PGEN COMMENTS ON EPA'S PROPOSED RULE: REVIEW OF FINAL RULE RECLASSIFICATION OF MAJOR SOURCES AS AREA SOURCES UNDER SECTION 112 OF THE CLEAN AIR ACT

Docket ID No. EPA-HQ-OAR-2023-0330

I. Introduction

The Power Generators Air Coalition ("PGen") appreciates the opportunity to submit these comments on the U.S. Environmental Protection Agency's ("EPA" or the "Agency") proposed rule entitled "Review of Final Rule Reclassification of Major Sources As Area Sources Under Section 112 of the Clean Air Act" ("Proposed Rule" or "Proposal").[1] This Proposal would apply retroactively to January 2018 and would require, among others: (1) any permit limitations taken to reclassify from a major source of hazardous air pollutants (HAP) to an area source of HAP must contain safeguards to prevent emission increases after reclassification; and (2) any such permit must be federally enforceable.

PGen is an incorporated nonprofit 501(c)(6) organization whose members are diverse electric generating companies—public power, rural electric cooperatives, and investor-owned utilities—with a mix of solar, wind, hydroelectric, nuclear, and fossil generation. PGen is a collaborative effort of electric generators to share information and expertise in the interest of constructively evaluating and effectively managing air emissions to meet and exceed environmental laws and regulations and in the interest of informing sound regulation and public policy.[2] Our members include leaders in the ongoing transition to cleaner energy in the United States. PGen and its members work to ensure that environmental regulations support a clean, safe, reliable, and affordable electric system for the nation.

II. Comments

A. Nothing in the Record Indicates that Reclassification of Major Sources to Area Source Status Has Resulted in HAP Emissions.

In the rulemaking for the 2020 MM2A rule,[3] EPA evaluated the potential emissions impacts from reclassification. In particular, EPA identified 69 sources that had reclassified since January 2018 (the date of the so-called MM2A Memorandum, which was the guidance memorandum that withdrew the "once in, always in" (OIAI) guidance).[4] EPA determined that, based on this actual experience, 68 out of the 69 sources did not and are unlikely to increase their HAP emissions.[5]

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[1] 88 Fed. Reg. 66336 (Sep. 27, 2023).

[2] Additional information on PGen and its members can be found at PGen.org.

[3] "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," 85 Fed. Reg. 73,854 (November 19, 2020).

[4] 85 Fed. Reg. at 73,880.

[5] *Id.*

No similar analysis was undertaken by EPA in the Proposed Rule. Rather, the rulemaking is entirely based on a generalized, theoretical concern of potential increases. In PGen members' experience, it is highly unlikely for an operator to discontinue the use of controls it has already installed. But the reduction in administrative burdens associated with NESHAP applicability is substantial.[6] Moreover, the availability of reclassification is an incentive for sources that emit above the Section 112 thresholds to reduce their overall emissions to less than those thresholds. The Proposed Rule removes that incentive.

B. Requiring an Affected Facility to Maintain Emissions Equivalent to the NESHAP After Reclassification Is Inconsistent with the Statute.

EPA proposes to revise the 2020 MM2A rule in this Proposal. That rule formalized the withdrawal of the so-called "once in, always in" (OIAI) policy, under which an affected facility that becomes subject to a NESHAP because it is in a major source must continue to meet the NESHAP indefinitely, even if the source reduces its potential to emit HAP so as to become an area source. The fundamental basis for the 2020 MM2A rule is that the OIAI policy was unlawful because the statutory definitions of major source and area source define such sources based on their potential to emit alone, and do not include a temporal limitation on reclassification.[7] EPA maintains the same interpretation of the statute in this proposal, yet it all but reinstates the OIAI policy by requiring "safeguards" that the now-area source cannot emit more than it did had it remained a major source. That is inconsistent with the statute.

1. The Statute Allows No Temporal Limitations on Reclassification.

As EPA explains in the 2020 MM2A rule, the statute unambiguously defines "major source" and "area source" on the basis of the amount of HAP they have the potential to emit. If a source has the potential to emit 10 tons of any individual HAP or 25 tons of total HAP, it is major. 42 U.S.C. § 7412(a)(1). If the potential to emit of the source falls below these two thresholds, the source is an area source. *Id.* § 7412(a)(2). There is no language in the statutory definitions indicating that the status of a source as major or area is fixed based on the source's status at any particular point in time. An area source that increases its potential to emit over the thresholds becomes a major source, by statutory definition. By the same token, a major source that reduces it potential to emit below the thresholds becomes an area source, also by statutory definition. Nothing in the statute remotely suggests that an area source that was previously major continues to be subject to major source standards. Congress made clear: an area source is subject to an applicable area source standard, if any. EPA has no authority to subject an area source to a different standard, just because it was subject to that now-inapplicable standard in the past. Accordingly, the OIAI policy was inconsistent with the statutory language, as EPA determined and now does not reopen.

