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Docket ID No. EPA-HQ-OAR-2019-0282

Dear EPA,

For the reasons below, EPA's proposed revisions to 40 C.F.R. part 63, 84 FR 36304 (July 26, 2019), are not in accordance with law and without observance of procedure required by law.

I. THE ACT UNAMBIGUOUSLY REQUIRES FEDERAL ENFORCEABILITY.

Note to EPA reviewers: This section primarily addresses C-22 and C-23, but it may also affect other identifiers that rely on the mistaken assumption that non-federally-enforceable controls to limit "potential to emit considering controls" are permissible.

Twenty-four years after the decision in *National Mining Association*, EPA reopens the question of federal enforceability. But, by assuming the Clean Air Act ("Act") is ambiguous with respect to the issue, EPA gets the question wrong. Sections 113 and 304 of the Act unambiguously require federal enforceability for provisions to limit "potential to emit considering controls"[1] below 10 tons per year ("tpy") of a hazardous air pollutant and 25 tpy of a combination of hazardous air pollutants ("HAPS").

The decision of the Court of Appeals for the D.C. Circuit in *National Mining Association v. U.S. EPA*, 59 F.3d 1351 (D.C. Cir. 1995), is not to the contrary: EPA in defending its 1994 definition of "potential to emit" focused on "effectiveness" rather than the plain language of the Act, resulting in a remand by the court for a *Chevron* step 2 explanation. But the issue is decided at *Chevron* step 1: The plain language and structure of the Act compel federal enforceability.

A. The Plain Language and Structure of the Act Compel Federal Enforceability for Provisions Limiting "Potential to Emit Considering Controls."

The reason federal enforceability is compelled is straightforward:

1 For the reasons given in section III, *infra,* this comment letter uses the full statutory phrase "potential to emit considering controls" from section 112(a)(1)'s definition of "major source," 42 U.S.C. § 7412(a)(1), instead of "potential to emit" as used in the prevention of significant deterioration ("PSD"), *id.* § 7479(1), and nonattainment new source review ("NSR") programs, *e.g. id.* § 7513a(b)(3).

1. Sections 113 and 304 create a cause of action in federal district court for a violation of any "requirement" under section 112.
2. For federal district courts to have jurisdiction, such requirements under section 112 must arise from federal law, or in other words, must be federally enforceable.
3. An enforceable provision to limit "potential to emit considering controls" is a "requirement" under section 112 within the meaning of sections 113 and 304 and therefore must be federally enforceable.

i. Congress Created a Cause of Action in Federal District Court for Violations of Any "Requirement" under Section 112.

Section 113(b)(2) authorizes EPA to bring an action in federal district court for any violation of "any other requirement or prohibition" under the Act; "any other" refers to violations other than violations under 113(b)(1), which are violations of the "applicable implementation plan," as defined in section 302(q), or of a permit. 42 U.S.C. § 7413(b)(2); *id.* § 7602(q). The word "any" in section 113(b)(2) is expansive and therefore unambiguously includes requirements and prohibitions under section 112.

Section 304 is also unambiguous. Under section 304(a)(1) there is a cause of action in federal district court for a violation of any "emission standard or limitation under this Act." 42 U.S.C. § 7604(a)(1). Section 304(f) defines "emission standard or limitation under this Act" for the purposes of section 304 to include "any requirement under section [112] (without regard to whether such requirement is expressed as an emission standard or otherwise)." *Id.* § 7604(f).

Thus, there is a cause of action in federal district court for violations of any "requirement" under section 112.

ii. Because There Is a Cause of Action in Federal District Court for Violations of Any "Requirement" Under Section 112, Such Requirements Must Be Federally Enforceable.

Congress cannot have intended to create a cause of action in federal district court for which the district courts would not have jurisdiction. Federal district courts have jurisdiction in nine instances specified in the U.S. Constitution. U.S. Const., art. III, § 2. The only instance that applies to all citizen suits under section 304 is subject matter jurisdiction; Congress cannot have intended to limit citizen suits to those arising from diversity jurisdiction.[2] Nor does jurisdiction over actions to which the United States is a party help; EPA is not specifically authorized by the Act to enforce violations of state law, and in any case such jurisdiction does not extend to citizen suits (except in the rare instance of a defendant federal facility).

As a result, a citizen suit under section 304 or an EPA action in district court under section 113 must necessarily "aris[e] under … the laws of the United States." U.S. Const., art. III, § 2. Therefore, an action in federal district court to enforce "any requirement under section 112" of

2 And indeed Congress said just that: Section 304(a) provides, "The district courts shall have jurisdiction, *without regard to the amount in controversy or the citizenship of the parties*, to enforce such an emission standard or limitation." 42 U.S.C. § 7604(a) (emphasis added).

the Act must arise under federal law. In short, "any requirement under section 112" is federally enforceable.

Analysis of sections 113 and 304 is critical to questions of federal enforceability. For example, it is often stated, without detailed analysis, in EPA actions on a submitted state implementation plan ("SIP") revision that EPA's approval makes the submitted provisions federally enforceable. *See, e.g.,* 84 FR 47437, 47438/2 (Sept. 10. 2019). Why so? The answer is that section 113(b)(1) gives EPA authority to bring an action in federal district court for "any violation of a requirement or prohibition of an *applicable implementation plan*."[3] In turn, the phrase "applicable implementation plan" is defined in section 302(q) to include "the portion (or portions) of the implementation plan, or most recent revision thereof, which has been *approved* under section 110." Thus, approved portions of the implementation plan are federally enforceable. Similarly, it is often stated that the terms and conditions of an NSR permit are federally enforceable. Why so? Again, look to sections 113 and 304: section 113(b)(1) gives EPA a cause of action in federal district court for any violation "of an applicable implementation plan *or permit*"; section 304(f) includes in citizen suits violations of "any permit term or condition … which is in effect … under an applicable implementation plan."

iii. If a Provision to Limit "Potential to Emit Considering Controls" Is Enforceable, then the Provision is a "Requirement" Within the Meaning of Sections 113 and 304 and Must Be Federally Enforceable.

