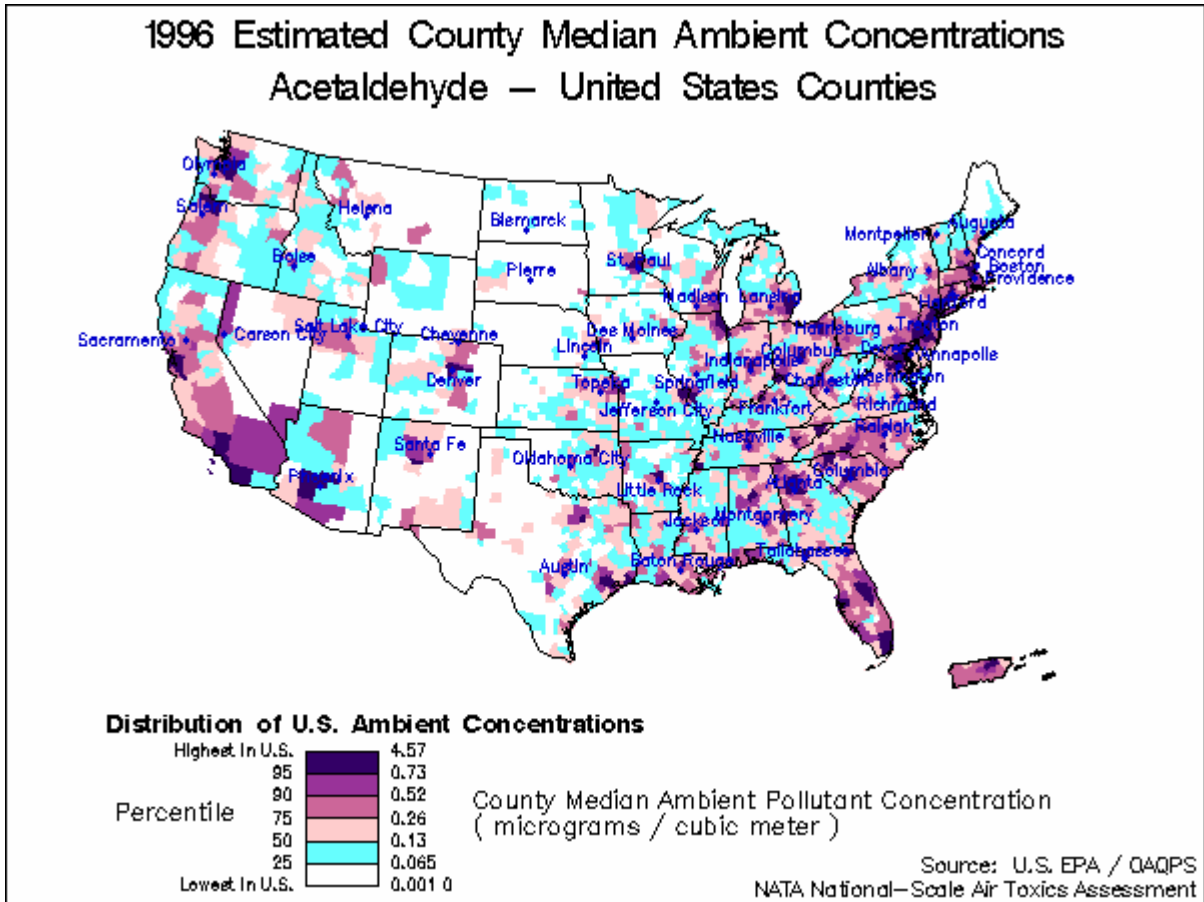
The lungs do not distinguish formaldehyde pollution from PCWP facilities from that caused by other plants or mobile sources. If the existing ambient concentration of a particular pollutant is at or near the safe level, additional sources of the pollutant can push the exposure over the threshold. Thus, because many of the HAPs emitted from PCWP facilities are found ubiquitously in the ambient air in the U.S., EPA must take background concentrations into account when evaluating the risks associated with a facility that emits HAPs. The two maps below, which reflect modeling performed for EPA’s National Air Toxics Assessment, illustrate this point. For formaldehyde, for

²⁶ *Id.*

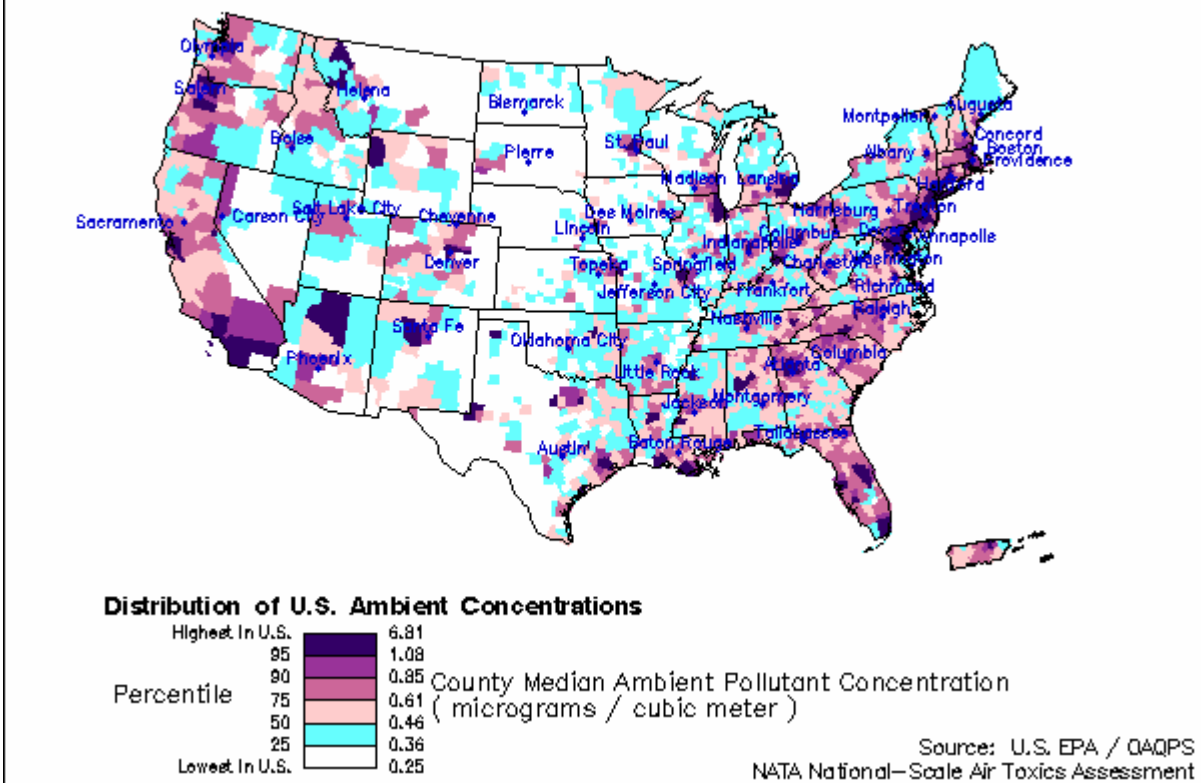
²⁷ *Id.* at 1,299.

²⁸ *See* 42 U.S.C. § 7412(c)(9)(B).

example, outdoor concentration estimates were greater than the cancer benchmark concentrations in over 90 percent of the census tracts. Approximately 200 census tracts had modeled air pollution levels over 100 times the benchmark.



1996 Estimated County Median Ambient Concentrations
Formaldehyde – United States Counties



In addition to being unreasonable, EPA’s proposal violates the Clean Air Act. The authors of the MACT and delisting provisions at issue in this rule made clear that they intended all co-located sources of HAPs to be included when the agency made risk-based decisions. The legislative history of the 1990 Clean Air Act amendments explains Congressional intent in crafting the HAP provisions, and Senator Durenberger addressed this issue directly, saying, “[o]ur intent is that the public will be protected with ‘an ample margin of safety’ from the combined health risks of all the pollutants emitted by an entire major source.”²⁹ He explained why this principle is important, in the context of

²⁹ Senate Debate on Conference Report (October 27, 1990), reprinted in “A Legislative History of the Clean Air Act Amendments of 1990,” Comm. Print S. Prt. 103–38 (1993) at 868.

discussing residual risk standards under section 112(f) of the Act, which – like section 112(c)(9) – uses the “ample margin of safety” standard:

People are not exposed in isolation to pollution from parts of a major source; they are exposed to all the pollution from the entire major source. It is the managers’ intent that residual risk standards shall be sufficient to protect the most exposed person with an ample margin of safety from the combined hazardous emissions of an entire major source. * * * This means that the residual risk standards for each source category must be set at a level sufficient to assure that the risks from the emissions of sources in that category, combined with the risks from the emissions of other sources that are located together within a major source, are below the “ample margin of safety” level.³⁰

Moreover, the Senator made clear that the same principle should apply to delisting decisions under section 112(c)(9), saying that “the [bill] managers intend EPA to use the same entire site approach when reviewing petitions to remove a source category from the list of source categories under subsection (c). . . .”³¹

3. EPA Must Reconsider Its Assessment of the Carcinogenicity of Formaldehyde.

In proposing the risk-based exemption idea, EPA indicated that it would use risk estimates from the agency’s toxicological database – the Integrated Risk Information System (IRIS) – to calculate whether a given source is “low-risk” or not.³² In so doing, EPA noted that the unit risk estimate (which the agency explains is “defined as the upper-bound excess lifetime cancer risk estimated to result from continuous exposure to an agent at a concentration of 1 $\mu\text{g}/\text{m}^3$ in air”) in IRIS for formaldehyde is 1.3×10^{-5} . Indeed, the value in IRIS today is the same.³³ In the final rule, however, EPA relied on a

³⁰ *Id.*

³¹ *Id.* at 869.

³² *See* 68 Fed. Reg. at 1,298-1,300.

³³ *See id.* at 1,298 & Table 2 (discussing EPA’s plan to use IRIS values and listing IRIS values for HAPs emitted by PCWP facilities); U.S. EPA, Integrated Risk Information System, Formaldehyde (CASRN 50-00-0), available online at <http://www.epa.gov/iris/subst/0419.htm#carc> (visited Sept. 20, 2004) (providing unit risk estimate for formaldehyde).

value of 5.5×10^{-9} , which was derived by the CIIT Centers for Health Research (previously the Chemical Industry Institute of Toxicology)³⁴ using a model that estimated the carcinogenic effects of formaldehyde on the respiratory system, and the basis for which does not appear to be available in the docket of this rulemaking during the period for public comment.³⁵ In short, between the proposed and final rules, EPA decided that formaldehyde was 99.96 percent less potent than it previously believed, and based its judgment on information that the public did not have an adequate opportunity to evaluate. The agency's decision – which obviously is centrally relevant to this rulemaking – is irrational and must be reconsidered, both because recent studies link formaldehyde to cancers other than those evaluated by CIIT, and because the CIIT evaluation is limited in a number of important ways.

First, although the CIIT model is limited to considerations of cancers of the nasal cavity of adults, and cannot model cancers of blood or bone, recent epidemiology studies by the National Cancer Institute (NCI) and the National Institute of Occupational Safety and Health (NIOSH) report on a dose- and duration-dependent excess of myeloid leukemia among workers exposed to formaldehyde. Both the NCI and NIOSH studies applied rigorous scientific methods, and were published in respected scientific journals. The NCI study reported on a follow-up of a cohort of industrial workers to evaluate the

³⁴ CIIT's founding and current Board of Directors includes representatives from: Air Products and Chemicals, Inc., ExxonMobil Chemical Co., Dow Chemical Co., Eastman Kodak Co., and DuPont. (http://www.ciit.org/about/board_directors.asp). CIIT's core research program is sponsored by the American Chemistry Council, the trade association for chemical manufacturers. (<http://www.ciit.org/about/leadership.asp>)

³⁵ See 69 Fed. Reg. at 49,993-94 (discussing EPA choice of CIIT value); *id.* at 46,040 (Appendix B, EPA's risk assessment methodology, refers to EPA website for unit risk estimates); U.S. EPA, Table 1, Prioritized Dose-Response Values, available online at <http://www.epa.gov/ttn/atw/toxsource/table1.pdf> (visited Sept. 20, 2004) (providing unit risk estimates for various HAPs, including formaldehyde).

association between formaldehyde and lymphohematopoietic cancers.³⁶ The cohort consisted of 25,619 workers employed before 1966, and followed through 1994. They analyzed formaldehyde exposure (peak exposure, average exposure intensity, cumulative exposure, and duration of exposure) and mortality from lymphohematopoietic malignancies. They report that relative risks for leukemia (69 deaths), particularly for myeloid leukemia (30 deaths), increased with formaldehyde exposure. When compared to workers exposed to low peak levels of formaldehyde (0.1-1.9 ppm), exposure to peak levels of 2-3.9 ppm increased the risk of myeloid leukemia almost 2.5-fold (RR=2.43, 95% CI = 0.81 to 7.25), and exposure to peak levels above 4 ppm increased the risk 3.5-fold (RR =3.46, 95% CI = 1.27 to 9.43).³⁷

Similarly, NIOSH reported on the updated results of a mortality study of a cohort of garment workers exposed to formaldehyde.³⁸ The cohort consisted of 11,039 workers exposed to formaldehyde for three months or more, from three separate garment plants. Formaldehyde was first introduced into the manufacturing process in the mid- to late 1950's, when exposures were likely to be highest. The mean time-weighted average (TWA) formaldehyde exposure in the 1980's was 0.15 ppm, and ranged from 0.09-0.20 ppm, within the legal allowable levels under the current OSHA standard of 0.75 ppm TWA (the 8-hour time-weighted average is not to exceed 0.75 ppm). The authors report an almost two-fold increase in multiple-cause mortality (this includes both underlying

³⁶ Hauptmann M, Lubin JH, Stewart PA, Hayes RB, Blair A. Mortality from lymphohematopoietic malignancies among workers in formaldehyde industries. *J Natl Cancer Inst.* 2003 Nov 5;95(21):1615-23.

³⁷ Interestingly, these authors report that risk for leukemia was associated with peak exposures to formaldehyde, and weakly with duration, but not with cumulative exposure. The authors suggest that duration as a measure of exposure may be problematic because it assumes a constant exposure rate for all jobs over time, which was not the case, and may therefore be poorly correlated with the true cumulative dose.