As EPA further noted, this conclusion is supported by other provisions in Section 112 that explicitly tie the new/existing status of a source to a particular point in time. The statute defines ''new source'' as a source that is constructed or reconstructed after EPA first proposes regulations covering the source. 42 U.S.C. § 7412(a)(4). The statute defines ''existing source'' as

[6] *See, e.g.,* 85 Fed. Reg. at 73,856.

[7] 85 Fed. Reg. at 73,859-62.

any source other than a new source. *Id.* § 7412(a)(10). Thus, under these provisions, the date of the proposed regulation fixes the status of that source. Congress clearly knows how to fix the status of a source at a particular time, if it so chooses. There is no similar language in the statutory definitions delineating the line between a major source and an area source. The contrast between the two sets of provisions – one delineating the major/area source status and the other delineating the new/existing source status – is strong, if not conclusive, evidence that subjecting an area source to a major source standard that previously applied to it because it was previously major is inconsistent with the statute.

2. The Proposed Rule Is Inconsistent with the Statute.

Notwithstanding the above, the Proposed Rule leads to that very result. *See* 88 Fed. Reg. at 66,343 (requiring "that a source reclassifying from major to area source status will not emit beyond what would have been allowed had the source maintained major source status"). EPA achieves this result by claiming discretion to interpret "considering controls" in the definition of potential to emit to allow it to impose more controls than required by the statute – that is, to impose on an area source controls equivalent to those required for a major source.

EPA proposes "that for a facility seeking to reclassify from major to area source status for purposes of a particular MACT standard, the 'controls' that are determinative are those that are proven to be at least as effective at reducing emissions as the MACT standard to which the facility has been subject."[8] That the statute does not admit to this reading of "controls" is demonstrated by the incongruence between a source that reduces its PTE before it is subject to a NESHAP, and one that reclassifies after it. For the former, controls that are legally and practically enforceable are sufficient to limit the potential to emit. For the latter, such controls are not "determinative," even though they are legally and practically enforceable, unless they also subject the area source to a major source standard. No one would seriously argue that for the former, EPA would have the discretion to decree that the only "determinative" controls are those that would be equivalent to a NESHAP that would apply to the source. By the same token, EPA simply declaring that the only determinative controls for a reclassified source are those that under the statute no longer apply is not a permissible interpretation of the plain language.

EPA relies heavily on *National Mining Association (NMA) v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995), correctly stating that controls that may be considered in determining potential to emit must be "effective," but then going further and misstating the holding of that case by suggesting that all EPA must do to justify *additional* requirements is to explain why they generally "further[] effectiveness."[9] First, one must ask "effective" to what end? In *NMA*, the concept of effectiveness is directly related to the ability of the controls to ensure that the potential to emit is limited to less than the Section 112 HAP thresholds. In that case, the controls that achieved this purpose were practically enforceable state controls. The court asked: "[I]s it also open to EPA under the statute to refuse to consider controls on grounds other than their lack of effectiveness?"[10] The answer is no. For as the Court held, if EPA is seeking to add additional

[8] 85 Fed. Reg. at 66,344.

[9] 88 Fed. Reg. at 66,340 (citing *NMA*, 59 F.3d at 1363-1365).

[10] *NMA*, 59 F.3d at 1363.

requirements, EPA must explain "how its refusal to consider limitations other than those that are [being proposed] serves the statute's directive to 'consider[] controls' when it results in a refusal to credit controls imposed by a state or locality even if they are unquestionably effective" in limiting the source's potential to emit.[11] To meet this requirement, EPA must show that the additional requirements EPA seeks to impose beyond requirements that are already effective to meet the statutory purpose of limiting potential to emit are "essential" to that purpose.[12]

Under Section 112, practically enforceable controls (more precisely, their impact on emissions) are what is required to effectively limit the potential to emit to less than the major source thresholds. As the *NMA* court made clear, EPA has no authority to refuse to consider them. Here, EPA's proposal to add additional controls (i.e., those that would require the reclassified area source to nonetheless meet major source standards) "results in a refusal to credit controls … even if they are unquestionably effective" in limiting the source's potential to emit.[13] Indeed, such additional controls are not necessary, much less "essential" for the purpose of effectively limiting the source's potential to emit, which is the only requirement for any HAP source to be classified as an area source. EPA's claim of a general discretion to decide what controls are "determinative" – and to do so for a reclassified source differently than how any other source may determine potential to emit – is belied by *NMA*, as discussed above, and is inconsistent with the plain statutory language, which does not distinguish between reclassified and non-reclassified sources. On this point, Congress's silence on reclassification is not a grant of authority for EPA to do whatever it wants in that context. The silence indicates that Congress did not consider a reclassified source to be any different than any other source; Congress did not grant authority to EPA to create such a distinction out of whole cloth.