EPA proposes to require, instead of federal enforceability, that provisions to limit "potential to emit considering controls" must be "legally enforceable and practically enforceable." 84 FR at 36306/1. However, EPA has not, and cannot, explain how such a provision is not a "requirement" within the meaning of sections 113 and 304. If provisions to limit "potential to emit considering controls" are enforceable (regardless of state versus federal enforceability), then sources are "required" to obey them, and thus such provisions are "requirements" under the plain meaning of the term.

As explained above, section 113(b)(1) gives a cause of action in federal district court for violations of "any requirement" under the Act, and section 304(a)(1) likewise for violations of "any requirement under section [112] (without regard to whether such requirement is expressed as an emission standard or otherwise)." Provisions to limit "potential to emit considering controls" are necessary to ensure that section 112 MACT standards are enforceable, and are thus "requirements under section 112" within the meaning of section 304 and "requirements" under the Act within the meaning of section 113(b)(1). Put differently, if section 112 did not exist, then there would be no need or reason for provisions to limit "potential to emit considering controls" of HAPS to the thresholds set forth in section 112; such provisions therefore flow from and are requirements under section 112.

EPA may nonetheless try to claim that "potential to emit considering controls" below 10/25 tpy merely concerns "applicability" of the MACT standards, and is not itself a "requirement." However, as just noted MACT standards are not enforceable unless the applicability provisions are enforceable. In turn, the applicability provisions are not enforceable unless

3 While actions under section 304 with respect to violations of the SIP are not quite so broad, that does not affect the point.

there are adequate provisions for monitoring, record-keeping, and reporting ("MRR"). In turn, the MRR provisions must be enforceable to be adequate. Because all of these are enforceable and flow from section 112, they are by necessity "requirements under section 112." In short, an enforceable provision is a "requirement" within the meaning of sections 304 and 113. Because EPA itself admits—as it must—that provisions to limit "potential to emit considering controls" must be enforceable, *see generally* 84 FR 36314-322—EPA must also admit that those provisions are requirements under section 112 within the meaning of sections 304 and 113.

Thus, arguments that federal enforceability is duplicative because the MACT standards are federally enforceable are beside the point: the Act unambiguously requires federal enforceability for provisions to limit "potential to emit considering controls," regardless of supposed duplication.

EPA may object that this analysis is so simple as to amount to a tautology. While it is simple, it is not a tautology: it gives full meaning to the phrases "any requirement or prohibition under the Act" in section 113(b) and "any requirement under section 112" in section 304.

Finally, EPA may nonetheless somehow attempt to argue that sections 113(b) and 304 are ambiguous with respect to federal enforceability for provisions to limit "potential to emit considering controls."[4] If so, it should be noted that section 304 creates a private right of action in the federal courts, and the meaning of "any requirement under section 112" affects the scope of that private right. While EPA may have general authority to create requirements relating to section 112, such as the provisions at issue here, EPA lacks authority to decide whether such requirements fall within the ambit of section 304, just as EPA lacked authority to create an "affirmative defense." *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (holding that section 304(a) creates a private right of action and therefore "the Judiciary, not any executive agency, determines the scope … of judicial power vested" by section 304(a)).

B. The Legislative History of the 1990 Amendments Supports This Conclusion.

Under the 1970 Act, section 113(b)(3) authorized EPA to bring suit in federal district court for a violation of (among other things) section 112(c). 1 Legislative History of the Clean Air Act Amendments of 1970 Together with a Section-by-Section Index 23 (1974) (Clean Air Act as amended in 1970). The compliance provisions for section 112 at the time were in section 112(c). *Id.* at 21. Section 304 created a cause of action in federal district court for violations of "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard." *Id.* at 56-58.

The 1977 Amendments left sections 112 and 113 unchanged in those respects. 1 Legislative History of the Clean Air Act Amendments of 1977 Together with a Section-by-Section Index 44, 47, (1978) (Clean Air Act as amended in 1977). However, the 1977 Amendments expanded

4 If EPA does so, then EPA is obligated to issue a supplemental proposal with its analysis for the public to review. *See infra*, section IV.

section 304 to the current "any requirement under section 111 or 112 (without regard to whether such requirement is expressed as an emission standard or otherwise)." *Id.* at 152.

Finally, the 1990 Amendments of course reworked section 112, but they also expanded EPA's enforcement authorities. Section 113(b) was revised to its current form: EPA can bring suit in federal district court for a violation of "any requirement or prohibition" of the Act. 1 Legislative History of the Clean Air Act Amendments of 1990 Together with a Section-by-Section Index 98 (1993). There is no restriction to a particular subsection of section 112.

Thus, Congress over time expanded EPA and citizen authority to bring suit in federal district court. There is no indication in the legislative history of the relevant provisions—sections 113 and 304—of any intent to create a special carve-out for provisions to limit "potential to emit considering controls."

C. *National Mining Association* Is Not to the Contrary

In 1983, EPA proposed to remove the requirement for federal enforceability from the definitions of "potential to emit" and "net emissions increase" in the major NSR regulations. 48 FR 38742, 38748/1 (Aug. 25, 1983). EPA did so in response to industry arguments that federal enforceability for those provisions was redundant, as it was already a violation of the SIP—which would be subject to federal enforcement[5]—to construct a new major stationary source or major modification without the appropriate major NSR permit. *Id.* at 38747/3.

In 1989, EPA chose not to finalize this proposed revision. 54 FR 27274 (June 28, 1989). EPA argued that federal enforceability was "essential to the integrity of the PSD and nonattainment programs" to ensure "effective enforcement" so that "limitations and reductions [would be] actually incorporated into a source's design and followed in practice." *Id.* at 27277/1-2. While EPA noted concerns about the effectiveness of enforcement under sections 113 and 304 in the absence of federal enforceability for provisions to limit potential to emit, *id.* at 27277/3-278/1, EPA did not make any arguments that the specific language of sections 113 and 304 compelled federal enforceability for such provisions, *see generally id.* at 27277/1-280/1.[6]

Subsequent to the 1990 Amendments, which introduced the major source/area source distinction into section 112, EPA promulgated the general provisions for part 63. 59 FR 12408 (Mar. 16, 1994). In response to comments on EPA's proposal to require federal enforceability in the definition of "potential to emit," EPA stated: "The Agency believes that these comments are similar in all relevant respects to arguments the Agency already has considered and responded to" in the 1989 decision to retain federal enforceability for provisions to limit potential to emit in the major NSR programs. *Id.* at 12414/1. EPA reiterated those considerations, but did not analyze the language of sections 113 and 304 as revised by the 1990 Amendments. *Id.*; *see also* EPA-450/3-91-019b, Emission Standards Division, 2-31 (Feb. 1994) (response to comments).[7]

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5 Under the Act as amended in 1977, section 113 provided EPA with a cause of action in federal district court for violations of a SIP after a 30-day notice period. 1 Legislative History of the Clean Air Act Amendments of 1977 Together with a Section-by-Section Index 41 (1978) (Clean Air Act as amended in 1977).

