United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

August 15, 2019

Ms. Elineth Torres
Office of Air and Radiation
U.S. Environmental Protection Agency (EPA)
109 T.W. Alexander Drive, Mail Code D205-02
Research Triangle Park, NC 27709

Dear Ms. Torres:

As the Environmental Protection Agency (EPA) receives public input on its proposed rule, "Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act," as the ranking member of the U.S. Senate Environment and Public Works (EPW) Committee, and, as a strong advocate for environmental quality, clean air and public health, I write to you to urge in the strongest terms that EPA withdraw this proposal.

On June 25, 2019, EPA proposed its rule to formally reverse an agency policy known as "once in, always in" which, for nearly a quarter-century, has driven clean air progress while providing industry with regulatory certainty. This policy reversal would allow some of our nation's largest sources of toxic air pollutants to ignore the strong emissions limits that Congress deliberately established in the Clean Air Act. What's more, according to EPA's own estimates, this rollback would allow more than 3,900 facilities that emit toxic air pollutants—nearly half of all such facilities in the country[1]—to increase harmful pollution that causes cancer, birth defects, child developmental problems, reproductive complications, nerve degeneration, neurological damage, and other severe health consequences. Simply put, the American people should not be subjected to breathing air polluted with increased air toxic emissions.

This proposal is entirely inconsistent with requirements under the Clean Air Act to regulate air toxic emissions in the United States. Nearly three decades ago, in 1990, Congress dramatically changed the way EPA should regulate these substances by amending Section 112 of the Clean Air Act to require the agency implement technology-based standards for the nation's largest sources hazardous air pollutants. In setting these standards, known as maximum available control technology (MACT) standards, Congress mandated that EPA ensure the emission limits achieve the "maximum degree of reduction in emissions." Such reductions must be achieved with existing technology and practices used by the best performers in industry. The revision required that every eight years, EPA must review MACT standards to determine if they sufficiently protect public health and human welfare. The law also sets emission thresholds to distinguish between major sources of air toxics, which must comply with MACT standards, and smaller

[1] 84 Fed. Reg. at 36,329 (July 26, 2019).

sources ("area sources") for which the EPA Administrator may set less stringent standards, or, in some cases, no standards whatsoever.

As EPA started to implement these amendments, the agency recognized there would be circumstances under which the MACT standards envisioned by Congress 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."[2] In response, in 1995, EPA established a "once-in, always-in" policy clarifying that once a facility is required to comply with major source MACT standards, that facility must 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, MACT standards limit emissions of 187 air toxics from more than 174 categories of major industrial sources—including coal-fired power plants, lead smelters and industrial boilers. In many circumstances, though, the EPA Administrator has set no standard for area sources at all. This means that, for 23 years, MACT standards under the "once in, always in" policy have served as the critical limits ensuring that air toxic reductions from our largest sources are permanent—just as Congress mandated in 1990. Over that time, MACT standards have proven incredibly effective, eliminating 1.7 million tons of toxics from the air we breathe.

Unfortunately, on January 25, 2018, EPA's Office of Air and Radiation issued a memorandum revoking the "once in, always in" policy for major sources, based on a purported "plain language reading" that is inaccurate and ignores the broader statutory framework intended by Congress. Instead of requiring major sources to meet the "maximum degree of reduction in emissions" as Congress expressly intended, EPA purported to grant facilities the legal right to ignore the MACT standards and increase emissions up to area source thresholds. This so-called "Air Toxics Loophole" would allow facilities across the country to stop running or stop consistently operating the key technology that limits the release of extremely dangerous air pollution.

Perhaps most troubling, EPA's rollback-by-memorandum included no analysis of the potential health or environmental consequences of taking such an action. When I asked then-Administrator Scott Pruitt about this missing analysis at a January 30, 2018 hearing before the EPW Committee, he responded, "[T]hat was a decision that was made outside of the Program Office of Air. It was a Policy Office decision." Not satisfied with that response, my colleague, Senator Ed Markey (D-Mass.) and I led a group of senators in sending a March 14, 2018 letter to then-Administrator Scott Pruitt, asking him to provide basic information about the health consequences of this dangerous reversal. To this day, EPA has not responded to our questions, nor provided us with any such analysis.

I remain deeply concerned that, still today, EPA has not performed any health analysis with respect to its 2018 memorandum or this proposed rule. This scarcity of data should be a cause of concern for EPA. In April 2018, the Environmental Defense Fund (EDF) attempted to conduct a

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

health analysis of this rollback, using limited publicly available data from 2014 and permit information about sources in a single metropolitan area.[3] EDF estimated that there were 2,617 facilities "eligible to use the Air Toxics Loophole," and that, should this rollback be finalized, sources in the Houston-Galveston area alone could be allowed to more than double their emissions of air toxics. What's more, EPA now estimates that more than 3,912 facilities nationwide would be eligible "at any time" to reclassify themselves as area sources and escape the MACT standards Congress intended to apply to them.

In fact, EPA continued to admit that the agency has not estimated the health impacts of this proposed rule. The proposal's Regulatory Impact Analysis (RIA) allots hundreds of pages assessing cost savings for polluters, but EPA admits it "did not attempt to estimate" health effects, in part because the agency still lacks the crucial data needed to conduct such a review.[4] Instead, the 305-page RIA spends a scant five pages describing some of the well-known health effects of just four air toxics. For the other 183, the RIA merely states, "other air toxic compounds might be potentially affected by this rule."[5] This is the perfect illustration of EPA's haphazard construction of this harmful proposal.

The lack of information and data-driven analysis from EPA, especially on a policy reversal as sweeping as this, is troubling. But what is all the more troubling is what we do know about this rollback – that it is projected to increase toxic pollution in the air we breathe, and inflict wide-ranging harm to public health in communities across the country. From the federal agency with the primary mission to protect human health and the environment, Americans deserve far better than this.

I request that this letter be included in the docket under EPA-HQ-OAR-2019-0282, "Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act." And, again, I urge EPA to put Americans first and reverse course on this proposal.

With personal regards, I am,

Sincerely,

Thomas R. Carper
Ranking Member
United States Senate Environment and
Public Works Committee

[3] https://www.edf.org/media/report-pruitts-air-toxics-loophole-could-mean-sharp-increase-air-pollution-houston
[4] https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0282-0142 at § 5.7 (p. 5-8 to 5-9) ("With the data available, it was not possible to estimate the tons of each individual HAP that would be reduced").
[5] *Id.* at 5-8 to 5-12.