Reclassification of Major Sources Under Section 112 of the Clean Air Act: American Cement Association and Industry Coalition Brief in Support of 2020 US Environmental Protection Agency Rule

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The American Cement Association and a number of other industrial organizations (collectively "ACA") filed on April 17th, a brief in the United States Court of Appeals for the District of Columbia Circuit, proceeding styled California Communities Against Air Toxics, et al v United States Environmental Protection Agency, et al, Case No. 21-1024.

The brief is filed in support of the United States Environmental Protection Agency ("EPA") Rule promulgated in 2020 that allows facilities to reclassify from major sources to area source status when their hazardous air pollutant ("HAP") emissions fall below the statutory thresholds. See 85 Fed. Reg. 73,854 (Nov. 1920).

The other industry organizations joining the brief include:

- Air Permitting Forum
- American Chemistry Council
- American Wood Council
- Auto Industry Forum
- National Lime Association

EPA had argued in 2020 in promulgating the final rule that it would encourage facilities to pursue innovation in pollution/reduction technologies and relieve regulatory requirements intended for larger emission sources. The reclassification enabled facilities to transition out of certain Maximum Aachievable Control Technology ("MACT") requirements.

Environmental organizations have argued in opposition to the reclassification rule that it created a loophole allowing facilities to opt out of the Clean Air Act National Emission Standards for Hazardous Air Pollutants ("NESHAP") requirements by reclassifying themselves as area sources exempt from MACT standards.

The EPA "once-in-always-in" policy was established in 1995. It provided that a facility subject to major NESHAP standards would always remain subject to such standards. This would be the case even where

production processes were changed or controls implemented that permanently reduced the facilities' potential to emit HAPs.

ACA states in its brief that the appeal:

> …presents the limited question of whether Congress's line-drawing decision between major area sources must add a time-bar nowhere found in the statute.

They further argue that EPA "realized the error" in "once-in-always-in" recognizing two things:

- *Once-in-always-in" is contrary to statutory language
- "Once-in-always-in" policy disincentivizes companies from reducing emissions and implementing pollution prevention

The brief states that the opponents characterize the 2020 rule as a "get-out-of-jail-free card" such that facilities will now ramp-up their emissions to levels far above levels imposed under previously applicable major source standards. These claims are argued to be baseless based on the 2020 rule making record stating:

- EPA carefully investigated that theoretical possibility and having review the best available evidence concluded the claims of emission increases would not materialize
- EPA engineers with extensive experience in these regulations conducted in detailed study evaluating dozens of sources that actually reclassified for major area sources and also the potential actions of facilities that have been historically emitting below major source thresholds that would be good candidates for reclassifications finding that such companies did not increase their emissions and that industry more broadly would be very unlikely to increase emissions

Copy of the brief is attached.