6 Such an argument might have been more difficult to make under the less expansive version of section 113 and in effect at the time.

Thus, there was no EPA analysis of sections 113 and 304 as revised by the 1990 Amendments in the record for the litigation over the general provisions for part 63. EPA, in its response brief, did not even cite, much less analyze, either section, but instead relied on a *Chevron* step 2 argument that the phrase "considering controls" was ambiguous and it was reasonable for EPA to interpret it as requiring federal enforceability. See Respondent's Brief, 1995 WL 17204788, *46-58 (C.A.D.C.).[8]

As summarized by the *National Mining Association* Court,

> Petitioner Chemical Manufacturers Association argues that this restrictive definition-which disregards emissions limitations imposed by state or local regulations not deemed "federally enforceable"-is contrary to the language of § 112(a)(1) of the Act. The government contends that since the word "controls" is not defined in the statute, it was open to EPA under *Chevron* to define the term, and it has done so reasonably. According to petitioners, even if *Chevron* Step II is to be reached-because the statute does not reveal a specific congressional intent-we should conclude that EPA's construction of "controls" is impermissible.

National Mining Association, 59 F.3d at 1362. Naturally, the Court found the language of section 112(a)(1) ambiguous with respect to the issue of federal enforceability. However, as shown above, the language of 112(a)(1) is irrelevant. The issue is controlled by the plain language of sections 113 and 304.[9]

The Court correspondingly did not examine the legislative history of sections 113 and 304, either. Instead, based on the record before it, the Court examined the legislative history of section 112. The Court stated:

> Congress thus acted in 1990 against a backdrop of over a decade of skirmishing between the agency and affected companies, during which the issue of whether and to what extent state and local controls were to be credited in calculating a source's "potential to emit" was very much in the forefront.

National Mining Association, 59 F.3d at 1363. But here again EPA's position led the Court astray. EPA (as well as Petitioners) took "controls" to include permit terms and regulations that limited "potential to emit"; the only dispute was whether those must be federally

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7 This document is included in attachments to this comment letter; it is also available at https://www3.epa.gov/ttn/atw/gp/gpbid94.pdf.

8 Because the relevant provisions for the NSR program do not contain the phrase "considering controls," *see infra*, section III, EPA in relying on its NSR arguments for the part 63 general provisions did not put any analysis of the ambiguity of the phrase in the record. Thus it does not appear that EPA's ambiguity argument should have been raised, but in any case the Court treated the argument with skepticism, referring to it as a "rather strained interpretation." *National Mining Association*, 59 F.3d at 1364. And quite correctly, as issues of federal enforceability should be decided based on the language of sections 113 and 304, not the substantive provisions of a program. *See supra*, section I.A.ii.

9 The Court did note that a source with actual emissions above the threshold, despite limits on "potential to emit considering controls," would be subject to enforcement for violation of the MACT standard under section 113. *National Mining Association*, 59 F.3d at 1364 n.20. However, that does not answer the question of whether the language of section 113, which the Court did not examine, itself requires limits on "potential to emit considering controls" to also be enforceable under section 113.

enforceable. *Id.* at 1362. But Congress, in employing the phrase "considering controls," must have meant to credit actual control equipment installed pursuant to state and local programs, not the permit terms and regulations themselves. *See infra*, sections III.A.iv, III.B.ii. Thus, when the Court spoke of "EPA's refusal to credit controls imposed by a state or locality even if they are unquestionably effective" as "sacrific[ing] a statutory objective," *National Mining Association*, 59 F.3d at 1364, the actual statutory objective was to credit control equipment, not permit terms and regulations. Requiring federally enforceable provisions for installation and operation of the control equipment would require no sacrifice at all of the equipment itself.

In summary, the Court never considered whether the plain language, structure, and legislative history of the Act compelled federal enforceability at *Chevron* step 1. Thus, *National Mining Association* does not control here.[10] Furthermore, the Court did not decide that the Act compelled "effectiveness" as the sole standard for provisions to limit "potential to emit considering controls." Instead, as discussed above it was EPA that created the "effectiveness" standard in its major NSR rulemaking; the Court merely found that EPA had not made the case under EPA's standard that federal enforceability was required for "effectiveness." The Court did state that it "would likely be impermissible" for EPA to take into account ineffective controls, *National Mining Association,* 59 F.3d at 1363, but that just reflects basic rationality regardless of federal versus state enforceability. As the court carefully stated: EPA's interpretation "*at least as presented in argument to us*, ha[s] not been justified, either in terms of § 112 or *other provisions of the Act*." *Id.* at 1364 (emphasis added).

Viewed more broadly, the *National Mining Association* approach proves too much. For example, section 110(a)(2)(A) requires SIPs to include "enforceable emission limitations and other control measures, means, or techniques." 42 U.S.C. § 7410(a)(2)(A). But section 110(a)(2)(A) is silent on whether enforceability must be federal. Thus, if one focuses just on 110(a)(2)(A), it might seem that state-only emission limitations and control measures could be permissible. Under the *National Mining Association* approach, EPA when acting on a submitted SIP revision would have to decide which submitted provisions were reasonable to make federally enforceable and which were not. But as already discussed, *see supra*, section I.A.ii, the Act unambiguously requires federal enforceability for approved SIP provisions.