³⁸ Pinkerton LE, Hein MJ, Stayner LT. 2004. Mortality among a cohort of garment workers exposed to formaldehyde: an update. *Occup Environ Med*, March (in press).

and contributory causes of death) from myeloid leukemia among workers with 10 or more years of exposure (9 deaths, SMR = 2.12, 95% CI = 0.78 to 4.62), and among workers after 20 years since their first exposure (15 deaths, SMR = 2.02, 95% CI = 1.13 to 3.34). The greatest risk of multiple myeloma was observed among workers who were employed during the earliest study time period (prior to 1963), when they likely would have been exposed to the highest levels of formaldehyde. The observation that leukemia shows both a dose-response and a temporal trend with formaldehyde exposure supports a causal relationship.³⁹

In June 2004, the International Agency for Research on Cancer (IARC), part of the World Health Organization, convened two dozen top scientists from 10 countries to evaluate all the available evidence on the carcinogenicity of formaldehyde, including the NIOSH and NCI epidemiology studies and the CIIT evaluations. The scientists concluded that formaldehyde is carcinogenic to humans. In addition to evidence of nasopharyngeal cancers, the working group also found “strong but not sufficient evidence” for leukemia. The finding for leukemia reflects the “epidemiologists’ finding of strong evidence in human studies,” predominantly the NIOSH and NCI studies, but an inability to identify a mechanism of leukemia cancer with the data available at this time.⁴⁰

The evidence for leukemia associated with formaldehyde exposures at currently allowable levels in the workplace is strong and, while additional research will be more

³⁹ The authors suggest that mortality studies that do not distinguish between lymphocytic and myeloid leukemia types may underestimate the risk from formaldehyde-related cancers. Both leukemia types are relatively rare; incidence for each type is approximately 5.5 per 100,000 Americans. The U.S. five-year survival rate for lymphocytic leukemia in adults is over 70 percent, whereas the survival rate for myeloid leukemia ranges from 19 percent (acute) to 35 percent (chronic). Studies that measure mortality, without distinguishing between types, may therefore not be a sufficiently sensitive to detect an effect of formaldehyde on myeloid leukemia, which is much more deadly. It is possible that elevated mortality from myeloid leukemia may have been overlooked in studies that considered all types of leukemia combined.

⁴⁰ International Agency for Research on Cancer. IARC classifies formaldehyde as carcinogenic to humans. Press Release No. 153. World Health Organization June 15, 2004.

informative, it is scientifically and morally unacceptable to await an increase in deaths from cancers before acting to limit exposures to men, women, and children from this known human carcinogen.

Notwithstanding the findings of reputable epidemiologists regarding the risks leukemia from formaldehyde exposure, EPA's final rule does not discuss the new results, except in the most opaque fashion, pledging to review "recently published epidemiological studies" when reassessing the carcinogenic properties and potency of formaldehyde at some undefined future date.⁴¹ Meanwhile, according to published reports, "[a]n internal EPA calculation showed that taking the new studies into consideration would keep the formaldehyde risk assessment close to the long-standing EPA [IRIS] level."⁴² Thus, EPA's wait-until-another-day approach is simply irresponsible and unreasonable in view of these observations and the fact that formaldehyde-associated cancers of blood and bone are evident in studies of exposed workers. In separate studies, leukemia excesses have been observed in certain professional groups (anatomists, embalmers, pathologists) exposed to formaldehyde. Research also has shown that formaldehyde causes genetic changes in circulating blood lymphocytes in exposed workers. In fact, the available studies do not provide adequate information to rule out a linear low-dose curve for effects; that is, even low-dose exposure levels could well be associated with some increased risk of cancer among sensitive populations such as children.

Second, the CIIT model fails to address a number of basic issues essential to properly characterizing formaldehyde's cancer-causing potential. For instance, CIIT's

⁴¹ 69 Fed. Reg. at 45,994.

⁴² Tom Hamburger & Alan C. Miller, *EPA Relied on Industry for Plywood Plant Pollution Rule*, Los Angeles Times (May 21, 2004).

approach does not capture sensitive populations, such as children. It is based on adult breathing rates and adult physiology. In addition, the CIIT model is based on the assumption that formaldehyde is a highly-reactive site-of-contact carcinogen. This means that the model cannot rule out other modes of action. The model is also based on very small samples. The human-extrapolation component of the model is based on only one human nose, whereas human nasal anatomy is highly variable. It cannot capture various air-flow and uptake patterns inherent in the highly variable nasal anatomy, especially considering exposures to children. Additionally, the model assumes that no formaldehyde reaches the blood circulation, without any definitive data to support this assumption.

The CIIT model and its results do not provide a sufficient basis for EPA to make regulatory decisions concerning formaldehyde. Indeed, just this year, in response to an industry request to re-open a prior risk assessment for formaldehyde using the CIIT analysis, a scientific review panel of the California Air Resources Board concluded that “that there is not sufficient new scientific data to support the petition to formally reopen the prior risk assessment on formaldehyde.”⁴³ Likewise, a joint Health Canada/U.S. EPA External Peer Review Workshop on formaldehyde in 1998 expressed concern that they were not provided with adequate documentation to conduct a proper review, noting that “[i]t would have been very difficult to conduct an adequate review based on the existing documentation. Obviously, it is imperative that the document be completed with clear

⁴³ California Air Resources Board, Meeting Transcript, Scientific Review Panel on Toxic Air Contaminants, at 70 (May 19, 2004), available online at <http://www.arb.ca.gov/srp/051904.pdf> (visited Sept. 21, 2004); *see also* Hamburger & Miller, *EPA Relied on Industry for Plywood Plant Pollution Rule* (“a California scientific advisory panel voted unanimously this week to reject a formaldehyde industry request to reconsider the state’s risk assessment of the toxic gas. Panel members said the chemical institute’s model needed further development and validation.”).

(transparent) presentation. . . .”⁴⁴ Moreover, the 1998 panel raised a number of significant concerns with the model, identifying several sources of uncertainty. For instance, the panel highlighted the effects of “intersubject variations in nasal geometry.” That is, everyone has a different nose, but the model is based on only one adult nose – which represents a big potential source of error, and which leaves cancer risks to children completely unconsidered. The panel recommended that future iterations of this model incorporate a “more realistic multi-compartment toxicokinetic tissue model” when considering the dose metrics, simulate the “unsteady nature of nasal flow”, and consider the effects of “intersubject variations in nasal geometry.”⁴⁵ The panel also “strongly encouraged” CIIT to make “some attempt to describe the uncertainty associated with projections of risk.”⁴⁶ The peer review report states that it anticipates revisions by CIIT in response to the concerns raised by the peer review panel, and then expects “additional more focused peer review and revision to ensure that recommendations of the Peer Review Panel have been adequately addressed and that documentation of the proposed approaches is adequate. . . .”⁴⁷ To our knowledge, additional peer review was never completed, and thus there is no evidence that the concerns of the panel were adequately addressed, or that any scientific peer review of the final iteration of the CIIT model was done.

4. EPA Must Reconsider Its Exemptions in Light of Evidence That They Will Impose Net Costs on Public Health.

⁴⁴ Health Canada & U.S. EPA, Report of External Peer Review Workshop on Formaldehyde, at 5 (March 18-20, 1998) (attached).

⁴⁵ *Id.* at 11

⁴⁶ *Id.* at 14

⁴⁷ *Id.* at 20.

EPA's failure to provide accurate or complete information in the proposed rule gave no notice of the exemptions' net cost to public health. Furthermore, the limited information available in the record makes clear that the exemptions in the final rule will cost the public significantly more than it will save the plywood industry. In the proposed rule, EPA stated that with the proposed exemptions, as many as 33 of 223 facilities potentially subject to the rule might qualify for an exemption from the rule because they did not exceed an undefined "low risk" threshold.⁴⁸ In the proposed rule and accompanying Regulatory Impact Analysis the Agency provided no background data on the impact these exemptions would have on emissions, health risks, costs or benefits, or any other indicators.⁴⁹

In the final rule, EPA more than quadrupled its high-end estimate of the number of facilities that would qualify for the "low risk" exemptions, stating that, "eventually as many as 147 of the 223 major source PCWP facilities may demonstrate eligibility for the low-risk subcategory...."⁵⁰ "Appendix A" of the Regulatory Impact Analysis accompanying the final rule includes some discussion of the net emissions impact and the relative costs and benefits of exempting most plywood manufacturers from the rule's emission control requirements.⁵¹ Because Appendix A appears to have been lifted verbatim from the preamble to the final rule, and the assumptions underlying emission

⁴⁸ 68 Fed. Reg. at 1,301.

⁴⁹ See 68 Fed. Reg. at 1,295-1,303; *id.* at 1,305 ("We did not estimate health and welfare benefits associated with changes in emissions of HAP, CO, VOC, OM, NO_x and SO₂ for this proposed rule."); *Regulatory Impact Analysis of the Proposed Plywood and Composite Wood Products NESHAP, Final Report*, August, 2002, available at www.docket.epa.gov, Docket number, OAR-2003-0048 (visited Sept. 27, 2004).

⁵⁰ 69 Fed. Reg. at 45,955

⁵¹ See, "Appendix A: Summary of Impacts Associated with the Delisted Low-Risk Subcategory", *Regulatory Impact Analysis for the Plywood and Composite Wood Products NESHAP, Final Report* (EPA-452/R-04-005), February, 2004 [hereinafter, *Final Regulatory Impact Analysis*], available at www.docket.epa.gov, Docket number, OAR-2003-0048 (visited Sept. 27, 2004).

estimates are not adequately explained, it is not clear that EPA has actually conducted an independent and in-depth review of the impact of the exemptions it has adopted.⁵²

It is clear that, even when relying on EPA's own sketchy assumptions, the public health costs associated with exempting so many plywood plants from the statutory requirement to reduce hazardous air pollution will outweigh any potential savings to the regulated industry. EPA's Final Regulatory Impact Analysis estimates that plywood manufacturers would face annual compliance costs of \$140 million per year at most, if all facilities potentially subject to the rule were required to comply.⁵³ With the "low risk" exemptions EPA has proposed, industry-wide compliance costs are expected to drop to \$74 million, for a net annual savings of \$66 million.⁵⁴ How does this compare to the higher levels of emissions that will result if two-thirds of plywood manufacturers are exempt from the standards?

The preamble to the rule admits that the exemptions could increase HAP emissions by 66 percent, or 4,400 tons per year, when compared to requiring all plants to meet pollution control requirements.⁵⁵ The preamble also acknowledges that exposure to the HAPs released by the plywood industry have also been linked to extensive noncancer health effects, such as genotoxicity, neurotoxicity, cardiovascular impairment, blood disorders, and reproductive and developmental effects.⁵⁶ The Regulatory Impact

⁵² See, Part III of preamble to final rule, 69 Fed.Reg. at 45,955-958, which is identical to Appendix A of the Final Regulatory Impact Analysis.

⁵³ 69 Fed. Reg. at 45,957.

⁵⁴ *Id.* EPA notes that "[O]ur cost estimates are likely to be overstated as we anticipate that owners and operators will take advantage of available cost saving opportunities." 69 Fed.Reg. at 45,956-57.

⁵⁵ 69 Fed. Reg. at 45,956.

⁵⁶ See Table 3, "Unquantified effects categories associated with HAP," 69 Fed.Reg., at 45,957.

Analysis for the Final Rule did not assign an economic value to these very serious health impacts.⁵⁷

Nevertheless, control of hazardous air pollutants at plywood plants also yields significant additional collateral benefits by reducing emissions of other forms of pollution, such as volatile organic compounds and fine particulate matter. For example, EPA estimates that if all plants were required to comply, the rule would reduce emissions of particulate matter by 12,000 tons a year, and emissions of volatile organic compounds by 27,000 tons per year.⁵⁸ With the exemptions granted under the final rule, these emission reductions could be cut in half, as particulate matter emissions would decline by as few as 5,900 tons per year, and VOC emissions by only 14,000 tons per year.⁵⁹ In other words, exempting two-thirds of plywood plants from the rule's pollution control requirements would permit higher particulate matter emissions by 6,100 tons per year, and VOC emissions by 13,000 tons annually, when compared to requiring all such sources to comply.⁶⁰

The Office of Management and Budget (OMB) has recognized and published estimates of the cost to the public health associated with exposure to each ton of particulate matter or VOC. For example, OMB's 2004 draft report to Congress on the costs and benefits of federal regulation values the benefits of reducing VOCs at between \$600 and \$2,700 per ton, and each ton of particulate matter at from \$10,000 to \$100,000 per ton.⁶¹ Although it is not clear why, EPA did not attempt to quantify the public health

⁵⁷ *Final Regulatory Impact Analysis*, at 6-7, 6-8.

⁵⁸ 69 Fed. Reg. at 45,956.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ "Informing Regulatory Decisions: 2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," (Draft OMB Report) at 34, available at www.whitehouse.gov/omb/infoereg/draft_2004_cbreport.pdf, (visited Sept. 24, 2004).

costs associated with higher increases of these pollutants in the preamble to the final rule.⁶² But even using the lowest end of the monetized benefits published by OMB, the value of reducing VOC and particulate matter emissions from all plywood plants exceeds the amount industry would save under the exemptions in the final rule.⁶³ These net benefits are realized without taking into account any additional public benefit from reducing exposure to noncancer health risks that neither EPA nor OMB could monetize.

The preamble to the final rule attempts to justify the exemptions in part because EPA estimated that requiring all plywood plants to reduce hazardous air pollutants would result in incidental increases in nitrogen oxide (NO_x) emissions.⁶⁴ EPA arbitrarily makes no attempt to compare this potential increase to the additional emissions of HAPs, VOCs, and particulate matter that would result from the exemptions. But once again, the available evidence suggests that the NO_x increases are relatively trivial, especially when compared to the additional pollution authorized by the rule's exemptions.

According to EPA, the regenerative thermal oxidizers that are the principal means of controlling hazardous air pollutants at plywood plants would release an

⁶² 69 Fed. Reg. at 45,958. EPA did note that while it had not monetized the benefits of reducing particulate matter under the rule, "these reductions are likely to have significant health benefits to populations living in the vicinity of affected sources." *Id.*

⁶³ EPA projects the exemptions will increase VOC emissions 13,000 tons per year, and particulate matter emissions 6,100 tons per year. 13,000 tons x \$600 per ton = \$7.8 million, and 6,100 tons x \$10,000 per ton = \$61 million, for a total annual public health cost of \$68.8 million. As discussed earlier, EPA expects the exemptions will save industry no more than \$66 million in annual compliance costs. Using the higher-end OMB benefit estimates for VOCs (\$2,700 per ton) and particulate matter (\$100,000 per ton), the foregone benefits of the VOC reductions wrought by the exemptions would be \$35.1 million, and \$610 million for the foregone benefits of particulate matter reductions. This estimated total annual public health cost of \$645.1 million would outweigh industry's annual compliance costs by nearly ten to one.

