United States Senate
WASHINGTON, DC 20510

March 14, 2018

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Pruitt:

We write to express our deep concern over the reversal of the Environmental Protection Agency's (EPA) longstanding policy under Section 112 of the Clean Air Act to continuously regulate hazardous air pollution from major industrial sources. Revoking the "once in, always in" policy will lead to greater levels of arsenic, lead, mercury, and almost two hundred other air toxic pollutants in communities around the United States. The policy's revocation is not based on sound legal reasoning. We therefore request that you reinstate the "once in, always in" policy at least until EPA has performed, and received public comment on, a thorough analysis of the expected increases in air toxic pollution and its corresponding impacts on human health. In a recent hearing before the Senate Environment and Public Works Committee, you acknowledged the agency failed to do such analysis before making its ill-advised decision.

In the Clean Air Act Amendments of 1990, Congress dramatically changed the way EPA regulated national air toxic emissions in this country. In 1990, Congress amended Section 112 of the Clean Air Act to require EPA to implement technology-based standards for the nation's largest sources of the most hazardous air pollutants known to cause cancer and other serious health effects. In setting these standards, known as maximum available control technology (MACT) standards, EPA must ensure the emission limits achieve the "maximum degree of reduction in emissions" based on existing technology and practices used by the best performers in industry. Every eight years, EPA must review MACT standards to determine if they protect health and welfare. The law also sets emission thresholds to distinguish between major and minor (called area) sources and allows the EPA Administrator to set less-stringent or no standards for area sources.

As the agency started to implement the Clean Air Act Amendments of 1990, EPA recognized there would be circumstances when the MACT standards Congress envisioned would reduce air toxic emissions lower than the major source threshold emission limits. According to EPA, this would mean "without a once in, always in policy, these (major) facilities could 'backslide' from MACT control levels" and "[T]hus, the maximum achievable emissions reductions that Congress mandated for major sources would not be achieved."[1] That's why, in 1995, EPA established a

[1] https://www.epa.gov/sites/production/files/2015-08/documents/pteguid.pdf

"once-in, always-in" policy stating that once a facility is required to comply with major source MACT standards, that facility would always remain subject to those standards. As EPA explained at the time, this interpretation "follows most naturally from the language and structure" of the Clean Air Act.

Today, through the air toxics MACT program, there are 187 hazardous air pollutants being reduced from more than 174 categories of major industrial sources – including coal-fired power plants, lead smelters and industrial boilers. In many circumstances, the EPA Administrator has decided not to include a standard for area sources. This means the "once in, always in" policy has served as a critical backstop for 23 years to ensure air toxic reductions from our largest sources are permanent, as Congress mandated in 1990. According to a 2017 EPA fact sheet, the air toxics MACT program with the "once in, always in" policy has resulted in the elimination of 1.7 million tons of hazardous air pollution.[2]

On January 25, 2018, EPA's Office of Air and Radiation issued new guidance that revoked the "once in, always in" policy for major sources, based on a purported "plain language reading" which is inaccurate, ignores the broader statutory framework, and likely to lead to absurd results. Instead of requiring major sources to meet the "maximum degree of reduction in emissions" as Congress intended, EPA's change now allows all major sources the legal right to increase emissions up to area source thresholds and an option to avoid MACT requirements all together. This will allow industrial facilities across the country to stop running or stop consistently operating the key technology that is currently reducing some of our most dangerous air pollution. In response to questions from Senator Markey in an Environment and Public Works (EPW) hearing on January 30, 2018, you responded that you do agree that more mercury, lead, and other air toxics will have a negative impact on human health. Yet, this policy reversal will mean that more cancer-causing and other hazardous air toxics, like arsenic, mercury, benzene and PCBs, will get into the air we breathe, the water we drink, and the food we eat.

Our concerns about the effects of EPA's decision is neither partisan nor uninformed. During the Bush Administration, then-Acting EPA Assistant Administrator Bill Wehrum attempted to withdraw the "once in, always in" policy through rulemaking and without analysis. In an internal 2005 EPA document, EPA regional officials stated that withdrawing the "once in, always in" policy would mean "many sources would take limits less stringent than MACT requirements" and the policy change would be "detrimental to the environment and undermine the MACT program."[3] The regional EPA officials explained that the policy change would mean major air toxic sources "could virtually avoid regulation and greatly complicate any enforcement against them" and "the cost of the increased [hazardous air pollutant] emissions would be borne by the communities surrounding the sources."[4] The regional EPA officials were so concerned about revoking the "once in, always in" policy, they stated EPA **should not** make the policy

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[2] https://www.epa.gov/sites/production/files/2017-10/documents/potw_rtr_fsfinal_0.pdf
[3] https://www.npr.org/documents/2006/apr/epa/epa_internal_letter.pdf
[4] https://www.npr.org/documents/2006/apr/epa/epa_internal_letter.pdf

change without looking "closely at this issue to determine whether the likely benefits would be greater than the potential environmental costs."[5]

However, by your own admission, EPA did not closely review – or potentially consider at all – the health effects of this policy change. During the January 30, 2018 hearing before the EPW Committee, Senator Carper asked if EPA did any analysis of the health or environmental effects before deciding to withdraw the "once in, always in" policy through a written memo. You answered, "[T]hat was a decision that was made outside of the Program Office of Air. It was a Policy Office decision." Based on your answer, we can only assume EPA made this decision without knowing if: more air toxic pollution will be emitted; where increased emissions might be located; and what the impacts of this policy change will be on human health, and state and local communities. You and your team seem to have acted without knowing about the potential health effects of your actions.