A related issue was addressed by the Ninth Circuit Court of Appeals in *Committee for a Better Arvin v. U.S. EPA,* 786 F.3d 1169 (9th Cir. 2015). Petitioners challenged an EPA action on a California SIP submission that relied in part on measures that were not approved into the SIP. After finding that the plain language of section 110(a)(2)(A) required measures to be "included" in the SIP, the Court also examined the structure of the Act:

> This plain language reading is further supported by the most basic of principles. If the state standards that are necessary for meeting federal requirements are not a part of the SIP, then, while the state agency, CARB, perhaps could enforce them, the responsible federal agency, EPA, would not be able to bring an action directly challenging violation of those state standards. It is the primary responsibility of EPA to ensure that Congress's aims to ensure healthy air quality have been carried out, and it

10 And even if it did—which it does not—EPA has reopened the issue, both for the public and potentially for the Court of Appeals.

> is fundamentally error if any of the standards necessary for federal compliance are not within the SIP so as to be enforceable directly by the responsible federal agency. The federal agency, EPA, not the state agency, CARB, has the fundamental duty to carry the ball across the goal line to achieve compliant air quality levels or satisfactory progress toward that end.

Id. at 1176-77. EPA's action was "also inconsistent with citizens' private right of action to enforce SIP provisions. Citizens cannot enforce provisions that are not a part of the SIP." *Id.* at 1177 (citing section 304).

The same structural considerations mandate federal enforceability for provisions to limit "potential to emit considering controls." EPA is not specifically authorized by the Act to bring actions in state court to enforce state-only provisions to limit "potential to emit considering controls," and therefore cannot under the *National Mining Association* approach carry out its "fundamental duty." *Cf. Alaska Dept. of Envt'l Conservation v. U.S. EPA*, 540 U.S. 461 (2004) ("It would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court. We decline to read such an uncommon regime into the Act's silence.") Negating EPA's fundamental duty "should be the canary in the mine shaft, signaling that something is very much amiss." *Cf. Brief for Petitioners* at 19, *Alaska Dept. of Envt'l Conservation v. U.S. EPA*, 540 U.S. 461 (2004).

D. Conclusion

EPA may object that the issue of federal enforceability at *Chevron* step 1 is outside the scope of EPA's proposal, as EPA is merely reacting to the *National Mining Association* decision remanding the rule to EPA for a *Chevron* step 2 justification. However, EPA is proposing to replace the phrase "federally enforceable" in the regulatory definition of "potential to emit." The issue is presented squarely for comment, and EPA's failure then and now to examine the plain language and structure of the Act cannot prohibit the public from raising *Chevron* step 1 arguments.

EPA may also object that *National Mining Association* has already decided the issue. That is wrong. As seen above, due to the record in that case, the *National Mining Association* Court had no occasion—and no authority, 42 U.S.C. § 307(d)(7)(A) (limiting the record for judicial review)—to decide the issue at *Chevron* step 1 by conducting an independent analysis of the Act. Thus it is less than clear that *National Mining Association* is even binding on the issue. But in any case as EPA has reopened the issue, commenters have the right to comment on it.

Finally, EPA may object that industry has relied for over 25 years on non-federally-enforceable provisions for area source status. That would be "a curious appeal to entrenched executive error," and "a novel principle of administrative law … that insulates disregard of statutory text from judicial review." *Rapanos v. U.S.*, 547 U.S. 715, 752 (1984) (Scalia, J.) (plurality opinion). EPA is the one at its discretion that is raising the issue now. If EPA wishes to avoid interfering with longstanding industry reliance on non-federally-enforceable

provisions to avoid MACT standards, as well as longstanding public reliance on the once-in-always-in policy to protect public health and welfare, EPA should withdraw its proposal.[11]

Congress has spoken directly to the issue: there is no need for EPA at *Chevron* step 2 to justify why it is reasonable to require federal enforceability, or to put it in the language of *National Mining Association* and the proposed rule, to explain why federal enforceability is necessary for "effective" controls.[12] Instead, it is Congress' considered judgment throughout the Act[13] that federal enforceability is required in order to make the Act "effective," and neither EPA nor the courts have occasion to question that judgment.[14]

II. EPA'S "TEMPORAL LIMITATION" ARGUMENT IS A RED HERRING

Note to EPA reviewers: You may associate this section with C-10.

EPA argues:

> The emissions-based distinction (arising from the definitions of major source and area source) and the timing-based distinction (arising from the definitions of new source and existing source) are independent, and neither is tied to the other. For example, the statutory definition of "major source" does not provide that major source status is determined based on a source's emissions or PTE as of the date that the EPA first proposes regulations applicable to that source or any other point in time. As noted above, the plain language of the "major source" and "area source" definitions create a distinction that is based solely on amount of emissions and PTE, and not timing. Similarly, with respect to the timing-based distinction, a source is a "new source" or an "existing source" based entirely on the timing of its construction or reconstruction and without consideration of its actual emissions or PTE. The contrast between the temporal distinction in the contrasting definitions of existing and new sources on the one hand, and the absence of any temporal dimension to the contrasting definitions of major and area sources on the other, is further evidence that Congress did not intend to place a temporal limitation on a source's ability to be classified as an area source[.]

84 FR 36310/1. First, as a matter of administrative law, EPA draws the wrong inference:

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11 The proposal did not state that the two revisions, one to the definition of "major source," and one to the applicability provisions, are severable. As explained in this comment letter, the two issues are inextricably intertwined: EPA's erroneous interpretation of "considering controls" infects both EPA's proposed revisions to the definition of "major source" and to the applicability provisions. In any case, if EPA has some argument that they are severable, then EPA was obligated to provide that argument to the public for comment. *See* 42 U.S.C. § 7607(d)(3). EPA therefore cannot finalize one revision and not the other, at least not without a supplemental proposal. *See infra*, section IV.

12 It is of course still proper to ask for comment on what is necessary for <u>enforceable</u> limitations on "potential to emit considering controls."

13 *See generally* 42 U.S.C. §§ 7413, 7524, 7604.

14 Other commenters, in support of a *Chevron* step 2 argument for federal enforceability, make a compelling factual case that Congress' judgment was correct. EPA-HQ-OAR-2019-0282-0343 at 49-52 (comments of Earthjustice, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club). These examples should foreclose any argument that Congress cannot have meant what it unambiguously stated in sections 113 and 304.