⁶⁴ 69 Fed. Reg. at 45,956. The preamble also discusses the possibility of small additional increases of nitrogen oxide and sulfur dioxide pollution from power plants, due to the increased electricity demand associated with the pollution controls the rule would require at plywood plants. But the Clean Air Act rules impose a ceiling on power plant emissions in most states, and the Agency's own Regulatory Impact Analysis notes that these increases are unlikely to occur. *Final Regulatory Impact Analysis*, at A-3.

estimated 2,400 annual tons of NOx -- nationwide.⁶⁵ The exemptions could cut that potential increase in half, saving as much as 1,200 tons per year.⁶⁶ That savings represents about 0.01 percent of the nitrogen oxide emissions generated annually by fixed sources in the United States.⁶⁷

NOx is a pollution of concern, because it is a key constituent (or precursor) in the formation of ground-level ozone, or smog. But as noted above, the exemptions that EPA has adopted could increase emissions of VOCs, another critical precursor of ozone, by as much as an estimated 13,000 tons annually.⁶⁸ Arbitrarily, neither the Regulatory Impact Analysis nor the preamble explains why increasing VOCs by 13,000 tons per year to avoid 1,200 tons of nitrogen oxide would yield a net benefit in reducing ozone formation. Similarly, the Final Regulatory Impact Analysis notes that NOx can form fine particulate matter, but the exemptions in the rule actually could result in an increase in an additional 6,100 tons of particulate matter annually by EPA's own estimate.⁶⁹

OMB's draft report to Congress cites EPA studies estimating that each ton of NOx reduced from a power plant yields \$1,300 in public health benefits.⁷⁰ Assuming the NOx reduction benefits are comparable for this industry, the plywood rule exemptions would reduce public health costs by \$1.56 million per year (\$1,300 per ton x 1,200 tons per year). But that comes at the expense of *imposing* public health costs of anywhere from \$68.8 million to \$645.1 million annually, as a result of higher VOC and particulate

⁶⁵ EPA is forced to acknowledge that even "[t]his estimated increase in NOx emissions may be an overestimate because some plants may select control technologies other than RTO to comply with" the final rule. *Id.* at 45,956/2.

⁶⁶ *Id.*

⁶⁷ "Air Emissions Trends—Continued Progress Through 2003: Nitrogen oxides national emissions totals" U.S. EPA, available at <http://www.epa.gov/airtrends/econ-emissions.html> (visited Sept. 27, 2004).

⁶⁸ *Id.*

⁶⁹ *Id.*, *Final Regulatory Impact Analysis*, at 6-5. 6-6.

⁷⁰ Draft OMB Report at 35.

matter exemptions resulting from the exemptions. These *increased* public health costs are anywhere from 44 to 414 times higher than the public health savings from the NO_x reductions that EPA touts in support of the exemptions.

Remarkably, in light of the foregoing, EPA is attempting to justify adoption of the final rule's exemptions on the grounds that "the cost of controlling [the specific pollutants emitted by PCWP sources] is high, and may not be justified by environmental benefits for these low-risk affected sources." 69 Fed. Reg. at 45985/3, 45986/2; *see also id.* at 45956/2. Indeed, internal agency documents reveal that EPA staff relied upon these two factors in briefing the EPA Administrator leading up to adoption of the final rule.

In a January 5, 2004 briefing (attached to this petition) for Administrator Leavitt entitled "Plywood and Composite Wood products MACT and Turbine MACT: Using Risk to Delist Certain Subcategories," attached ("Jan. 5, 2004 Leavitt briefing"), one slide answers the question "Why are We Considering Delisting these Subcategories?" The answer for the plywood sector follows:

- Plywood:
 - Compliance costs are high (\$140M/yr) and exceed the monetized benefits
 - In some cases, the MACT controls result in increases in nitrogen oxides

Jan. 5, 2005 Leavitt briefing at 3, slide 6.

Several things are noteworthy about this slide. The first and most obvious is the fact that for this Administrator-level briefing, the *only* reasons given for the exemptions were the two identified above. The second is the fact that internal agency thinking and decisionmaking plainly were driven by cost considerations in attempting to exempt these

facilities, contradicting the agency's denials in the preamble to the final rule,⁷¹ and making plain the extent to which industry compliance costs (rather than public health or environmental considerations) and a distorted, erroneous benefit-cost frame of reference were dictating the agency's actions. *See* also Jan. 5, 2005 Leavitt briefing at 11, slide 22 ("Impacts of Delisting Low-risk Subcategory" – "Costs of rule could be significantly reduced.") Third, by noting that "[i]n some cases, the MACT controls result in increases in nitrogen oxides" the briefing materials reveal how the industry's attempt to find environmental benefit in the exemptions led even internal agency deliberations to rely upon this fiction.

Nowhere do these briefing materials identify for the Administrator: (1) the significantly higher emissions of HAPs, VOCs and particulate matter resulting from the exemptions and how this compares to the substantially smaller NO_x reductions achieved by foregoing controls;⁷² (2) the substantially higher annual public health costs imposed by the exemptions and the degree to which these costs outweigh the compliance costs savings to industry; or (3) the substantially higher annual public health costs imposed by the exemptions and the degree to which these costs dwarf the NO_x reduction benefits from foregoing controls. Indeed, primarily through omission, the briefing materials are affirmatively misleading or flat out false on these questions.

⁷¹ 69 Fed. Reg. at 45984/1 ("Thus, the low-risk subcategory of PCWP affected sources is defined in terms of risk, not cost. We are not subcategorizing or determining MACT floors based on cost.").

⁷² In further support of the point that the exemptions do more harm than good – even taking EPA's defense of the exemptions on its own terms – the agency is forced to concede that the facilities that are exempted as "low risk" are not necessarily going to be clean, saying, "it is theoretically possible that between two sources the better performing source will be a high-risk source, and the worse-performing source will be a low-risk source, based on circumstances that are unrelated to the question of what abilities the sources have to control HAP emissions through application of MACT, such as the sources' locations vis a vis exposed human populations." 69 Fed. Reg. at 45,991/2. This is further indication of the arbitrary and capricious nature of the agency's exemptions and the reasons offered in support of them.

In basing its final rule on the claims that “the cost of controlling [the specific pollutants emitted by PCWP sources] is high, and may not be justified by environmental benefits for these low-risk affected sources,” 69 Fed. Reg. at 45,985/3, EPA runs afoul of *National Lime Assn v. EPA*, 233 F.3d 625, 640 (D.C.Cir. 2000), in which the court stated:

Cost, however, may be taken into account only in considering beyond-the-floor emissions limitations, which in the case of PM we have remanded to the agency; cost may not influence the determination of a MACT floor, which depends exclusively upon the emissions reductions achieved by the best-performing sources. *See id.* § 7412(d)(3). Relatedly, the NLA also claims that in light of both the high costs and the low quantities of HAP metals to be controlled, the EPA should read a *de minimis* exception into the requirement that it regulate all hazardous air pollutants emitted by major sources. The EPA reasonably rejected this argument on the ground that the statute “does not provide for exceptions from emissions standards based on *de minimis* principles where a MACT floor exists.”

Notwithstanding the preamble’s disingenuous claims elsewhere that the low-risk subcategory was not based on cost, 69 Fed. Reg. at 45984/1, or that the exemption does not rely upon an implicit *de minimis* theory, *id.* at 45984/2, the preamble passage quoted at the outset of this paragraph as well as internal briefing materials accompanying this reconsideration petition make clear that cost was the driving factor behind the subcategory delisting. Under *National Lime*, and for other reasons discussed in this petition and our original comments, the exemption is unlawful.

In conclusion, not only do the compliance costs and claimed lack of environmental benefits fail to justify the final rule’s so-called risk-based exemptions, the foregoing information and analysis reveal the glaring extent to which these justifications are arbitrary and capricious and serve to undermine adoption of the exemptions. EPA’s own data reveal that the exemptions have a substantially higher net social cost than a lawful MACT standard without the exemptions, and also result in significantly higher

emissions of HAPs, VOCs and particulate matter than a rule without the exemptions. For these reasons, EPA's exemptions are further unlawful, arbitrary and capricious and an abuse of the agency's discretion; the agency must reconsider these exemptions, grant an administrative stay, and undertake proceedings that will lead to withdrawal of the exemptions.

5. EPA Must Reconsider Its Assessment of Ecological Risks.

As noted above, EPA's proposal gave the scarcest of details about how a low-risk subcategory/delisting action would be accomplished, and the agency's handling of ecological risks is a perfect example of how the public was denied any meaningful opportunity to comment on the risk method. The proposal did not discuss how ecological risks would be factored into the risk approach at all, except to quote the statutory language concerning delisting.⁷³ That language presents a daunting hurdle to EPA's desired exemption theory; it provides that, for facilities emitting non-carcinogenic HAPs, no source category or subcategory may be delisted unless "no adverse environmental effect will result from emissions from any source. . . ."⁷⁴ The agency's proposal did not give any inkling of how EPA intended to implement this provision, or what standards it would use to assess whether PCWP sources might cause environmental harm. Nor to our knowledge did any item in EPA's rulemaking docket, until February 18, 2004 – nearly a year after the close of the comment period and eight days before the final rule was signed – contain any analysis of the ecological risks of PCWP facilities. Accordingly, because a finding that there are no environmental effects is a necessary prerequisite to delisting a

⁷³ See 68 Fed. Reg. at 1,301-02.

⁷⁴ 42 U.S.C. § 7412(c)(9)(B)(2).

category or subcategory (and therefore is centrally relevant to this rulemaking), and because the grounds for this objection arose after the public comment period, EPA must grant reconsideration of this element of the rule. Moreover, because EPA's ecological assessment for the final rule is fundamentally inadequate, the agency must reverse its approach on reconsideration.

In the final rule, EPA describes its effort to assess ecological risks in the following manner:

We have conducted an ecological assessment . . . on those HAP emitted from PCWP affected sources . . . that we have identified as having the potential for persisting and bioaccumulating in the environment. From this analysis we determined that adverse ecological effects . . . are unlikely from PCWP affected sources. Therefore, PCWP affected sources attempting to demonstrate their low-risk status will not be required to include an ecological assessment. . . .⁷⁵

A memorandum in the docket has a single paragraph explaining the ecological assessment that EPA's contractor performed; the assessment "used the media concentrations developed for the human health assessment to estimate screening level ecological impacts . . . [and] used the media concentrations from the highest risk facility location - Minnesota."⁷⁶ Beyond that, however, there are virtually no details about how EPA evaluated risks, leaving a completely inadequate record upon which to find that PCWP plants cause "no adverse environmental effect," and thus is arbitrary and capricious.⁷⁷ Moreover, the few details EPA has revealed about its methodology indicate that the agency has failed to meet the legal requirement in the CAA in several obvious

⁷⁵ 69 Fed. Reg. at 45,998.

⁷⁶ Memorandum from Nancy Jones and Lesley Stobert, EC/R Inc., to Dennis Pagano and Maria Pimentel, EPA/REAG, "Multipathway and Ecological Risks from Model PCWP Facilities," at 4 (Jan. 28, 2004).

⁷⁷ By way of comparison, EPA must assess the ecological effects of pesticides to determine if they are eligible for registration under the Federal Insecticide, Fungicide and Rodenticide Act, and the agency's assessments for that purpose are lengthy, detailed documents looking at a variety of possible scenarios and ecological endpoints. *See, e.g.*, U.S. EPA, Reregistration Eligibility Science Chapter for Atrazine: Environmental Fate and Effects Chapter (Jan. 26, 2001), available online at http://www.epa.gov/oppsrrd1/reregistration/atrazine/atrazine_eco_assessment.pdf (visited Sept. 26, 2004).

ways: (1) the assessment focused on just a few HAPs and thus ignored potential environmental impacts from other emissions; (2) by evaluating a single location, the assessment ignored potential site-specific environmental receptors and locally affected species; and (3) the consideration of only persistent and bioaccumulative HAPs would not capture potential acute effects on the environment.⁷⁸

6. EPA Must Reconsider the Fundamental Legal Basis for the Rule's Risk-Based Exemptions.

a. Introduction

EPA's risk-based exemptions contravene the statutory language, structure and history of the 1990 Clean Air Act amendments. We discuss the exemptions' many legal deficiencies in greater detail below. But it is useful initially to revisit the history of air toxics regulation under the Act, and the Congressional response to that history in 1990, to see just how thoroughly this rule's risk-based exemptions flout Congressional intent. Since EPA is already familiar with this history, and EPA's own Office of General Counsel has confronted agency policymakers with reminders of this history in the process of concluding that this risk-based enterprise is unlawful, we will content ourselves with excerpting relevant portions of the legislative history here. These excerpts reinforce the unlawfulness and arbitrariness of the final rule's risk-based exemptions, and we ask that the agency reconsider those exemptions and respond to this legislative history in acting on this petition.

⁷⁸ This simplistic assessment seems well short of EPA's technical capacity to examine ecological impacts. For instance, we note that the agency has a model which EPA claims "predicts pollutant concentrations in multiple environmental media and in biota and pollutant intakes for biota, all of which provide both temporal and spatial exposure estimates for ecological receptors (i.e., plants and animals)." U.S. EPA, Total Risk Integrated Methodology (TRIM) - TRIM.FaTE, available online at http://www.epa.gov/ttn/fera/trim_fate.html (visited Sept. 26, 2004).

By 1990, Congress was disgusted with EPA's failure to regulate air toxics over the prior two decades sufficiently to protect the American public. Under the pre-existing risk-based regime, EPA had managed to list only eight toxic air pollutants for regulation, and Congress attributed the failings of the existing system to the cumbersome, risk-based system of regulation.⁷⁹ As Senator Baucus explained:

There is therefore, broad consensus that the program to regulate hazardous air pollutants under section 112 should be restructured. There is broad consensus that current law doesn't work. In light of this, the bill would entirely restructure the existing law, so that EPA would have authority to regulate industrial and area source categories of air pollution rather than individual pollutants. Moreover, the bill provides new authority allowing cost to be considered in applying controls.

This new approach towards regulation of both routine releases of hazardous air pollutants relies on technology-based standards rather than risk-based standards. This approach is needed to overcome the inertia that plagued the health-based standard setting process authorized by current law.

1 Legis. Hist. At 1029.

These same sentiments were echoed repeatedly throughout the deliberations leading to adoption of the new section 112 MACT program:

It is essential that EPA promulgate meaningful MACT standards on time. We have postponed the health test under section 112 of current law in the expectation that MACT will be effective. A weak MACT standard would cause more sources to trigger the residual risk standard. This would postpone needed health protection and would increase costs of toxics controls. The best solution is an aggressive MACT program that protects public health and the environment.

Id. at 790.; *see also id.* at 5000-01.

Speaking to section 112's phase II residual risk program, Senator Durenberger explained:

To summarize the program for health-based standards: It is a second phase of the standard-setting process which comes after the technology-based standards.

⁷⁹ 1 A Legislative History of the Clean Air Act Amendments of 1990, Comm. Print S. Prt. 103-38 (1993) ("1 Legis. Hist.") at 1028-29 (Sen. Baucus).

Id. at 5008. Senator Durenberger explained elsewhere that “[t]he Administrator is to replace the technology standards for a source category, only if it is necessary to protect health with a more stringent standard. This bill does not authorize the Administrator to relax the standards established under subsection (d) for a category by establishing standards under subsection (f).” *Id.* at 877.