By failing to follow the congressional intent of mandatory standards, EPA has instead put American lives at risk in the hope that industry does the right thing on its own. In Assistant Administrator Wehrum's January 25, 2018, memorandum to EPA Regional Administrators, he stated that changing the "once in, always in" policy will encourage facilities to implement voluntary pollution abatement and prevention efforts. However, we know from history and experience that voluntary innovation and operation improvements by industry do not, alone, reduce this air toxic pollution. That is why Congress overhauled the air toxics provisions of the Clean Air Act almost 30 years ago, requiring compliance with MACT standards.

We believe that it is EPA's responsibility to provide clear, consistent regulations with the goal of protecting our communities. Withdrawing the longstanding "once in, always in" policy fails this responsibility.

So that we can better understand the rationale and health impacts of the decision to withdraw the "once in, always in" policy, we also ask that you please respond to us in writing with answers to the following questions:

1. In order to understand the potential magnitude of air toxic emissions from this decision, we need to know,
    a. How many individual facilities in the country were considered a "major source" under Section 112 on January 24, 2018?
    b. Please identify, as of January 24, 2018, how many of the "major source" facilities identified in question 1(a) had complied with one or more MACT standards with the result being the source no longer emits more than 10 tons per year of any hazardous air pollutant or more than 25 tons per year of any combination of hazardous air pollutants? Please group these facilities by source categories (for example, there were X number of chemical plants meeting a MACT standard that resulted in lower emissions than the major source threshold).
    c. Please provide state-by-state data and a national total for facilities identified in 1(b).

[5] https://www.npr.org/documents/2006/apr/epa/epa_internal_letter.pdf

d. Please provide the potential maximum amount of pollution increases for all 187 hazardous air pollutants as a result of EPA's decision to revoke the "once in, always in" policy.
e. How much additional particulate matter, ozone, lead and other criteria pollution will be added to the atmosphere as a result of revoking the "once in, always in" policy?

2. Under the new memorandum, do you expect any major source facilities in the power plant source category to be eligible to be re-designated as an area source?
3. How many facilities does EPA expect will implement voluntary pollution abatement and prevention efforts, or pursue technological innovations now that the "once in, always in" policy has been revoked? Please group the number of facilities by source category and provide a copy of the modeling data, assumptions and other analysis EPA performed to reach its conclusions.
4. We request all EPA analysis and modeling of the impacts of this policy change, including cancer and other human health effects, environmental effects, effects on state air pollution emissions, cost-benefit analysis, and effects on interstate emissions. If none exists today, we request that EPA complete such analysis and provide a timeline for completion.
5. Please provide all documents produced or obtained by EPA that are dated after January 20, 2001, that contain, relate to, or refer to data, calculations, or analysis, regarding the quantification of emission effects (negative or positive) that could result from withdrawing the "once in, always in" policy change.
6. Please provide all documents produced or obtained by EPA that are dated after January 20, 2001, that contain, relate to, or refer to data, calculations, or analysis, regarding the impacts on the regulatory implementation costs and benefits for states from withdrawing the "once in, always in" policy change.
7. Please provide all documents produced or obtained by EPA that are dated after January 20, 2001, that contain, relate to, or refer to data, calculations, or analysis, regarding EPA's estimations of how many facilities will no longer continue to reduce hazardous air pollutants by the amounts required by the MACT standard because of this policy change and the justification of that estimation.
8. Please provide all documents produced or obtained by EPA that are dated after January 20, 2001, that contain, relate to, or refer to data, calculations, or analysis, regarding the quantification of health effects that could result from withdrawing the "once in, always in" policy change.
9. Please provide all documents produced or obtained by EPA that are dated from January 20, 2017 through January 25, 2018 that contain, relate to, or refer to meetings with any and all stakeholders related to the "once in, always in" policy.
10. The Environmental Protection Agency has said it will seek public comment on withdrawing the "once in, always in" policy.
    a. Will the agency undertake a rulemaking proposal?
    b. How long will the public comment period be, and when will a Federal Register notice be published?
    c. How many public meetings will the EPA hold on this issue? What will be the dates and the locations of these meetings?

Please provide written responses to these questions by April 9, 2018. If you or members of your staff have further questions, please have them contact Laura Gillam at laura_gillam@epw.senate.gov.

Sincerely,

Tom Carper
U.S. Senator

Edward J. Markey
U.S. Senator

Tammy Duckworth
U.S. Senator

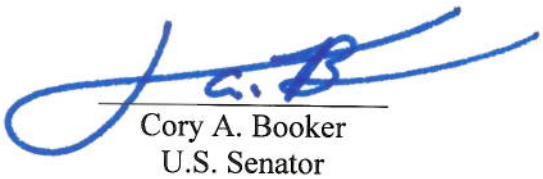
Benjamin L. Cardin
U.S. Senator

Chris Van Hollen
U.S. Senator

Sheldon Whitehouse
U.S. Senator

Bernard Sanders
U.S. Senator

Jeffrey A. Merkley
U.S. Senator



Cory A. Booker
U.S. Senator

Kirsten Gillibrand
U.S. Senator

Richard J. Durbin
U.S. Senator

Richard Blumenthal
U.S. Senator

Brian Schatz
U.S. Senator

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