> When interpreting statutes that govern agency action, we have consistently recognized that a congressional mandate in one section and silence in another often "suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion." *Cheney R. Co. v. ICC,* 902 F.2d 66, 69 (D.C. Cir. 1990); *see also Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n,* 895 F.2d 773, 779 (D.C. Cir. 1990) ("[W]here an agency is empowered to administer the statute, Congress may have meant that in the second context the choice should be up to the agency."). Silence, in other words, may signal permission rather than proscription. For that reason, that Congress spoke in one place but remained silent in another, as it did here, "rarely if ever" suffices for the "direct answer" that *Chevron* step one requires. *Cheney,* 902 F.2d at 69 (internal quotation marks omitted); *see also Am. Forest & Paper Ass'n v. FERC,* 550 F.3d 1179, 1181 (D.C. Cir. 2008) (statute's discrepant inclusion of the modifier "competitive" to describe "markets" renders statutory provision lacking the modifier ambiguous).

Catawba County, NC v. U.S. EPA, 571 F.3d 20, 36 (D.C. Cir. 2009). Thus, if anything, EPA's argument about silence in the definitions of "major source" and "area source" in contrast to the definitions of "existing source" and "new source" supports the position that the once-in-always-in policy is permissible.

Second, EPA looks in the wrong place for "temporal limitations." Take the definition of "major emitting facility" in the PSD program. 42 U.S.C. § 7479(1). As with "major source" in section 112, there is no explicit temporal language. Instead, the structure of the PSD program creates the temporal limitation: the determination of "major emitting facility" (or, in the language of the regulations, "major stationary source" or "major modification") is made at the time a PSD or minor NSR permit is issued. *See id.* § 7475(a)(1) (prohibiting construction of a major emitting facility until a PSD permit is issued).

The same is true here: the structure of section 112 creates the temporal limitations. Under the once-in-always-in ("OIAI") interpretation, "potential to emit considering controls" is determined at the first compliance date, per section 112(i). Under EPA's proposed interpretation, "potential to emit considering controls" is determined at the first compliance date, and at the issuance date of certain permits. Thus, even EPA's proposed interpretation has "temporal limitations."

This shows EPA's argument proves too much: the necessary result of it would be that any relevant change at the source would <u>instantaneously</u> impact the source's "potential to emit considering controls." EPA must acknowledge, though, that such an approach would violate other aspects of the Act, such as enforceability. The structure of the Act necessarily injects temporal elements into the major source/area source distinction.

Instead of dangling the red herring of the definitions of "major source" and "area source," EPA should first look to the compliance language in section 112(i), "Schedule for Compliance," for "temporal limitations." Even EPA admits that this language is ambiguous:

> This text is not *reasonably* read to say that, once a standard is applicable to a source, that standard continues to be applicable to the source for all time, even if the source's

> potential to emit changes such that it no longer meets the applicability criteria for the standard.

84 FR 36311/1 (emphasis added).[15]

EPA goes on to say that "such a reading would lead to odd results." *Id.* But EPA offers only one "odd result," based on a strawman argument that the OIAI policy would treat a stationary source as both an area source and a major source at the same time in contravention of the statutory definition of "area source." In any case, EPA's admission that 112(i) is ambiguous is fatal to EPA's argument that its proposed policy is compelled by the Act.[16]

III. POTENTIAL TO EMIT CONSIDERING CONTROLS

Note to EPA reviewers: You may associate this section with C-2.

The phrase "considering controls" is ambiguous. This is fatal to EPA's argument that its new policy is compelled by the statute. The phrase by itself does not say how or when to consider controls. *See Catawba County,* F.3d at 36; *cf.* 79 FR 5032, 5104/2 (Jan. 30, 2014) (noting the Act does not specify how existing pollution control technology should be "take[n] into consideration" in a best available retrofit technology determination).

While the phrase "considering controls" is ambiguous, not all interpretations are permissible. The OIAI interpretation and EPA's new interpretation disagree about when to consider controls, but they do agree about what is a control. Both allow for operational limits to be used to limit "potential to emit considering controls." In this respect, the two interpretations are identical to the interpretation of "potential to emit" in the NSR programs. By interpreting "potential to emit considering controls" identically with "potential to emit," EPA has, under both the current and proposed interpretations, impermissibly robbed the phrase "considering controls" of any significance.

The structure, legislative history, and purpose of the Act point to the best reading of "potential to emit considering controls": "controls" means air pollution control equipment. This interpretation harmonizes the term "controls" with the remainder of section 112, furthers the technology-forcing structure of section 112, and gives independent significance to the phrase "considering controls." As EPA has reopened the interpretation of "potential to emit considering controls," EPA is compelled to adopt the best reading of the statute. But in any case this alternative interpretation demonstrates that EPA's interpretation is not compelled.

A. EPA Fails to Give Meaning to the Phrase "Considering Controls"

15 If EPA has some argument that the relevant provisions of section 112(i) are not ambiguous, then EPA had an obligation to present that argument in the proposed rule. 42 U.S.C. § 7607(d)(3). If EPA nonetheless finalizes its proposal on the basis that the relevant provisions of section 112(i) are not ambiguous, then that is of central relevance to the rule and the public's inability to comment creates a substantial likelihood that the rule would have been significantly changed. *See infra,* section IV.

16 Judging by the 2007 proposal, other commenters will likely present strong arguments that the OIAI interpretation is in fact compelled by the language of section 112(i) and other structural considerations. For the purposes of this comment letter, it is sufficient to observe that EPA admits section 112(i) is ambiguous.

The text, structure, and legislative history of the Act show that EPA has impermissibly failed to give any meaningful significance to the phrase "considering controls." EPA's offhand nods to the phrase, *e.g*. 84 FR 36310/1 ("including a source's ability to be classified as an area source through the permitting authority's 'considering controls'"), do not differ in any relevant respect from how a permitting authority "considers controls" when determining "potential to emit" for issuing an NSR permit. In short, EPA interprets "potential to emit considering controls" identically with "potential to emit" elsewhere, and has therefore failed to give any meaning to the statutory phrase "considering controls."

i. *EPA's Definitions Impermissibly Nullify "Considering Controls"*

Currently, part 63 defines "potential to emit" as:

> [T]he maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

40 C.F.R. 63.2. EPA rules for state PSD programs define "potential to emit" as:

> [T]he maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

40 CFR 51.166(b)(4). Thus, in the relevant respect, that is how controls are considered, the two definitions are word-for-word identical.[17] The definition of "potential to emit" in the federal PSD program is also identical, as are the definitions of "potential to emit" for state nonattainment NSR programs, 40 CFR 51.165(a)(1)(iii), and in the "Interpretative Offset Ruling," 40 CFR part 51, Appendix S, II.A.3. As a result, the current definition of "potential to emit" in 40 CFR 63.2 is in the relevant respect—how "controls are considered"—identical to all definitions for NSR.