Finally, it is notable that two of the principal architects of the 1990 Amendments – one Republican, one Democrat -- have specifically condemned the risk-based exemption in this very PCWP rulemaking as an outright circumvention of the statute and Congressional intent:

"I don't have any doubt but that is a way to get around the policy which we worked hard to achieve," said former Sen. David F. Durenberger (R-Minn.). Rep. Henry A. Waxman (D-Los Angeles) declared the timber products exemption "directly contrary to our intent."

Alan C. Miller & Tom Hamburger, “EPA Relied on Industry for Plywood Plant Pollution Rule,” *L.A. Times* (May 21, 2004).

b. EPA’s New Interpretation of Subsections 112(c)(1) and 112(d)(1)

In the preamble to the final rule, EPA offers a statutory interpretation and lengthy supporting arguments intended to demonstrate that its rule is authorized under subsection 112(c)(9) and not in violation of any other provision of the Act. 69 Fed. Reg. at 45946/1, 45984/1-85/3, 45986/3-91/3.⁸⁰ According to that interpretation, EPA’s rule does not exceed “the discretion provided to the Administrator under CAA section 112(d)(1) to distinguish among classes, types, and sizes of sources within a category and under CAA section 112(c)(1) to base categories and subcategories on any appropriate criteria.” *Id.* at 45984/3.

⁸⁰ “This action . . . includes a detailed rationale for removing low-risk PCWP affected sources from the source category list.” 69 Fed. Reg. at 45944/2.

EPA's proposal, however, did not even mention § 112(d)(1) or provide any reasoned explanation why risk is an "appropriate" criterion for distinguishing between sources. This approach flies in the face of the Act's instruction that EPA accompany any proposed rule with "the major legal interpretations . . . underlying [it]." 42 U.S.C. § 7607(d)(3)(C).⁸¹ Consequently, NRDC could not reasonably during the period for public comment object to the final rule's interpretation of the statute or present the grounds for its objection. The objection is thus appropriately raised in this petition. *Id.* § 7607(d)(7)(B). The following discussion presents NRDC's objection and the grounds for it. The objection is "of central relevance to the outcome of the rule," *id.*, because it demonstrates that the rule contravenes the Clean Air Act and is arbitrary and capricious.

i. The Rule Exceeds the Discretion Afforded EPA by Subsections 112(c)(1) and 112(d)(1).

The subsection 112(d)(1) sentence upon which EPA seeks to rely is, on its face, incapable of authorizing this rule. EPA refers only to the sentence's first clause, which authorizes EPA to "distinguish among classes, types, and sizes of sources within a category or subcategory in establishing [emission] standards" *Id.* § 7412(d)(1). In its second clause, however, the sentence declares unambiguously that it does not authorize EPA actions that cause "delay in the compliance date for any standard applicable to any source under subsection (i)." *Id.* On its face, EPA's rule delays the subsection 112(i) compliance date for all sources that are designated "low risk," including those that, by the time the subsection 112(i) date arrives, have lost the "low

⁸¹ In the notice of proposed rulemaking, EPA simply quoted language in subsection 112(c)(9)(B) of the Act and announced that, "[g]iven these authorities and the suggestions from the white paper prepared by industry representatives," the agency was "considering whether it would be possible to establish a subcategory of facilities within the larger PCWP category that would meet the risk-based criteria for delisting." 68 Fed. Reg. at 1301/2-3.

risk” designation and are thus unquestionably subject to the PCWP MACT standards. 69 Fed. Reg. at 45955/2-3, 46043/2. Therefore, the last sentence of subsection 112(d)(1) cannot provide authorization for this rule.

Moreover, neither subsection 112(c)(1) nor subsection 112(d)(1) purports to – or could – authorize EPA to contravene Congressional intent. 42 U.S.C. § 7412(c)(1), (d)(1).⁸² As demonstrated below, EPA’s rule contravenes the Congressional intent that is expressed unambiguously in the language, structure, and history of section 112. Therefore, the rule exceeds the discretion afforded EPA by subsections 112(c)(1) and 112(d)(1).

ii. The Rule Contravenes the Clear Commands of Section 112 and the Intent of Congress.

EPA acknowledges that its rule establishes a subcategory – the so-called “Low-Risk Subcategory of PCWP Affected Sources” – pursuant to subsection 112(c)(1). 69 Fed. Reg. at 45984/3. As the agency also concedes, however, the rule does not establish emissions standards for the new subcategory, or even leave open the possibility that the administrator will do so in the future. *Id.* at 45944/2, 45946/1. The rule thus contravenes subsections 112(c)(2) and 112(d)(1) while thwarting Congressional intent.

Subsection 112(c)(2) declares that, “[f]or the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.” 42 U.S.C. § 7412(c)(2) (emphasis added). Subsection 112(d)(1) declares that “[t]he Administrator shall promulgate regulations establishing emission

⁸² Indeed, the subsection 112(c)(1) language upon which EPA seeks to rely merely affirms the agency’s “authority to establish subcategories under this section [*i.e.*, section 112], as appropriate.” 42 U.S.C. § 7412(c)(1) (emphasis added).

standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) and (e) of this section.” *Id.* § 7412(d)(1) (emphasis added). EPA’s rule contravenes these directives by precluding the establishment of emissions standards for a listed subcategory.⁸³

EPA claims that its rule falls within the one exception to the Act’s directive that the agency establish emission standards for each listed category or subcategory. Specifically, EPA argues that the rule carries out a source category deletion of the type authorized by subsection 112(c)(9)(B). 69 Fed. Reg. at 45944/2. But that subsection does not authorize what this rule does.

First of all, the action EPA takes in this rule is identical, in all relevant respects, to agency action that Congress affirmatively declined to authorize when it enacted subsection 112(c)(9)(B). Specifically, the rule institutes a system whereby EPA exempts individual sources from a listed category – and from that category’s MACT standards – on the basis of source-by-source risk determinations. *Id.* at 46012/1 (40 C.F.R. § 63.2231), 46040/2 (40 C.F.R. Part 63, Subpart DDDD, App. B, § 4) (individual source belonging to the PCWP category becomes exempt from the MACT requirements that apply to that category if the source demonstrates that the risks caused by its HAP emissions fall below thresholds identified in a “look-up table” or in a “site-specific risk assessment”).⁸⁴ Congress affirmatively rejected a proposal to authorize EPA to make

⁸³ The second sentence of subsection 112(d)(1), upon which EPA seeks to rely, authorizes the agency to “distinguish among classes, types, and sizes of sources within a category or subcategory in establishing [emissions] standards,” not in exempting certain members of a listed category from MACT standards altogether. 42 U.S.C. § 7412(d)(1) (emphasis added). For other reasons stated above, moreover, the second sentence of subsection 112(d)(1) cannot provide authorization for this rule. *See supra*, p. 36.

⁸⁴ The text of the proposed rule did not include provisions for exempting individual PCWP sources from MACT based on risk, *see* 68 Fed. Reg. at 1310-1339, and the preamble’s discussion of “Subcategory Delisting Under Section 112(c)(9)(B) of the CAA” made no mention of any such provisions. *See id.* at 1301-02. Consequently, the grounds for NRDC’s objection to those provisions arose after the period for

such exemptions. *See* Remarks of Senator Durenberger in Senate Debate (Oct. 27, 1990), *reprinted in* 1 *Legis. Hist.* at 866 (“The fourth set of alternatives reviewed in the paper concern source-by-source exemptions from MACT based on risk assessments, a provision contained in the House bill. The authority for such exemptions was not present in the Senate bill, and the House receded to the Senate on this point. The provision was deleted in conference.”). Indeed, EPA concedes as much. 69 *Fed. Reg.* at 45984/2 (“[T]he legislative history of the 1990 Amendments to the CAA indicates that Congress considered and rejected allowing us to grant such source-specific exemptions from the MACT floor.”). Therefore, subsection 112(c)(9)(B) cannot be read to authorize a rule like this one, under which individual sources are exempted from a category and its MACT standards on the basis of individualized risk determinations.

EPA’s own Office of General Counsel (“OGC”) reached the same conclusion in a March 4, 2002 draft memorandum (attached) analyzing this rule when it was under development:

The conclusion that Congress did not intend to exempt individual low-risk sources is further supported by Congress’ rejection of a provision that would have allowed relaxed standards for such individual low-risk sources. The House Bill, H.R. 3030, would have allowed a source to comply with an alternative emission limitation (in lieu of the technology-based standards otherwise required), if the source could demonstrate that emissions meeting the alternative limitation would present a negligible risk to public health. *See* H.R. 3030 *reprinted in* 2 *Legis. Hist.* at 3939 (proposed CAA § 112(g)(1)(A)). Senator Durenberger explained that this source-specific risk-based exemption was rejected by Congress. [citing the Senator Durenberger remarks quoted *supra*, p. 37]

OGC Memo at 10-11; *see also id.* at 10 (“Section 112(c)(9) does not provide EPA authority to delist individual low-risk sources.”). The agency has not acknowledged –

public comment had ended. The objection is thus appropriately raised in this petition. *See* 42 U.S.C. § 7607(d)(7)(B). Moreover, the objection is “of central relevance to the outcome of the rule,” *id.*, because it demonstrate that the rule contravenes the Clean Air Act and is arbitrary and capricious.

much less resolved – the contradiction between the conclusions in its final rule and the evidence that OGC found determinative of an opposite conclusion. For that reason alone, the rule is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (agency rule arbitrary and capricious where agency “offered an explanation for its decision that runs counter to the evidence before the agency”).⁸⁵

In the face of the clear legislative history, EPA makes the extraordinary claim that Congress did not specifically decline to authorize the agency from taking the action described in this rule. 69 Fed. Reg. at 45990/2. EPA’s position amounts to a contention that although Congress considered and rejected a provision that would have allowed sources to abide by weaker standards by making source-specific showings about risk, the same legislators would have embraced a rule exempting allegedly low-risk sources from standards altogether. Even if this claim were correct, which it plainly is not, it would not rehabilitate the rule from unlawfulness, for it would not change the fact, demonstrated below, that the rule rests upon a reading of subsection 112(c)(9)(B) that would render the language of paragraphs (i) and (ii) in that subsection meaningless. In any event, the arguments that EPA offers in support its claim are specious.⁸⁶

⁸⁵ It was impracticable to raise this objection of arbitrariness and capriciousness during the period for public comment on this rule – and the grounds for the objection arose only after that period ended – because the OGC memorandum did not become public until May 21, 2004, more than two months after the public comment period had closed. *See* Alan C. Miller and Tom Hamburger, “EPA Relied on Industry for Plywood Plant Pollution Rule,” *Los Angeles Times*, May 21, 2004 (publishing OGC memorandum with online version); 69 Fed. Reg. at 45946/2 (“The public comment period lasted from January 9, 2003, to March 10, 2003.”). The objection is thus appropriately raised in this petition. *See* 42 U.S.C. § 7607(d)(7)(B). Moreover, the objection is “of central relevance to the outcome of the rule,” *id.*, because it demonstrates that the rule is arbitrary and capricious.

⁸⁶ Neither EPA’s claim nor the arguments intended to advance it appeared, even in summary form, in the notice of proposed rulemaking. *See* 68 Fed. Reg. at 1301/2-3. Consequently, the grounds for NRDC’s objection to EPA’s interpretation arose after the period for public comment had ended. The objection is thus appropriately raised in this petition. *See* 42 U.S.C. § 7607(d)(7)(B). Moreover, the objection is “of

First, EPA argues that its rule is different from the approach that Congress rejected, in that the rule relies “upon the application of specific eligibility criteria that are defined in advance of any source’s application to be included in the low-risk PCWP subcategory, in much the same way as any other applicability determination process works.” *Id.* at 45990/2. But there is not the slightest indication – indeed, EPA cannot point to any – that Congress would have adopted the proposed provision if only the provision had required that the eligibility criteria be spelled out in advance of any source-by-source eligibility determinations. Moreover, as discussed above, EPA permits individual sources to avoid pollution controls by making source-specific risk assessments governed by only a few general and ambiguous criteria, so EPA’s attempted distinction of its approach from the one Congress refused to adopt does not withstand scrutiny. In fact, as OGC has recognized, all the evidence indicates that Congress would have rejected any source-by-source approach that was based on risk:

The statute and legislative history demonstrates that, for non-threshold pollutants, Congress did not intend to regulate only high-risk sources or to regulate sources only to the point where they meet the risk criteria of 112(c)(9) or 112(f). . . . [S]ubcategorization based on risk would effectively allow source-specific delisting under 112(c)(9). Such an outcome is not contemplated by the language of section 112(c)(9) and was expressly rejected by Congress in drafting section 112.

OGC Memo at 8 (emphasis added). EPA concedes that its rule establishes a source-by-source eligibility approach,⁸⁷ and that eligibility is decided on the sole basis of risk. 69

central relevance to the outcome of the rule,” *id.*, because it demonstrates that the rule contravenes the Clean Air Act and is arbitrary and capricious.

⁸⁷ “[T]he approach we are taking for identifying additional low-risk PCWP affected sources is fully consistent with the approach we have long taken in identifying, on a case-by-case basis and subject to appropriate review, whether individual sources are members of a category or subcategory subject to standards adopted under CAA section 111 and 112.” 69 Fed. Reg. at 45990/2.

Fed. Reg. at 45990/3 (“[T]he criteria for the low-risk subcategory we are delisting are based solely on risk and not on technological differences in equipment or emissions.”). Therefore, EPA’s rule is precisely the agency action that Congress affirmatively declined to authorize. Moreover, the agency’s failure to acknowledge – much less resolve – the contradiction between the conclusions in its final rule and the evidence that OGC found determinative of an opposite conclusion renders the rule arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.⁸⁸

Next, EPA argues that Congress’s decision not to enact the provision that would have authorized a risk-based, source-by-source approach “is not probative of congressional intent” concerning EPA’s authorization *vel non* to promulgate such an approach since “[t]here is no evidence that this provision was ever debated, considered, or voted upon.” 69 Fed. Reg. at 45990/2. This argument is flatly contradicted by EPA’s own assertion that “the legislative history of the 1990 Amendments to the CAA indicates that Congress considered and rejected allowing us to grant such source-specific exemptions from the MACT floor.” *Id.* at 45984/2 (emphasis added). Moreover, the fact that EPA’s action rests upon a reading of subsection 112(c)(9)(B) that would render the language of paragraphs (i) and (ii) in that subsection meaningless (*see infra*, p. 42) is alone sufficient to establish the fact that the subsection does not authorize the agency’s action in this rule. EPA’s suggestion that Congress’s rejection of H.R. 3030 does not further reinforce that fact is at odds with governing case law. *See, e.g., I.N.S. v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1218-19 (1987) (inclusion of provision in Senate bill indicated

⁸⁸ This objection of arbitrariness and capriciousness is appropriately raised in this petition, and is of central relevance to the outcome of the rule, for the reasons stated *supra*, n. 84.

consideration of provision, and enactment of House bill rather than Senate bill demonstrated Congressional rejection of provision).