Moreover, EPA's invocation of the general purpose of the Clean Air Act to reduce emissions and then reading into that a directive to prohibit any increases from reclassified sources does not justify treating different types of area sources differently based on whether they reclassified or not. The statute has a single standard for area sources. EPA has no authority to subject sources to different standards depending on reclassification, based on the general purpose of the Act to reduce emissions. Indeed, what EPA is implementing here is a prohibition on "backsliding." But Congress knows how to write such a prohibition into the statute. *See* 42 U.S.C. § 7502(e) (commonly referred to as the "anti-backsliding" provision). Congress did not include such a prohibition in Section 112. Therefore, Congress did not authorize EPA to create such a prohibition by administrative fiat.

C. EPA Should Not Seek to Make This Proposed Rule Retroactive.

The Supreme Court has made clear that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[14] Absent such express terms,

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[11] *NMA*, 59 F.3d at 1364.

[12] *NMA*, 59 F.3d at 1364.

[13] *NMA*, 59 F.3d at 1364.

[14] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

"rules have legal consequences only for the future."[15] EPA cites no such express terms in Section 112 (or the Clean Air Act generally), and there are none. Accordingly, EPA should abandon its proposal to revise the MM2A rule retroactively.

D. Federal Enforceability Is Not Essential for an Effective Limitation on Potential to Emit.

As discussed above, the *NMA* court held that, for EPA to justify additional requirements for an "effective" limitation on potential to emit, it must explain why such an additional requirement is essential for that purpose and also does not result "in a refusal to credit controls … even if they are unquestionably effective" in limiting the source's potential to emit.[16] EPA has not done so here, nor can it. If a source, whether reclassified or not, takes practically enforceable – i.e., effective – limitations to ensure its potential to emit does not exceed the Section 112 thresholds, an additional requirement that the limitations be federally enforceable cannot be essential. And such an additional requirement results in EPA's refusal to credit controls that are unquestionably effective in their own right. Otherwise, one wonders why EPA has not added such a requirement to the potential to emit regulatory definitions not only under Section 112, but also under other programs with applicability thresholds based on potential to emit (*e.g.,* the NSR programs; the Title V program), since *NMA* was decided almost 20 years ago. And the justifications that EPA gives in the Proposed Rule for adding the federally enforceable requirement has nothing to do with ensuring that a reclassified source's potential to emit remains under the Section 112 thresholds – that is achieved for such a source like it would be for any other source, through practically enforceable limitations sufficient and necessary for that purpose. For these reasons, EPA should not seek to add a federal enforceability requirement for only one category of sources.

E. EPA Should Not Require States to Amend Their Rules and Seek EPA Approval Before They Can Establish Limitations on Potential to Emit.

The states should not be required to amend their regulations and seek delegation from EPA under 40 C.F.R. Part 63, Subpart E to be able to adopt in permits practically enforceable limitations. This creates a substantial burden on the states, and it is unwarranted as it stems from EPA's proposed addition of a federally enforceable requirement for potential to emit of reclassified sources. But even if EPA does add such a requirement (something it should not do, as discussed in Part II.D above), there is no need for specific delegation under 40 C.F.R. Part 63, Subpart E. EPA should clarify that *any* mechanism that the states have to create a federally enforceable limitation is acceptable. For example, "Title V permits are an appropriate means by which a source can assume a voluntary limit on emissions for purposes of avoiding being subject to more stringent requirements."[17] Most states have SIP-approved operating and minor source

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[15] *Id.* at 216 (Scalia, J., concurring).

[16] *NMA*, 59 F.3d at 1363-64.

[17] 57 FR 32250, 32279 (July 21, 1992); *see* 40 CFR §§ 70.2 (defining "emissions allowable under the permit" to include, among other things, "a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject"), 70.6(b)(1) (identifying "any provisions designed to limit a source's potential to emit" as a type of title V permit term that would be federally enforceable), 70.7(e)(2)(i)(A)(*4*)

construction permit programs. EPA should simply recognize that a permitting agency has inherent authority to include in a permit a condition that the applicant voluntarily requests and assumes under any SIP-approved permit program.

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(precluding minor permit modification procedures for terms that "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").