Proposed 40 C.F.R. 63.2 defines "potential to emit" as

> [T]he maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted,

17 "Secondary emissions," as defined in 40 CFR 51.166(b)(18) and referred to in the final sentence of the definition of "potential to emit," are not relevant to the question of how to account for air pollution control equipment and operational limitations at a stationary source.

> stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions i*s legally and practicably enforceable as defined in this subpart (i.e., effective).*

84 FR 36337/1 (emphasis added). Thus, the proposed and current definitions of "potential to emit" in part 63 are identical except for the object of the final clause, i.e. "federally enforceable" is changed to "legally and practicably enforceable as defined in this subpart (i.e., effective)."[18]

One more regulatory definition is needed to close the loop. Part 63 defines "major source" as

> [A]ny stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the *potential to emit considering controls*, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless the Administrator establishes a lesser quantity, or in the case of radionuclides, different criteria from those specified in this sentence.

40 C.F.R. 63.2 (emphasis added).

Thus, under both the current and proposed definitions, to determine whether a stationary source or group of stationary sources is a major source, one must insert the definition of "potential to emit" into the definition of "major source." This leaves the phrase "considering controls" in the regulatory definition of "major source" dangling and undefined.[19] As far as can be determined from EPA's docket and other publicly available materials such as the title V databases, EPA has never given any independent significance to "considering controls" in this definition,[20] instead subsuming it into the way in which controls are accounted for in the definition of "potential to emit." But that is precisely how controls are considered in determining "potential to emit" in the PSD and nonattainment NSR programs. EPA has thus transmogrified the phrase "considering controls" into a useless appendage, rather like a human appendix.

While the human appendix can be surgically removed without damage, the Act cannot be treated so. The phrase "considering controls" modifies and narrows the phrase "potential to emit," unlike the unmodified phrase "potential to emit" in major NSR. Thus, necessarily the phrase "potential to emit considering controls" must be interpreted more narrowly than the phrase "potential to emit." In other words, to give meaning to "considering controls," the set of sources with a "potential to emit considering controls" below a certain threshold must be a

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18 *See supra*, section I, for why this proposed change is impermissible.

19 EPA does not get additional deference in interpreting regulatory language that merely mirrors statutory language. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414 n.5 (2019) (citing *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)). EPA's use of the phrase "considering controls" in the regulatory definition of "major source" merely mirrors the statutory definition. Thus, EPA's failure to give meaning to the regulatory language "considering controls" in the regulatory definition of "major source" is not in accordance with law, in the same way EPA's failure to give meaning to the statutory language "considering controls" in the statutory definition of "major source" is not in accordance with law.

20 *Available at* https://www.epa.gov/caa-permitting/search-air-permit-policy-guidance-databases (last searched using the phrase "considering controls" on October 29, 2019).

strict subset of the set of sources with a "potential to emit" below a certain threshold. That is to say, there must be some set of sources (e.g., those with an operational limit, *see infra*, section III.B) that would have a "potential to emit" below a threshold but would not have a "potential to emit considering controls" below the same threshold.

EPA's current and proposed interpretation fail to do this and are therefore impermissible.

ii. *Legislative History for "Considering Controls"*

The context and history for the phrase "potential to emit considering controls" is briefly presented in *National Mining Association*:

> Although it is the regulations implementing the 1990 amendments to the Clean Air Act which are directly before us, this dispute had its genesis at least a decade earlier. Following the passage of the Clean Air Act Amendments of 1977, the agency took the position that the phrase "potential to emit" as used in the definition of "major emitting facilities" excluded even emissions-reducing equipment, such as scrubbers, filters, and other technologies. *See* 40 C.F.R. §§ 51.24(b)(3), 52.21(b)(3) (1978). We rejected that position in *Alabama Power*. *See* 636 F.2d at 353-55. In the wake of that case, EPA proposed a new definition of "potential to emit" that would have taken into account air pollution control equipment, but not operational restraints. See 44 Fed. Reg. 51,924 (1979). The final regulations issued in 1980, however, adopted the position that capacity calculations could factor in operational restraints—but only if they were "federally enforceable." *See* 45 Fed. Reg. 52,676, 52,746 (1980). The regulations defined as "federally enforceable" those emissions restrictions that were "enforceable by the Administrator." *Id*. at 52,737. The requirement of federal enforceability was, EPA explained, "necessary, as a practical matter, to ensure that sources will perform the proper operation and maintenance for the control equipment." *Id*. at 52,688.
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> The 1980 rule was challenged in this court, but in a February 1982 settlement, EPA agreed to amend its position on federal enforceability. The proposal that followed would have taken into account emission limits "enforceable under federal, state or local law and discoverable by the Administrator and any other person." 48 Fed.Reg. 38,742, 38,748, 38,755 (1983). But by the time the final rule was issued, in 1989, the agency had apparently decided to abandon the terms of the settlement. The final regulations reverted to the former position of requiring federal enforceability as the sine qua non for crediting operational restraints. "Federal enforceability" was still defined to reach only those limitations "enforceable by the Administrator," but this term now included state constraints imposed under federally approved plans. See 54 Fed. Reg. 27,274, 27,285-86 (1989). New litigation followed but the cases were stayed (in our court) in anticipation of the 1990 amendments.
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> Congress thus acted in 1990 against a backdrop of over a decade of skirmishing between the agency and affected companies, during which the issue of whether and to what extent state and local controls were to be credited in calculating a source's "potential to emit" was very much in the forefront.