Finally, EPA claims that “it is reasonable to assume that, had Congress been aware in 1990 of the possibility that an identifiable group of PCWP affected sources is low risk, while that group does not correspond to traditional criteria differentiating categories and subcategories,” Congress would have “expressly” authorized EPA’s action in this rule. 69 Fed. Reg. at 45900/2. But EPA’s assumption cannot be called reasonable, for three reasons. First, EPA offers no basis whatsoever for the assumption. Second, EPA’s own lawyers concluded that “[i]t does not appear reasonable to support risk-based subcategorization based on an argument that Congress did not intend to regulate low-risk sources.” OGC Memo at 11 (emphasis added); *see also id.* (“This argument is inconsistent with the structure of section 112 and the underlying legislative history.”). The agency’s failure to acknowledge – much less resolve – the contradiction between the conclusions in its final rule and the evidence that OGC found determinative of an opposite conclusion renders the rule arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.⁸⁹ Third, as demonstrated below, the assumption necessitates the invalid conclusion that Congress intended to render meaningless the language in paragraphs (i) and (ii) of subsection 112(c)(9)(B).

Construing subsection 112(c)(9)(B) to authorize EPA’s rule would render its terms meaningless. The subsection authorizes EPA to delete a category only when the agency determines that “no source in the category” emits HAPs that may cause more than a specified cancer risk, emits HAPs in a quantity that thwarts the protection of public

⁸⁹ This objection of arbitrariness and capriciousness is appropriately raised in this petition, and is of central relevance to the outcome of the rule, for the reasons stated *supra*, n. 84.

health with an ample margin of safety, or emits HAPs that will have an adverse environmental effect. 42 U.S.C. § 7412(c)(9)(B)(i), (ii) (emphasis added). This prerequisite would be futile if the subsection authorized EPA to do what this rule does, namely, allow individual sources to exempt themselves on a case-by-case basis from a listed category based on individualized showings that the adverse effects of their HAP emissions fall below the thresholds identified in the subsection. “Congress cannot be presumed to do a futile thing.” *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997).

Moreover, construing subsection 112(c)(9)(B) to authorize EPA’s rule would generate a direct conflict with the plain language of subsection 112(d)(3), the “MACT floor” requirements. After worrying about what effect this exemption idea would have on the MACT floor, *see* 68 Fed. Reg. at 1,301-02, EPA has tried to have its regulatory cake (by using “low risk” sources to help define the floor level of control) and eat it too (by subsequently letting those sources escape MACT regulation). *See* 69 Fed. Reg. at 45,991. The agency proclaims that

there is nothing in the CAA that prevents us from including [sources from a different subcategory] in any consideration of what represents the best controlled similar source in the new source MACT context, and because it is not unprecedented for us to look outside the relevant category or subcategory in identifying the average emission limitation achieved by the best-controlled existing sources if doing so enables us to best estimate what the relevant existing sources have achieved.

Id. However, this approach cannot be reconciled with the clear language of subsection 112(d)(3) defining the MACT floor based on the performance of sources “in the category or subcategory.” 42 U.S.C. § 7412(d)(3). What this indicates is that if EPA were authorized to and did subcategorize based on risk, it would not be authorized to establish MACT floors for the non-low-risk subcategory based on sources in the low-risk

subcategory. This problem demonstrates that EPA's interpretation is flawed; the Act requires floors to be established for subcategories during the rulemaking process, but EPA's low-risk methodology ensures that the sources making up the low-risk subcategory will not actually be identified until some period in time long after the promulgation of the rule.

Another reason that subsection 112(c)(9)(B) cannot be read to authorize this rule is that paragraph (i) of that subsection does not authorize EPA to delist *subcategories* of sources of carcinogenic emissions, allowing delisting only of *categories* of sources of carcinogens. Confronted with this plain statutory language, and direct contradiction with the risk-based subcategorization and delisting approach in EPA's final rule, EPA for the first time in the preamble to the final rule resorts to arguing that the Clean Air Act reflects "nothing more than a drafting error":⁹⁰

. . . we interpret the absence of explicit references to subcategories in this introductory language and in section 112(c)(9)(B)(i) as representing nothing more than a drafting error.

69 Fed. Reg. at 45990/3. Thus, EPA's position amounts to inserting the words "or subcategory" into the statute in subsections 112(c)(9)(B) and 112(c)(9)(B)(i).

This is unlawful, arbitrary and capricious, and otherwise an abuse of the agency's discretion. Under *Chevron* Step One, 467 U.S. 837 (1984), the plain language of subsection 112(c)(9)(B) does not authorize EPA to delist subcategories of sources of carcinogenic emissions. EPA is entitled to no deference under Chevron Step Two on this

⁹⁰ Neither EPA's claim nor the arguments intended to advance it appeared, even in summary form, in the notice of proposed rulemaking. See 68 Fed. Reg. at 1301/2-3. Consequently, the grounds for NRDC's objection to EPA's interpretation arose after the period for public comment had ended. The objection is thus appropriately raised in this petition. See 42 U.S.C. § 7607(d)(7)(B). Moreover, the objection is "of central relevance to the outcome of the rule," *id.*, because it demonstrates that the rule contravenes the Clean Air Act and is arbitrary and capricious.

question of statutory interpretation. See *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C.Cir. 2001) (“we do not give an agency alleging a scrivener’s error the benefit of Chevron step two deference, by which the court credits any reasonable construction of an ambiguous statute. Rather, the agency ‘may deviate no further from the statute than is needed to protect congressional intent.’ *Id.*”).

The standard is extremely high for overcoming the plain meaning of a statute and rewriting the law on the basis of an alleged “drafting error,” as EPA attempts to do here. That is especially true where EPA is asserting not just one but two instances in which Congress allegedly committed a scrivener’s error. A leading Supreme Court decision addressing the question of an alleged scrivener’s error, for example, provides that the availability of this excuse turns on whether a statute’s plain meaning is “overwhelm[ed by] evidence from the structure, language, and subject matter of the” statute, such that it is clear that Congress made a “scrivener’s error.” Nat’l Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 462 (1993).

Likewise, the D.C. Circuit says this about the scrivener’s error doctrine:

Reading a statute contrary to its seemingly clear meaning is permissible “[i]f ‘the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C.Cir.1998) (quoting United States v. Ron Pair Enterprises, 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). We will not, however, invoke this rule to ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification:

[T]he court’s role is not to ‘correct’ the text so that it better serves the statute’s purposes, for it is the function of the political branches not only to define the goals but also to choose the means for reaching them.... Therefore, for the EPA to avoid a literal interpretation at Chevron step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.

Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1089 (D.C.Cir.1996).
Appalachian Power Co. v. EPA, 249 F.3d 1032, 1041 (D.C. Cir. 2001). A more recent D.C. Circuit decision declines to characterize a statutory reading as a “scrivener’s error” so long as there is a “plausible interpretation” to the literal statutory language. Williams Companies v. F.E.R.C., 345 F.3d 910, 912 (D.C. Cir. 2003).

EPA’s preambular arguments do not come close to providing the “extraordinarily convincing justification,” Appalachian Power Co., 249 F.3d at 1041, needed to abrogate the plain statutory language of section 112(c)(9)(B). Nor does EPA offer – since there is *nothing* to offer – “overwhelming evidence from the structure, language, and subject matter of the” Clean Air Act to make clear that Congress committed a scrivener’s error in § 112(c)(9)(B). Nat'l Bank of Oregon, 508 U.S. at 462. Finally, there is more than sufficient “plausible interpretation” of section 112(c)(9)(B) to deny EPA’s attempt to rewrite the statute.

EPA’s preamble offers essentially four arguments to justify its drafting error conclusion, none of which – individually or collectively – provides the extraordinarily convincing justification needed to contradict the plain statutory language. The agency’s first argument is entirely conclusory and offers *no* explanation, much less an extraordinarily convincing justification. 69 Fed. Reg. at 45990/3 (“This construction is logical in the context of the general regulatory scheme established by the statute . . .”). As we discuss below, it is equally and more logical to adhere to the plain language of the statute.

Second, EPA offers a *non sequitur* that fails to advance its argument and, in fact, undermines it. *Id.* (“and it is the most reasonable [construction] because section

112(c)(9)(B)(ii) expressly refers to subcategories.”) The reference to “subcategory” in subsection 112(c)(9)(B)(ii) merely reinforces the omission of that language in subsection 112(c)(9)(B)(i), and shows that Congress understood the distinction between categories and subcategories, and how to include subcategories when it wished. *See also* 42 U.S.C. § 7412(c)(9)(A) (providing only for delisting of a “source category”). The most reasonable conclusion from subsection 112(c)(9)(B)(ii)’s reference to subcategory, then, is that Congress wished to include it here, but not in the other provisions of subsection 112(c)(9).

Third, the agency argues that “[u]nder a literal reading of section 112(c)(9)(B), no subcategory could ever be delisted, notwithstanding the explicit reference to subcategories, since the introductory language of section 112(c)(9)(B) provides explicit authority to only delist categories.” 69 Fed. Reg. at 45990/3. As an initial matter, the agency fails to explain why even this reading is an irrational one – it is plausible that Congress did not wish subcategories to be delisted at all, and structured subsection 112(c)(9)(B) accordingly. The agency also ignores the possibility that the word “subcategory” in subsection 112(c)(9)(B)(ii) is a drafting error.

But more important, a claimed internal contradiction between subsections 112(c)(9)(B)(ii) and § 112(c)(9)(B) does not indicate any internal contradiction between subsections 112(c)(9)(B)(ii) and § 112(c)(9)(B)(i). It is highly revealing that EPA does not and cannot claim any internal contradiction between subsections 112(c)(9)(B)(ii) and § 112(c)(9)(B)(i). The absence of any authority in subsection 112(c)(9)(B)(i) – regardless of what subsection 112(c)(9)(B) says -- is sufficient to prevent EPA from delisting subcategories of sources of carcinogens.

Continuing with this last line of argument, EPA argues that a “literal” reading of subsection 112(c)(9)(B)

makes no sense, at the very least because Congress plainly assumed we might also delist another collection of sources besides either categories or subcategories, even in the case of sources of carcinogens. Both sections 112(c)(9)(B)(i) and (ii) refer additionally to groups of sources in the case of area sources as being eligible for delisting, even though only a category of sources is specifically identified as eligible for delisting in the introductory language of section 112(c)(9)(B).

Id. at 45990/3. These arguments utterly fail to provide the extraordinarily convincing justification needed to delist subcategories for sources emitting carcinogens under subsection 112(c)(9)(B)(i).

EPA has authority to delist a “group of sources in the case of area sources” under subsections 112(c)(9)(B)(i) and 112(c)(9)(B)(ii) because those provisions specifically authorize such delisting. That is precisely our point -- subsection 112(c)(9)(B)(i) does not authorize at all the delisting of subcategories for sources emitting carcinogens, because it does not contain the words “or subcategory” as subsection 112(c)(9)(B)(ii) does. Indeed, the structure of the key sentences in subsections 112(c)(9)(B)(i) and 112(c)(9)(B)(ii) – with the parentheticals (“group of sources in the case of area sources”) following the words “category” in subsection 112(c)(9)(B)(i) and “category or subcategory concerned” in subsection 112(c)(9)(B)(ii) – make clear that Congress was defining (for its purpose here) “group of sources in the case of area sources” as an included subset eligible for delisting. This is the most sensible, natural reading of these sentences, and “makes no sense” to EPA only because the agency is attempting to write words into the statute that are not there and, in service of this project, must resort to reading other parts of the statute in a similarly tortured, conforming manner.

Again, it is highly revealing that EPA does not and cannot claim any internal contradiction between subsection 112(c)(9)(B)(i) and the fact that EPA has authority to delist a “group of sources in the case of area sources” under subsections 112(c)(9)(B)(i) and 112(c)(9)(B)(ii). The absence of any authority in subsection 112(c)(9)(B)(i) – regardless of what the introductory language of subsection 112(c)(9)(B) says -- is sufficient to prevent EPA from delisting subcategories of sources of carcinogens.

EPA’s arguments fail to provide the “overwhelming evidence from the structure, language, and subject matter of the” Clean Air Act needed to prove that Congress made a “scrivener’s error” not once, but *twice* in subsection 112(c)(9)(B). Nat’l Bank of Oregon, 508 U.S. at 462; *see also* Appalachian Power Co., 249 F.3d at 1041 (“for the EPA to avoid a literal interpretation at Chevron step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it. Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1089 (D.C. Cir. 1996).”) EPA presents *no* “historical fact” – in the form of legislative history or otherwise – to override subsection 112(c)(9)(B)’s failure to authorize delisting for subcategories of carcinogen-emitting sources.⁹¹ Nor does the language, logic or statutory structure of the Act even support EPA’s reading, much less provide the “extraordinarily convincing justification” needed to override the literal language, as discussed above. EPA utterly fails to show that “the literal application of [the Act] will produce a result demonstrably at odds with the intentions of its drafters.”

⁹¹ Indeed, there is legislative history confirming § 112(c)(9)(B)(i)’s availability only for categories and not subcategories. Legis. Hist. at 5201 (“MACT standards are not required for source *categories* that pose less than a 1-in-1,00,000 risk of cancer.”) (emphasis added). Having failed to demonstrate that the statutory provisions are at odds with Congressional intent, EPA additionally fails to “offer[] a convincing account” – much less any account – “of how [the provisions] came to be enacted nevertheless.” Appalachian Power Co., 249 F.3d at 1043. EPA’s reading represents a far cry from the section 126 cross-reference in Appalachian Power Co., where the court found it “quite plausible that the Congress substituted ‘(ii)’ for ‘(i)’ in § 126 inadvertently in the course of a routine renumbering of statutory cross-references.” *Id.*

Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (internal citations omitted).

The “subject matter” of subsection 112(c)(9)(B)(i), Nat'l Bank of Oregon, 508 U.S. at 462, provides more than sufficiently “plausible interpretation” (Williams Companies, 345 F.3d at 912) why the statute does not authorize delisting for subcategories of carcinogen-emitting sources: because this provision addresses carcinogens, Congress adopted tighter restrictions on the deregulatory action of delisting in the same manner that it did for the governing delisting criteria. Just as subsection 112(c)(9)(B)(i) is more restrictive than subsection 112(c)(9)(B)(ii) in not authorizing delisting of subcategories, subsection 112(c)(9)(B)(i) contains more restrictive, thus more protective, delisting criteria (“lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed” versus for non-carcinogens, “adequate to protect public health with an ample margin of safety and no adverse environmental effect”). It is eminently reasonable, and certainly more than plausible, for Congress to adopt more restrictive conditions for carcinogens, as Congress did here and elsewhere in the statute. *See also* 42 U.S.C. § 7412(f)(2)(A).