National Mining Association, 59 F.3d at 1363. Given Congressional awareness of this "skirmishing" in the context of NSR, Congress consciously chose in the 1990 Amendments to define "major source" in section 112 not based on "potential to emit" as used in NSR—which would have endorsed EPA's current and proposed position that, to use the Court's language, both "air pollution control equipment" and "operational restraints" could be credited for area source status—but on "potential to emit considering controls." EPA must respect Congress' choice by giving meaning to it.[21]

iii. *EPA's Failure to Give Meaning to "Considering Controls" Is Fatal to EPA's Proposal*

As explained above, the ambiguity of "considering controls" is fatal to EPA's argument that its new position is compelled by the Act. EPA's impermissible nullification of the phrase is also fatal to EPA's proposal.

EPA may attempt to claim that the issue raised in this section is outside the scope of EPA's proposal. However, by requesting comment on proposed paragraph 40 C.F.R. 63.1(c)(6), EPA has created a renewed opportunity to object to the regulatory definitions of "major source" and "potential to emit" on which proposed paragraph 63.1(c)(6) relies.

Specifically, EPA states:

> We solicit comment on all aspects of this proposal, including the EPA's position that the withdrawal of the OIAI policy and the proposed approach gives proper effect to the statutory definitions of "major source" and "area source" in CAA section 112(a) and is consistent with the plain language and structure of the CAA as well as the impacts of the proposal on costs, benefits, and emissions impacts.

84 FR 36309/3. The proposed approach, which as explained above continues to rely on an impermissible nullification of "considering controls," is not "consistent with the plain language and structure" of the Act. Furthermore, the impacts of the proposal on "costs, benefits, and emission impacts" should be weighed against the impacts of a proper interpretation of "considering controls," *see infra*, section III.B, on costs, benefits, and emission impacts. Because EPA is requesting comment on the impacts of its proposed policy, it is implicitly reexamining the definitions on which that proposed policy relies. As explained above, those definitions are fatally flawed.

B. *National Mining Association* Redux

EPA may claim that this issue was already decided in *National Mining Association*. It was not. The *National Mining Association* Court stated that it was "common ground" between the litigants "that Congress meant the word 'controls' to refer to governmental regulations." *National Mining Association*, 59 F.3d at 1362. While the Court stated that the word "could be

21 And the *National Mining Association* Court's framing of the "skirmishing" over "air pollution control equipment" and "operational restraints" practically compels the answer: Congress meant air pollution control equipment. *See infra*, section III.C.

read that broadly," *id.*, the Court did not hold and did not need to hold that the term "controls" necessarily included permit terms and regulations.

This "common ground" was in error. Based on its flawed definitions in the part 63 general provisions, *see supra*, section III.A, and on its failure to examine the plain language of sections 113 and 304, EPA was forced to concede that "common ground" in defending the 1994 part 63 general provisions.

This shows that the two issues are inextricably intertwined. Once EPA considers permit terms and regulations to be "controls," then EPA is forced to explain how state-only permit terms and regulations should not be "considered controls." *National Mining Association*, 59 F.3d at 1364. The difficulty of doing so in turn leads EPA to impermissibly propose that federal enforceability is not required, in clear contravention of sections 113 and 304. *See supra*, section I. Thus, the clear language of sections 113 and 304 indicate that EPA's interpretation of "considering controls" is also impermissible.

C. The Best Reading of "Controls" Is Air Pollution Control Equipment

EPA's impermissible failure to give significance to "considering controls" in the phrase "potential to emit considering controls" naturally leads to the question: what permissible interpretation would give significance to the phrase in a way that is narrower than the interpretation of "potential to emit" in the PSD and nonattainment NSR programs? The phrase considered in isolation does not answer the question, but the structure, purpose, and legislative history of the Act do: "controls" means "air pollution control equipment."

i. *Structure and Purpose of the Act*

This interpretation better fits the structure and purposes of section 112. EPA's current and proposed interpretation of "controls"—"if it's good enough for NSR, it's good enough for 112"—serves no purpose of section 112 whatsoever except to allow sources to avoid MACT standards through operational limits. It also has a structural mismatch in that MACT and GACT standards can only consist of operational limits when 112(h) applies. That Congress only allowed operational limits for MACT and GACT standards in the very limited circumstances in which EPA has made the required determination under section 112(h)(2) indicates Congress generally disfavored operational limits for HAPs.

On the other hand, a definition that limits "controls" to air pollution control equipment fits the structure and purposes of section 112. If a source is required to install and operate control equipment for area source status, then that equipment can be considered when EPA promulgates and revises GACT standards. If the control equipment happens to be very effective, it may even inform revisions to MACT standards, at least for existing sources. An operational limit, on the other hand, does nothing to inform EPA's updates of GACT and MACT standards (except perhaps in those rare instances under section 112(h) when such limits are permissible). In other words, EPA's interpretation is not "technology-forcing"; the appropriate interpretation is.

Furthermore, this interpretation appropriately credits sources that have complied with a MACT standard through installation of control equipment when that standard is revised and tightened.[22] This close structural fit again argues for this interpretation.

The appropriate interpretation also partially addresses policy issues regarding repeal of the OIAI policy. First, repeal would give less benefit to owners and operators of regulated sources, as it is unlikely that sources will willy-nilly swap out control equipment due to the costs involved. Second, a requirement to continuously operate a control device is more likely to reduce hazardous air pollutants than a requirement that allows sources to only intermittently use such devices.[23]

ii. *Legislative History*

As noted above and by the *National Mining Association* court, Congress was aware of the history of EPA's pre-1990 Amendment interpretation of "potential to emit" and nonetheless chose to use the phrase "potential to emit considering controls." Congress thus instructed EPA to interpret "major source" more narrowly with respect to potential to emit than for NSR. Given the legislative history as the *National Mining Court* framed it, *see supra*, section III.A.ii, as skirmishing over crediting "air pollution control equipment" and "operational restraints" in the context of NSR, the conclusion is practically compelled that Congress meant air pollution control equipment in the phrase "considering controls."

Statements in the legislative history and inferences from it support this conclusion. The Senate bill, S. 1630, defined "major source" as:

> [A]ny stationary source (including all emission points and units of such source located within a contiguous area and under common control) of air pollutants that emits, *considering installed and operating controls*, in the aggregate, ten tons per year or more of any hazardous air pollutant or twenty-five tons per year or more of any combination of hazardous air pollutants.