There is no contradiction, much less illogic, between subsection 112(c)(9)(B)(i)’s authorization of delisting for categories and groups of sources in the case of area sources that emit carcinogens, and failure to authorize delisting for subcategories. Congress easily could have concluded it would be more difficult to make a category-wide showing under the rigorous criteria of subsection 112(c)(9)(B)(i), with the “no source in the category” condition and one-in-one-million lifetime cancer risk standard; thus, EPA would be unable to make that showing very often. In the rare instance in which EPA could make

the necessary showings, however, with respect to every source in the category, then it should be able to delist every source. Put differently, in the case of sources that emit carcinogens, the inability to delist just a portion of the category makes it harder for EPA to fail to regulate such sources using the MACT approach.

For all of these reasons, subsection 112(c)(9)(B) cannot be read to authorize EPA's rule. OGC reached the same conclusion in the March 4, 2002 memorandum:

[S]ubcategorization based on the 112(c)(9) risk criteria would seem to circumvent the very limits included in section 112(c)(9). If individual sources could demonstrate they are "low risk" and therefore should be subcategorized and delisted, the limitation that delisting is only appropriate when "no source" in the category or subcategory presents a risk to public health would become meaningless. Any subset of sources, including a single source, could be delisted if the sources can demonstrate they meet the criteria for delisting. This is inconsistent with the language in 112(c)(9) and results in a regulatory approach equivalent to the one Congress specifically rejected in H.R. 3030.

OGC Memo at 11; *see also id.* (subsection 112(c)(9) "clearly not intended to provide the type of source-by-source delisting that risk-based subcategorization would allow."). The agency has not acknowledged – much less resolved – the contradiction between the conclusions in its final rule and the evidence that OGC found determinative of an opposite conclusion. For that reason alone, the rule is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.⁹²

c. EPA's other arguments confirm the conflict with Congressional intent.

In the preamble to the final rule, EPA offers a raft of arguments in an unsuccessful attempt to demonstrate that its rule is consistent with Congress's intent in

⁹² This objection of arbitrariness and capriciousness is appropriately raised in this petition, and is of central relevance to the outcome of the rule, for the reasons stated *supra*, n. 84.

enacting subsections 112(c) and 112(d). 69 Fed. Reg. at 45988/3-90/1. An examination of EPA’s unavailing arguments simply confirms that the rule thwarts Congress’s intent.⁹³

First, EPA posits a Congressional concern “that undue burdens not be placed on groups of sources within the PCWP source category whose HAP emissions are demonstrated to present little risk to public health and the environment.” *Id.* at 45989/1; *see also id.* (“Congress’s intent that we be able to find that sources, such as those in the PCWP category whose HAP emissions are below identified risk levels, should not necessarily be subject to MACT”); *id.* at 45989/2 (“Congressional intent not to unnecessarily burden low-risk PCWP facilities by forcing them to meet stringent MACT controls when they already meet the risk-based goals of section 112”). EPA is plainly mistaken, however, because, as shown above (and as OGC concluded), the language of paragraphs (i) and (ii) in subsection 112(c)(9)(B) unambiguously evinces Congressional intent to impose the burdens of MACT standards on all of the members of a category even if only one of those members has HAP emissions presenting the risks identified in the paragraphs. 42 U.S.C. § 7412(c)(9)(B)(i), (ii); OGC Memo at 10 (“[I]f a category or subcategory contains even a single source that poses a risk over these thresholds, all of the sources in the category or subcategory will be subject to MACT.”). Indeed, some in Congress criticized the version of section 112 that ultimately was enacted precisely because that version “imposes MACT requirements, regardless of whether the

⁹³ Neither EPA’s interpretation of the purposes of section 112, nor the arguments intended to advance that interpretation, appeared, even in summary form, in the notice of proposed rulemaking. *See* 68 Fed. Reg. at 1301/2-3. Consequently, the grounds for NRDC’s objection to EPA’s interpretation arose after the period for public comment had ended. The objection is thus appropriately raised in this petition. *See* 42 U.S.C. § 7607(d)(7)(B). Moreover, the objection is “of central relevance to the outcome of the rule,” *id.*, because it demonstrates that the rule contravenes the Clean Air Act and is arbitrary and capricious.

hypothetical risk is large, small, or negligible.” Remarks of Senator Symms during the Senate Debate (Oct. 27, 1990), *reprinted in* 1 Legis. Hist. at 752. As OGC puts it:

The fact that MACT requires emission reductions in non-threshold pollutants irrespective of risk, the fact that Congress called for the technology-based standards under 112(d) to prohibit or eliminate emissions where achievable, the fact that technology-based standards may not be relevant to levels equated with an ample margin of safety and the fact that technology-based standards must be periodically reviewed to keep up with developments in technology, all are inconsistent with the assertion that Congress only intended to regulate high-risk sources.

OGC Memo at 10. The agency’s failure to acknowledge – much less resolve – the contradiction between the conclusions in its final rule and the evidence that OGC found determinative of an opposite conclusion renders the rule arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.⁹⁴

Because EPA’s false conception of Congressional intent is the only basis for the agency’s allegation of “tension between the arguably restrictive language of section 112(c)(1) and the Congressional intent behind section 112(c)(9),” 69 Fed. Reg. 45989/2, EPA’s claim that its rule is “reasonable . . . as a way to reconcile” (*id.*) that imaginary tension collapses as well. Moreover, even if, *arguendo*, EPA’s rule did represent a “reasonable” accommodation of competing policies, the rule still would be unlawful because “it is not the accommodation the Congress made.” *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002).

Second, EPA claims that Congress did not intend to preclude the agency, in deleting categories or subcategories under subsection 112(c)(9)(B), from using “criteria other than those traditionally used under section 111 before 1990, or those used after

⁹⁴ This objection of arbitrariness and capriciousness is appropriately raised in this petition, and is of central relevance to the outcome of the rule, for the reasons stated *supra* n.84.

1990 for sections 111 and 112.” 69 Fed. Reg. at 45989/1; *id.* at 45989/1-2 (“while after 1990 we have principally used the traditional criteria to define categories and subcategories, such use in general does not restrict how we may define a subcategory in a specific case”); *id.* at 45989/3 (“Congress in section 112(c)(1) clearly did not absolutely prohibit us from basing categories and subcategories on other criteria generally.”). But that claim is irrelevant, because even if it were true, it would not alter the fact that Congress did preclude the source-by-source, risk-based approach that EPA has adopted in this rule.

Third, even if the Act’s language is “clear on its face” in precluding the approach adopted in this agency rule, EPA believes that “as a matter of historical fact,” Congress could not have meant what it said and that, “as a matter of logic and statutory structure, it almost surely could not have meant it.” *Id.* at 45989/2 (citing *Engine Mfrs. Ass’n*, 88 F.3d at 1089). In the same breath, however, EPA repeatedly concedes that Congress could have meant what it said and, indeed, may well have. *Id.* at 45989/1 (“[W]e recognize that, at the time of the 1990 CAA Amendments, Congress may have assumed that we would generally base categories and subcategories on the traditional technological, process, output, and product factors that had been considered under CAA section 111.”); *id.* at 45989/2 (“Congress [] in 1990 likely did not fully anticipate the policy considerations that come into play in regulating HAP emissions from PCWP affected sources”); *id.* at 45990/1 (“At the time of the 1990 Amendments, Congress did not consider it necessary to provide express relief for additional groups such as low-risk PCWP facilities, beyond those defined by traditional category and subcategory criteria, because it assumed we could implement a comprehensive regulatory scheme for air

toxics that would both address situations where technology-based standards were needed to reduce source HAP emissions to levels closer to the risk-based goals of section 112, and avoid the unnecessary imposition of technology-based requirements on groups of sources that were already meeting those goals.”); *id.* (“context turned out to be more complex than Congress anticipated”). Those concessions alone prevent the agency from making the “extraordinarily convincing justification” needed to pass the *Engine Manufacturers* test. *See Appalachian Power Co.*, 249 F.3d at 1041. EPA further undermines its pronouncement as to what Congress could have and did mean when the agency acknowledges that, in the few circumstances where Congress found regulatory relief for low-risk HAP sources to be appropriate, it explicitly authorized EPA to provide that relief. 69 Fed. Reg. at 45989/3-90/1. After all, EPA does not claim – nor could it – that Congress explicitly authorized the agency to extend HAP sources the regulatory relief that this rule provides. 69 Fed. Reg. at 45989/1; *see Sierra Club*, 294 F.3d at 160 (“We cannot but infer from the presence of these specific exemptions that the absence of any other exemption . . . was deliberate, and that the Agency’s attempt to grant such a dispensation is contrary to the intent of Congress.”).

EPA is left, finally, with the claim that had Congress known that “in the case of PCWP facilities there is no clear differentiation between high- versus low-risk sources that corresponds to our traditional approach for identifying source categories and subcategories,” it is “reasonable to conclude” that Congress would not have wanted EPA to be without the authority to exempt individual PCWP sources solely on the basis of risk. *Id.* at 45990/1. But, as shown above, EPA has failed to find any support for that conclusion in the text or legislative history of section 112. Whether or not Congress

anticipated the “complex” situation that EPA alleges, it is clear that Congress did not want EPA extending HAP sources the regulatory relief that this rule provides. EPA’s belief that Congress would have decided differently in 1990 if only it knew then what EPA knows now cannot justify action that contravenes unambiguous statutory commands. *See Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1088 (D.C. cir. 1996) (“the court’s role is not to ‘correct’ the text so that it better serves the statute’s purposes”).

7. EPA Must Reconsider its Grant of an Unlawful Compliance Extension to Existing Sources.

EPA’s final rule grants an unlawful compliance extension to existing sources that become subject to the MACT standard after no longer qualifying for the agency’s (unlawfully created) low-risk subcategory:⁹⁵

If you are operating outside of the low-risk subcategory due to a population shift or change to dose-response values, then you must comply with all of the applicable requirements of 40 CFR part 63, subpart DDDD no later than three years from the date your affected source commences operating outside the low-risk subcategory.

69 Fed. Reg. 45955/2-3. This result contravenes the plain language of the statute and is otherwise arbitrary, capricious, and an abuse of the agency’s discretion. EPA offers no legal justification or rationale for this result, and there is none.

For each category or subcategory of existing sources, the Act requires

compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard, except as provided in subparagraph (B) and paragraphs (4) through (8).

CAA § 112(i)(3)(A). EPA’s 3-year compliance extension for existing sources previously covered by EPA’s illegal exemption violates the plain language of section 112(i)(3)(A).

⁹⁵ The proposed rule gave no indication that a final rule would adopt such an illegal compliance extension.

The approach represented by this unlawful compliance extension does not qualify for any of the enumerated exceptions provided for in this section.⁹⁶ Because the effective date for the standard is September 28, 2004, see 69 Fed. Reg. at 45944/2, existing sources may not “operat[e] outside the low-risk subcategory” (*id.* at 45955/3) after September 28, 2007 without complying with the standard or they will be in violation of the Act. For EPA to claim otherwise is unlawful.

Section 112(d)(1) provides further proof that EPA may not delay the compliance date for existing sources in the name of the illegal low-risk subcategory that EPA has created – or, indeed, in the name of subcategorization generally:

The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for *any standard* applicable to *any source* under subsection (i) of this section as the result of the authority provided by this sentence.

CAA § 112(d)(1) (emphasis added). Even if EPA is relying upon section 112(d)(1) “to distinguish among classes, types, and sizes of sources within a category” (69 Fed. Reg. at 45984/1) to create its low-risk subcategory, this section makes clear that this fact provides no authority for the final rule’s illegal compliance extension. Having identified no legal authority for this compliance extension whatsoever, and having failed to propose such an extension in the first instance, the agency must reconsider this unlawful grant of extension.

⁹⁶ The approach does not fit section 112(i)(3)(B), which at any rate allows only a 1-year extension necessary for the installation of controls, and may only be carried out through a Title V permit. Nor does the approach qualify for the Presidential exemption under section 112(i)(4), early reductions under section 112(i)(5), other reductions under section 112(i)(6), the extension for new sources under section 112(i)(7), or the coke ovens relief under section 112(i)(8). Indeed, EPA does not claim that any of these exemptions or extensions apply.

8. EPA Must Reconsider the Final Rule's Startup, Shutdown & Malfunction Provisions.

EPA's proposed and final rules each contain provisions concerning sources' obligations during periods of startup, shutdown, and malfunction (SSM), but the final rule requirements vary significantly from those that were proposed. In particular, EPA replaced the SSM approach in the proposal with one based on recently-amended General Provisions, and thus did not provide commenters on the PCWP rule with the opportunity to comment on applying these requirements in the context of the PCWP rule. As discussed below, the changes to the SSM requirements reflected in the final rule are arbitrary and capricious and unlawful.

A. Proposed Rule.

EPA's proposed rule referred to the SSM provisions of the MACT General Provisions as they existed in January 2003,⁹⁷ and accordingly permitted sources to avoid compliance with emission standards during periods of SSM, so long as those sources were in compliance with their self-written SSM plans (SSMP). In particular, the proposed rule's section 63.2771(b)(1)-(2) provided:

(1) During periods of startup, shutdown, or malfunction, you must operate in accordance with the SSMP.

(2) Consistent with § 63.6(e) and 63.7(e)(1), deviations that occur during a period of startup, shutdown, or malfunction are not violations if you demonstrate to the Administrator's satisfaction that you were operating in accordance with the SSMP.

68 Fed. Reg. at 1318/1.

B. Final Rule.

⁹⁷ See 68 Fed. Reg. at 1,313 (proposed 40 C.F.R. §§ 63.2250(a)-(d)).

After the comment period for EPA's proposed PWCP regulations expired but before the agency issued its final PWCP regulations, the agency amended the General Provisions' SSM requirements. 68 Fed. Reg. 32586 (May 30, 2003). *See* 69 Fed. Reg. at 45983/1. In its General Provisions amendments, the agency expressly acknowledged that — contrary to the position EPA espoused in the proposed PWCP rule — compliance with self-written SSM plans cannot insulate sources from liability for exceeding emission limits during periods of SSM. 68 Fed. Reg. at 32589-32590. Unfortunately, in correcting this problem, EPA's rulemaking created other (and new) legal concerns; for instance, the agency's rule unlawfully restricts public access to information contained in SSM plans. 40 C.F.R. § 63.6(e)(3)(A)(v). *See* Ex. ___ (petition for reconsideration of amended General Provisions). As a result, the amended general provisions are now in litigation. 69 Fed. Reg. at 45983/1. *See* Ex. ___ (comments on proposed amendments to General Provisions); Ex. ___ (non-binding statement of issues in lawsuit challenging amended General Provisions).

In its final PWCP rule, EPA's SSM requirements referenced the amended General Provisions that the agency had issued on May 30, 2003. The final PWCP rule states:

Due to the timing of the these [sic] rulemakings, the proposed PWCP rule language did not reflect our most recent decisions regarding SSM. To avoid confusion and promote consistency, we have written the final rule to reference the General Provisions directly, where applicable, and to be more consistent with other more recently promulgated MACT standards. Although the amendments to the General Provisions regarding SSM plans are currently involved in litigation, the rule requirements promulgated on May 30, 2003 apply to the final PWCP unless and until we promulgate another revision.

69 Fed. Reg. at 45983/1. Thus, EPA included defects in the amended General Provisions, such as their unlawful restriction on public access to SSM plans, in the final

PWCP rule. Because the amended General Provisions did not exist at the time EPA issued its proposed PWCP rule, the public had no opportunity to comment on the defects that the amended General Provisions contained.

In addition to denying the public any opportunity to comment on the final PWCP rule's reference to the amended General Provisions, EPA also denied the public any opportunity to comment on another key provision of the final PWCP rule's SSM provisions. In the preamble, EPA states:

we combined proposed § 63.2250(d) with proposed § 63.2250(a) and revised the resulting § 63.2250(a) *to clarify that the SSM periods mentioned in proposed § 63.2250(a) apply to both process units and control devices and to clarify when the compliance options, operating requirements and work practice requirements do and do not apply.*

69 Fed. Reg. at 45983 (emphasis added). What EPA's preamble does not say is that its "clarif[ication]" included dropping a key phrase and thus completely changing the substantive SSM requirements. The proposed PWCP rule provided "startup and shutdown periods must not exceed the minimum amount of time necessary for these events, and during these events, *you must minimize emissions to the greatest extent possible.*" 68 Fed. Reg. at 1313/1 (proposed 40 C.F.R. § 63.2250(d) (emphasis added)). The final rule, however, does not state that sources "must minimize emissions to the greatest extent possible" during SSM periods. The public had no opportunity to comment on that change.

Accordingly, because the grounds for objecting to EPA's new SSM provisions arose when EPA promulgated its final rule and because they are of central relevance (since they will govern PWCP plants' compliance obligations during periods of SSM), EPA must convene a proceeding to reconsider this provision.

C. Grounds For Objection.

1. The SSM Provisions Referenced In EPA’s Final PWCP Rule Allow Unlawful Exceedance Of Emission Standards.

The amended General Provisions now referenced in the PWCP rule contain a limited exemption from sources’ duty to comply with emission standards at all times. 40 C.F.R. § 63.6(e)(1)(i). The Clean Air Act’s air toxics provisions, however, neither contain nor allow any such exemption. To the contrary, they require “emission standards,” 42 U.S.C. § 7412(d)(1), a term expressly defined in the Clean Air Act as “a requirement established by the State or Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, 42 U.S.C. § 7602(k) (emphasis added). Because sources’ compliance with air toxics standards must be “continuous,” sources may not avoid compliance with emission standards — or liability for noncompliance — during periods of startup, shutdown or malfunction.

Elsewhere, EPA has argued that caselaw allows an exemption from the continuous compliance requirement during SSM periods for standards that are based on the application and performance of a specific control technology. Neither the caselaw nor the exemption, however, apply to air toxics standards, which are not based on the application and performance of a specific control technology but instead must reflect the maximum degree of reduction that is achievable through the application of the full range of emission reduction measures.

Assuming *arguendo* that any SSM exemption from continuous compliance requirements is legally supportable, the exemption provided in the amended General Provisions is unlawfully and unnecessarily broad. “Malfunction” is defined to include “the failure of air pollution control and monitoring equipment, process equipment, or a

process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded.” 40 C.F.R. § 63.2. Thus, if the failure of a piece of equipment has the “potential” to cause an exceedance, the failure of that equipment on any specific occasion qualifies as a “malfunction” — and may be argued to excuse the source from liability for exceeding its emission standards — even if such failure did not actually cause the exceedance on the occasion in question. For example, if the failure of a piece of monitoring equipment has the “potential” to cause an exceedance of emission standards, an exceedance that occurs when that piece of monitoring equipment is failing “to operate in a normal or usual fashion” may qualify as a “malfunction” under the amended General Provisions even if that exceedance actually results from another cause, such as sloppy operation. In short, EPA’s amended General Provisions may be argued to excuse even preventable exceedance of emission standards so long as such exceedance takes place concurrently with an equipment failure that qualifies as a “malfunction” under EPA’s overly broad definition. Accordingly, even if the caselaw relating to SSM exemptions from non-air toxics emission standards were applicable to air toxics standards, EPA’s SSM provision would be unlawful.

2. The SSM Provisions In EPA’s Final PWCP Rule Are Internally Conflicting.

The final PWCP rule provides “[y]ou must always operate and maintain your affected source, including air pollution control and monitoring equipment, according to the provisions in § 63.6(e)(1)(i).” 40 C.F.R. § 63.2250(b). Section 63.6(e)(1)(i) of the amended General Provisions provides

At all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affect source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. During a period of startup, shutdown, or malfunction, this general duty requires that the owner or operator reduce emissions from the source to the greatest extent which is consistent with safety and good air pollution practices.

40 C.F.R. § 63.6(e)(1)(i) (emphasis added).

Section 63.2771 of the final PWCP rule, however, provides

(1) During periods of startup, shutdown, or malfunction, you must operate in accordance with the SSMP.

(2) Consistent with § 63.6(e) and 63.7(e)(1), *deviations that occur during a period of startup, shutdown, or malfunction are not violations if you demonstrate to the Administrator's satisfaction that you were operating in accordance with the SSMP.*

40 C.F.R. § § 63.2771(b)(1)-(2) (emphasis added). Thus, although § 63.2250(b) of the final PWCP rule makes clear that even during periods of startup, shutdown and malfunction, owners and operators must “reduce emissions from the source to the greatest extent which is consistent with good air pollution practices,” § 63.2771 allows sources to avoid liability for exceeding emission standards in such periods just by “demonstrat[ing] to the Administrator’s satisfaction that [it was] operating in accordance with the SSMP. In short, the two provisions directly conflict.

Section 63.2771 is flatly unlawful, as shown in NRDC’s comments on the proposed rule. Ex. ___ at 34-35. In addition, because the final PWCP rule contains conflicting SSM provisions, it is arbitrary and capricious.

3. The PWCP Rule’s Limitations On The Public Availability Of SSM Plans Is Unlawful And Arbitrary And Capricious.

a. The PWCP Rule’s Limitations On The Public Availability Of SSM Plans Is Unlawful.

The final PWCP rule provides “[y]ou must develop and implement a written SSMP according to the provisions in § 63.6(e)(3).” 40 C.F.R. § 63.2250(c). Section 63.6(e)(3) of the amended General Provisions provides:

The Administrator may at any time request in writing that owner or operator submit a copy of any startup, shutdown, and malfunction plan (or a portion thereof) which is maintained at the affected source or in the possession of the owner or operator. Upon receipt of such a request the owner or operator must promptly submit a copy of the requested plan (or portion thereof) to the Administrator. The Administrator must request that the owner or operator submit a particular startup, shutdown, or malfunction plan (or a portion thereof) *whenever a member of the public submits a specific and reasonable request to examine or to receive a copy of that plan or portion of that plan.*

40 C.F.C. § 63.6(e)(3)(v) (emphasis added). Thus, the final PWCP rule restricts public access to SSM plans for PWCP plants.

The Clean Air Act, however, requires without exception that SSM plans be made available to the public. First, Title V of the Clean Air Act requires that a copy of each “compliance plan” “shall be available to the public.” 42 U.S.C. § 7661b(e). Likewise, EPA’s Title V regulations provide that State permitting authorities must “[m]ake available to the public any ... compliance plan ... pursuant to section 503(e) of the Act.” 40 C.F.R. § 70.4(b)(3)(viii). As EPA has recognized expressly, SSM plans fall within the meaning of “compliance plan”:

the title V program requires the permit writer to make publicly available all parts of the permit, including plans, under 40 CFR 70.4(b)(3)(viii).

66 Fed. Reg. 16318, 16326 (March 23, 2001). Because SSM plans are “compliance plan[s]” within the meaning of § 503(e), they must be made available to the public.

Second, § 114(c) of the Clean Air Act requires that SSM plans be made available to the public:

Under CAA section 114(c) and 40 CFR 70.4(b)(3)(viii), *information in SSM plans must be made available to the public* unless the submitter makes a satisfactory showing that disclosure would divulge methods or processes that are entitled to protection under the Trade Secrets Act...

67 Fed. Reg. at 72880 (emphasis added). *See also* EPA, Technical Document for Promulgation of Amendments to Standards (May 8, 2003), Docket OAR-2002-0038 (“2003 RTC”), at 8 (“EPA *disagrees* with the industry commenters who argued that there is no general obligation to provide public access to SSM plans, and that only those plans that the States or EPA actually elect to obtain from the sources must be made available to the public. These commenters argued that EPA has incorrectly construed the SSM plan as an integral part of the permit documentation that must be made available to the public under sections 114(c) and 503(e).”) (emphasis added).

Although the Clean Air Act requires that SSM plans be made available to the public, EPA’s regulations impose limits on the public availability of SSM plans. Accordingly, they are flatly unlawful. Further, to the extent EPA has interpreted the Clean Air Act as allowing it to place limits on the public availability of SSM plans, its interpretation is unlawful under *Chevron* Step One. Because it is well established that EPA may not limit statutory mandates, any attempt by EPA to limit the Clean Air Act’s mandate that SSM plans be publicly available contravenes Congress’s plainly expressed intent.

Moreover, any interpretation of the Act as allowing EPA to place limitations on the public availability of SSM plans is also unlawful under *Chevron* Step Two. The notion that EPA has discretion to limit the public availability of SSM plans is not even

arguably consistent with the Act's requirement that such plans be publicly available. Further, EPA has never explained how any such interpretation could be reconciled with the agency's admission that "information in SSM plans must be made available to the public," 67 Fed. Reg. at 72880. Specifically, although EPA argues that it does not wish to "discourage facilities from integrating SSM plans with other procedures" and that its approach to SSM plans "strike[s] the right balance between public disclosure and the need to make SSM plans comprehensive and effective," 68 Fed. Reg. at 32591, the agency does not and cannot explain how such policy argument can trump the undisputed statutory mandate that SSM plans be made available to the public.

b. The PWCP Rule's Limitations On The Public Availability Of SSM Plans Is Arbitrary And Capricious.

As discussed above, before issuing its amended General Provisions, EPA expressly agreed that SSM plans fall within the categories of information that must be made available to the public pursuant to § 503(e) and § 114(c) of the Clean Air Act. *See supra* (citing 67 Fed. Reg. at 72880). In addition, EPA has found that SSM plans fall within the meaning of "compliance plans" in § 503(e) of the Act and the agency's Title V regulations, 40 C.F.R. Part 70. Discussing the obligation to make SSM plans publicly available, EPA stated "the title V program requires the permit writer to make publicly available all parts of the permit, including plans, under 40 CFR 70.4(b)(3)(viii)." 66 Fed. Reg. at 16326 (emphasis added). Thus, in responding to comment on the present rulemaking, the agency made clear that it

disagrees with the industry commenters who argued that there is no general obligation to provide public access to SSM plans, and that only those plans that the States or EPA actually elect to obtain from the sources must be made available to the public. These commenters argued that EPA has incorrectly construed the SSM plan as an integral part of the permit

documentation that must be made available to the public under sections 114(c) and 503(e).

2003 RTC at 8 (emphasis added).

Therefore, EPA's decision to limit public access to SSM plans in the amended General Provisions — and in the final PWCP rule — is arbitrary and capricious as well as unlawful. First, it is hopelessly inconsistent for EPA to concede that, under the Clean Air Act, “information in SSM plans *must be made available to the public*,” 67 Fed. Reg. at 72880 (emphasis added), but also assert that it has discretion to limit the public availability of SSM plans. EPA's rationale — i.e., that its approach to SSM plans “strike[s] the right balance between public disclosure and the need to make SSM plans comprehensive and effective,” 68 Fed. Reg. at 32591 — is arbitrary and capricious for the same reason that it is unreasonable under *Chevron* analysis. EPA does not, and cannot possibly, explain how it has authority to “balance” a clear and undisputed statutory mandate with its own policy goals.

Second, the premise upon which EPA's position rests — that there is a conflict between implementing the Clean Air Act's undisputed requirement that SSM plans be generally available to the public and providing for effective SSM plans — is false. As EPA itself has made clear, compliance with an inadequate SSM plan does not excuse a facility from compliance with its emission standards. 68 Fed. Reg. at 32590. Because facilities' interest in avoiding liability for exceeding their emission standards during periods of SSM already creates an incentive to write effective SSM plans, EPA does not need to sacrifice the public availability of SSM plans to create additional incentive. Indeed, if EPA's goal were to create an incentive for facilities to write effective SSM plans, that goal would be far better served by ensuring that such plans are publicly

available — and thus allowing the public to evaluate their effectiveness — than by promulgating regulations that allow SSM plans to be shielded from public scrutiny. In short, EPA has not shown a rationale connection between its decision and its stated goal.

Third, EPA has offered nothing but sheer speculation that the obligation to submit SSM plans to the Administrator might deter facilities from integrating SSM plans into their operating procedures or otherwise writing effective SSM plans. Moreover, as explained above, facilities must design effective SSM plans to avoid liability for exceeding their emission standards during periods of SSM. Thus, EPA's rationale for not requiring SSM plans to be submitted to the Administrator is both unexplained and at odds with the record.

Fourth, to comply with the requirement that SSM plans be submitted to the Administrator, a facility need only submit a copy of its SSM plan; it does not have to provide copies of other documents into which the SSM plan has been integrated unless those other documents must be made available to the public for independent reasons. Thus, regardless of whether it chooses to integrate its SSM plan into its process and operating procedures, a facility can comply with the obligation to make SSM plans publicly available without making publicly available otherwise unavailable information. To do so, a facility need only submit a separate copy of the SSM plan that has not been integrated with its process and operating procedures.

Fifth, even assuming *arguendo* that requiring SSM plans to be submitted to the Administrator might deter facilities from writing effective SSM plans, EPA's regulations create the possibility that a facility's SSM plan might be have to be submitted. That possibility would — under EPA's reasoning — deter facilities from writing effective

SSM plans. Accordingly, EPA’s rationale for limiting the public availability of SSM plans is unexplained, internally inconsistent, and illogical.

9. EPA Must Reconsider the Final Rule’s Use of Title V Permits as the Implementation Mechanism for the So-Called Low-Risk Exemptions.

The PCWP proposal failed to provide any notice of the Title V implementation approach for the section 112(c)(9) low-risk exemptions adopted in the final rule.⁹⁸ This Title V implementation approach unlawfully, and arbitrarily and capriciously: (1) attempts to create specific and federally enforceable legal requirements, without notice-and-comment rulemaking, through an informal exemption “letter approval” process conducted between a source and EPA behind the scenes; (2) imposes those legal requirements upon states and the public by employing a state-issued Title V permit to *establish* applicable requirements; (3) does so without providing states or the public with any meaningful, legal opportunity to comment on or challenge those requirements; and (4) does so all in contravention of existing EPA legal interpretations and policy that prohibit use of Title V permits for such purposes.