4 Legislative History of the Clean Air Act Amendments of 1990 Together with a Section-by-Section Index 4407 (1993). The House bill, H.R. 3030, instead contained the current phrase, "emits or has the potential to emit considering controls." 3 Legislative History of the Clean Air Act Amendments of 1990 Together with a Section-by-Section Index 78 (1993). In conference, the language from the House bill was selected, but the House report on H.R. 3030 states: "The determination as to whether a source is a 'major source' is based on the emissions of hazardous air pollutants from the source after application of installed controls." One does not "install" an operational limit.[24]

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22 Congress has always had a concern with the cost of retrofitting control equipment onto existing sources. S*ee infra*, section III.B.ii,

23 Under the appropriate interpretation, the proper form of an emission limitation for area source status would be a requirement to continuously operate and maintain air pollution control equipment of known control efficiency to limit emissions below the 10/25 tpy HAP thresholds, with appropriate MRR to ensure enforceability. If an area source is allowed to operate control equipment intermittently as necessary to stay under the thresholds, then effectively that is an impermissible operational limit.

24 Nor, to use the Senate language, does one "operate" an operational limit. Instead one complies with it.

Furthermore, air pollution control equipment that was installed under state and local programs would generally have a high cost to replace with new control equipment. On the other hand, state and local permit terms or regulations would have a relatively low cost (relative to the costs of control equipment, that is) to replace with an identical federally enforceable permit term. And, as explained in section I, *supra*, Congress in fact mandated that provisions to limit "potential to emit considering controls" be federally enforceable; cost was not and cannot be a consideration. Thus, the only rational explanation for Congress' choice to require consideration of "controls" is that Congress wanted to take into account the high costs of replacing existing control equipment, not the low cost of replacing state permit terms and regulations with federal equivalents.

The issue of the cost of replacing existing air pollution control equipment and the related issue of retrofitting control equipment pervades the Act's provisions for existing stationary sources. *See e.g.*, section 169A(g)(2) (defining best available retrofit technology factors to include "any existing pollution control technology in use at the source"); *see generally* RICHARD L. REVESZ AND JACK LIENKE, STRUGGLING FOR AIR: POWER PLANTS AND THE "WAR ON COAL" 41-49 (Oxford University Press 2016) (recounting Congressional concern with costs for controls for existing sources). In fact, the phrase "considering controls" in the section 112(a)(1) definition of "major source" is a perfect example of this: sources that have installed control equipment to meet a MACT standard will get credit for that equipment when the MACT standard for existing sources is revised and strengthened and as a result (given the stringency of MACT standards) will likely qualify as area sources.

Finally, the historical context for the 1990 Amendments must also be considered. One of the hazardous air pollutants listed by Congress in section 112(b)(1) is methyl isocyanate, CAS number 624839. 42 U.S.C. § 7412(b)(1). `In the early morning of December 3, 1984, an uncontrolled release of 30 tons of methyl isocyanate from the Union Carbide facility in Bhopal, India killed five thousand people in two days; eventually twenty thousand died. Varma, R. & Varma, D., *The Bhopal Disaster*, BULLETIN OF SCIENCE, TECHNOLOGY & SOCIETY Vol. 25, No. 1, at 38 (Feb. 2005). Two hundred thousand people were exposed, and sixty thousand required long-term treatment. *Id.* Among the factors in the magnitude of the release was that the scrubber and flare tower (inadequate as they were) were not in operation. *Id.* at 41. The notion that, less than six years later, the 1990 Congress would have allowed sources of methyl isocyanate to only operate their control equipment intermittently as necessary to stay just under the 10 tpy threshold beggars belief.

D. Summary

EPA may object that the definition of "major source" has been in place for 25 years and industry has relied on it during that time to use operational limits for area source status. But it is EPA at its discretion that is trying to reverse a nearly 25-year old policy that the public has relied on for protection from hazardous air pollutants. If EPA does not want to revise the definition of "major source" to give proper consideration to controls, then EPA should withdraw its current proposal.

IV. PROCEDURAL FLAWS

Note to EPA reviewers: You may associate this comment with C-11.

As instructed by *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544 (D.C. Cir. 2015), in section 307(d) rulemakings[25] procedural issues must be raised during the comment period to be considered in judicial review. Certain potential outcomes for the proposed rule are not permissible without a supplemental proposal for public comment, because EPA to respond to comments would have to provide for the first time a legal analysis for issues that EPA has entirely overlooked in its proposal. *See supra,* nn. 4, 11, 15 (specifically identifying procedural deficiencies).

For example, EPA requests comment on whether EPA's interpretation of the statute is permissible. However, EPA has provided no legal analysis whatsoever that would provide a basis for determining that EPA's interpretation is permissible, instead arguing that EPA's interpretation is compelled by the plain language of the statute. Section 307(d) does not allow such offhand proposals. EPA must identify the terms it finds ambiguous and explain why they are so. *See* 42 U.S.C. § 7607(d)(3)(C). EPA therefore cannot finalize its interpretation on the basis that it is permissible, rather than compelled, without a supplemental proposal. If EPA does so, then this procedural flaw is of central relevance to the final rule, and commenter's inability to comment on the legal basis for EPA's interpretation creates a more than substantial likelihood that the final rule would have been significantly different had the public been allowed to comment. If EPA truly wants input from the public for a legal basis to propose that its interpretation is permissible, then the proper procedure is an advance notice of proposed rulemaking.[26]

V. SUMMARY

EPA's proposal to allow non-federally enforceable provisions to limit "potential to emit considering controls" is contrary to the Act. EPA's red herring argument that its new policy is compelled by the language of "major source" ignores EPA's own admission that section 112(i) is ambiguous. Finally, EPA has failed to give the correct meaning to the phrase "considering controls": "controls" means air pollution control equipment. For these reasons, EPA's proposed action cannot be finalized.

Respectfully,

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25 EPA at its discretion chose to proceed under section 307(d) and must therefore take the bitter portions of that section along with the sweet. 84 FR 36336/2 (citing 42 U.S.C. § 7607(d)(1)(V)).

26 *See* Office of Federal Register, A Guide to the Rulemaking Process, at 3 ("An agency that is in the preliminary stages of rulemaking may publish an 'Advance Notice of Proposed Rulemaking' in the *Federal Register* to get more information. The Advance Notice is a formal invitation to *participate in shaping the proposed rule* and starts the notice–and–comment process in motion.") (emphasis added), *available at* https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.