Scattered across the final rule’s preamble, the Title V implementation approach for the so-called low-risk exemptions under § 112(c)(9)(B) is described thusly:

⁹⁸ Indeed, the proposal’s § 112(c)(9) discussion did not even *mention* Title V. See 68 Fed. Reg. at 1301-1302. And even the § 112(d)(4) discussion asked only the following, uninformative question that failed even to provide adequate notice for § 112(d)(4) purposes, much less § 112(c)(9) purposes: “Finally, EPA requests comment on how we should implement the section 112(d)(4) applicability cutoffs, including appropriate mechanisms for applying cutoffs to individual facilities. *For example, would the title V permit process provide an appropriate mechanism?*” *Id.* at 1300 (emphasis added).

Consequently, the grounds for NRDC’s objection to the Title V approach arose after the period for public comment had ended. The objection is thus appropriately raised in this petition. See 42 U.S.C. § 7607(d)(7)(B). Moreover, the objection is “of central relevance to the outcome of the rule,” *id.*, because it demonstrate that the rule contravenes the Clean Air Act and is arbitrary and capricious.

For your affected source to be part of the delisted low-risk subcategory, you must have a low-risk demonstration approved by EPA, and you must then have federally enforceable conditions reflecting the parameters used in your EPA-approved demonstration incorporated into your title V permit to ensure that your affected source remains low-risk. Low-risk demonstrations for eight facilities were conducted by EPA, and no further demonstration is required for them. They will, however, need to obtain title V permit terms reflecting their status. (We will provide these sources and their title V permitting authorities with the necessary parameters for establishing corresponding permit terms and conditions.)

69 Fed. Reg. at 45953/2-3.

All approved low risk sources must then obtain title V permit revisions including terms and conditions reflecting the parameters used in their approved demonstrations, according to the schedules in their applicable part 70 or part 71 title V permit programs.

Id. at 45955/2.

You must ensure that your affected source is low risk by periodically certifying your affected source is low risk, monitoring applicable HAP control device parameters, and by maintaining certain records. You must certify with each annual title V permit compliance certification that the basis for your affected source's low-risk determination has not changed. Your certification must consider process changes that increase HAP emissions, population shifts, and changes to dose-response values.

Id.

We will review and approve/disapprove low-risk subcategory eligibility demonstrations based on look-up table analyses and low-risk demonstrations. Following review of each low-risk subcategory eligibility demonstration for a facility, we will issue a letter of approval/ disapproval to the facility and will send a carbon copy to the facility's title V permitting authority to be used to develop source-specific permit terms and conditions that will ensure that the source remains eligible for the low risk subcategory. The letter of notification regarding approval/disapproval of an affected source's low risk demonstration will also be sent to any other interested stakeholders. The criteria for low-risk subcategory delisting are clearly spelled out in today's final PCWP rule, along with criteria needed to ensure that affected sources in the low-risk subcategory remain low risk. Because these requirements are clearly spelled out in today's final PCWP rule and because any standards or requirements created under CAA section 112 are considered applicable requirements under 40 CFR part 70, the terms and conditions demonstrating eligibility for membership in the delisted low-risk subcategory would be incorporated into title V permits, pursuant to State's existing permitting programs.

69 Fed. Reg. at 46003/2-3.

Section 112(c)(9)(B) requires source category deletions under § 112(c)(9)(B)(i), and source category or subcategory deletions under § 112(c)(9)(B)(ii), to be accomplished by detailed, factual risk- or safety-based determinations by the Administrator. These determinations cannot be knowable in advance and, with the exception of eight sources, EPA's final rule does not purport to make these determinations with respect to any individual PCWP source. The final rule does not consider the factual basis, or establish the legal terms and conditions, for exempting any given source from the standard on the basis of purported low risk.

Against this backdrop, the preamble to the final rule advances the arbitrary claim that the results of the exemption approval process employed here are simply section 112 applicable requirements that may be incorporated into Title V permits. *See* 69 Fed. Reg. at 46003/2-3. But there are key legal differences between usual MACT standards, including MACT exemptions or negative applicability determinations, and the arbitrary hybrid approach created by the final PCWP rule.

First, EPA does not and cannot identify another instance in which a statutorily-required "determination by the Administrator," as under section 112(c)(9)(B), achieves its culmination and embodiment in a Title V permit. EPA identifies no statutory authority in section 112 or Title V indicating Congressional intent to allow such a result.

Second, this result transgresses Title V's function to incorporate – "assure compliance with" – *pre-existing* federally enforceable applicable requirements into operating permits issued by approved permitting authorities, following applicability determinations by the approved permitting authority. The final rule's Rube Goldberg

creation contravenes the structure and purpose of Title V in several ways. Unlike the PSD or NSR permitting programs in which the rules contain criteria that are subsequently rendered “applicable requirements” in federally enforceable preconstruction permits,⁹⁹ the risk exemption approval process gives definition and content to the qualifying conditions in an unenforceable, legally meaningless “letter.” This letter is not a legal permit, nor a contract, nor an “applicable requirement” as that term is defined in parts 70 or 71.¹⁰⁰ EPA identifies no previously approved example or analogy under Title V similar to the arbitrary process employed here.

EPA points to language in the part 70 regulations in an attempt to locate authority for its unlawful enterprise to *establish* applicable requirements in the first instance in a Title V permit:

For example, in its provisions governing what types of permit revisions may proceed through the abbreviated “minor permit modification” process, our rules state that such procedures may not be used “to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.” 40 CFR 70.7(e)(2)(i)(A)(4); 40 CFR 71.7(e)(1)(i)(A)(4). We feel that permit terms reflecting a low risk PCWP source’s eligibility clearly represent such terms, and are, therefore, allowed under title V.

69 Fed. Reg. at 46005/2. But EPA’s reliance on this provision is itself revealing, since it makes plain that there is no direct authority under Title V to establish applicable

⁹⁹ See 40 C.F.R. § 70.2 (defining “applicable requirement” in relevant part as “[a]ny *term or condition of any preconstruction permits* issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act.”) (emphasis added).

¹⁰⁰ See, e.g., *id.* (defining applicable requirement in relevant part as “[a]ny standard or other requirement under section 112 of the Act”).

Indeed, the “criteria for low-risk subcategory delisting . . . spelled out in [the] final PCWP rule” are more akin to the criteria for BACT or LAER in the PSD and NSR permitting programs, where the actual “determinations,” with the actual legal conditions and requirements arising out of a case-by-case review, are not rendered – and do not become enforceable legal conditions – until later. Just as the Title V rules treat the terms and conditions of PSD/NSR requirements as applicable requirements rather than the “criteria” in the permitting rules, the mere criteria in the final PCWP rule are insufficient to qualify as Title V applicable requirements, and insufficient to render EPA’s subsequent letter approvals “applicable requirements” for Title V purposes.

requirements in Title V permits.¹⁰¹ EPA’s invocation of this provision simultaneously indicates that the risk parameters will be reflected in permit terms “for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject,” *id.*, while elsewhere claiming in a directly contradictory fashion that such permit terms *would* be applicable requirements. See *id.* at 46003/2-3. These internal contradictions reveal the further arbitrariness of EPA’s approach.

EPA’s protest that this process simply amounts to the usual applicability determination under Title V is simply wrong. In Title V programs administered by states, the approved permitting authority renders applicability determinations in their permits based upon their application of fully conceived section 112 MACT standards. These state determinations are subject to public hearing, public comment, public challenge in state courts, EPA objection, and eventual petitions to the Administrator.

Under the PCWP’s risk-based exemption scheme, by contrast, it is *EPA* that establishes the legal conditions and parameters associated with the risk determination. EPA would deny the public any opportunity to review and comment upon these determinations before they are a *fait accompli*.¹⁰² EPA pretends that this situation is “similar to facilities requesting applicability determinations regarding promulgated

¹⁰¹ At any rate, this minor permit modification provision’s backhanded suggestion that Title V provides direct authority to “to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject” is simply wrong. EPA points to no statutory or regulatory authority for such a proposition. Moreover, we are unaware of EPA ever having suggested that this provision provides authority to accomplish *indirectly* what no provision –statutory or regulatory – authorizes directly. To the extent that EPA is offering such interpretation here, it will be ripe for legal challenge.

¹⁰² 69 Fed. Reg. at 46004/1 (“individual low-risk demonstrations will not be subject to public review and comment.”)

standards,” *id.* at 46004/1, but that is a view that pre-dates the role of Title V and in fact turns that role on its head.

Title V permit programs, administered by approved permitting authorities, serve the role of subjecting applicability determinations to opportunities for public comment and challenge. The PCWP exemption approval, scheme, however, reduces permitting authorities to the role of ministerial scribes, meekly accepting “carbon copies” of approval letters from EPA for incorporation into state-issued permits. The state authorities do not render these approvals, they have no ownership over them, and they have no reason to stand behind them. Indeed, they could strongly disagree with them, without any legal recourse to challenge them.

In light of this, it is farcical that EPA points to the public participation opportunities accompanying Title V permits as the public’s opportunity to review the determinations and parameters allowing individual sources to qualify for the low-risk subcategory.¹⁰³ Is it EPA’s position that states will have the prerogative and legal authority to reject these determinations, strip these permit conditions and subject the sources to the MACT standard? Is EPA saying that state courts will have the opportunity and authority to reject these determinations? Will EPA Regional officials be empowered to object to state-issued Title V permits on the basis of low-risk determinations rendered by EPA headquarters? If the answer to any of these questions is No, as we suspect from the structure and tone of the Title V description in the final preamble, then the public does not in fact have the public comment, challenge and petition opportunities afforded

¹⁰³ *Id.* (“However, the parameters that rendered an affected source part of the low-risk subcategory will be incorporated into a title V permit and subject to the public review process through title V.”)

under Title V for ordinary state applicability determinations. The agency's Rube Goldberg creation simply does not hold up to scrutiny.

The final preamble implicitly recognizes this, and offers a series of absurd, unavailing excuses for the assaults on public participation opportunities carried out by the exemption's implementation scheme. The preamble says:

Furthermore, the PCWP proposal provided the public with the opportunity to comment on the consideration of risk in the final PCWP rule. Regarding the assurance of adequate public participation in the process of reviewing the risk analyses, the risk-based compliance options are part of a rule that was subject to public comment. The supporting information to the final rule details the assessment we conducted to determine the feasibility of delisting a low-risk subcategory and the look-up tables we developed to be used by affected sources in their demonstrations, thereby providing a public demonstration of the method employed to ensure protection of the public health and environment in decisions associated with the final rule.

Id. at 46003/3. Each of these excuses is more preposterous than the last.

As discussed above, the PCWP proposal was thoroughly inadequate in providing the public “with the opportunity to comment on the consideration of risk in the final PCWP rule,” a fact emphasized by EPA attorneys and professional staff in briefings for management. *See supra* at _____. Incredibly, the agency cites this same public comment opportunity on the *rulemaking* as the “assurance of adequate public participation in the process of reviewing the *risk analyses*” – when the agency's risk assessment methodology was not even made public until the final rule, and the individualized risk analyses still have not occurred and will not for several years! Finally, the kicker – the text quoted above discusses the assessment and look-up tables appearing in the final rule and proclaims that this provides a “public *demonstration* of the method employed to ensure protection of the public health and environment in decisions associated with the final rule.” *Id.* The preamble evinces no apparent awareness of irony in this assertion

and the fact that it is made in the context of a discussion about opportunities for public comment on the risk determinations. Allowing the public *after the fact* to see the already-accomplished “demonstration” made by EPA hardly amounts to an opportunity for the public to comment on methods purportedly employed to ensure protection of public health and the environment.

The final rule’s implementation approach and the justifications offered to support it are unlawful, arbitrary and capricious, and otherwise an abuse of the agency’s discretion.

Finally, we note that governing EPA statutory and regulatory interpretations prohibit the Title V implementation approach employed in the final rule. In a May 20, 1999 letter from John Seitz, EPA OAQPS, to Robert Hodanbosi & Charles Lagges, STAPPA/ALAPCO, EPA explains why Title V permits may not be the exclusive legal mechanism for establishing and enforcing “applicable requirements”:

As noted in the previous section, title V permits must assure compliance with terms and conditions in SIP-approved permits. In enacting title V, Congress did not amend title I of the Act and did not intend the title V permitting program to replace the title I permitting programs. SIP-approved permits must remain in effect because they are the legal mechanism through which underlying NSR requirements (from the Act, federal regulations and federally-approved SIP regulations) become applicable, and remain applicable, to individual sources. NSR programs provide the relevant permitting entity with the authority to impose source-specific NSR terms and conditions in legally enforceable permits, and provide States, EPA and citizens with the authority to enforce these permits. Because State title V programs do not provide the authority for the establishment and maintenance of SIP-approved permit requirements, the title V permit cannot “assure compliance” with those requirements unless the underlying implementation and enforcement mechanism for the NSR requirements--the SIP-approved permit--remains valid.

The supersession of SIP-approved permits poses additional problems that EPA believes are inconsistent with the structure and purposes of title V and title I of the Act. First, while SIP-approved permits impose continual operational requirements and restrictions upon a source’s air pollution activities and, accordingly, may not expire so long as the source operates, title V permits

could expire or become unnecessary. If the title V permit supersedes the source's SIP-approved permit and then subsequently expires, neither the superseded SIP-approved permit nor the expired title V permit would provide the legal authority to enforce the site-specific operational requirements and restrictions imposed upon the source pursuant to preconstruction review. Even if title V permits expire, of course, sources are still required to comply with applicable requirements that remain independently enforceable outside of title V permits, as all applicable requirements must.

Moreover, the continuing existence of SIP-approved permits independent of title V preserves the ability of permitting authorities and EPA to reopen title V permits that failed to include all SIP-approved permit terms, or to make such corrections upon permit renewal. Finally, title V regulations allow a permitting authority to include in the title V permit a "permit shield" stating that "compliance with the conditions of the [title V] permit shall be deemed compliance with any applicable requirements as of the date of permit issuance" [40 CFR §§ 70.6(f) & 71.6(f)]. The fact that compliance with the title V permit may be "deemed compliance" with underlying applicable requirements, including applicable requirements contained in SIP-approved permits, indicates that those underlying requirements must remain in force and may not be superseded. If those requirements could be superseded by the title V permit, there would be no need for a mechanism in the title V permit clarifying the source's obligations and compliance status.

May 20, 1999 Letter from John Seitz, EPA OAQPS, to Robert Hodanbosi & Charles Lagges, STAPPA/ALAPCO, Enclosure A, at 4-5.

The reasons offered in this letter for not allowing SIP-approved permit terms to exist exclusively in Title V permits apply equally to the detailed and source-specific risk determinations, parameters and conditions that would exist exclusively in individual Title V permits. For example, if a PCWP's Title V permit expired, for whatever reason, the legal parameters and conditions of the risk exemption would no longer exist as a legal matter. The other reasoning behind the agency's prohibition on supersession in Title V permitting applies equally to prohibiting the agency from legally establishing the PCWP rule's risk-based exemption conditions exclusively through Title permits.