July 21, 2009

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Response to Rulemaking Petition from the Natural Resources Defense Council

Dear Administrator Jackson:

On January 14, 2009, the Natural Resources Defense Council ("NRDC") and the Sierra Club submitted to former Administrator Johnson a petition (the "NRDC Petition") for rulemaking that asks the Agency to undertake "a comprehensive assessment of its existing regulations under 40 C.F.R. part 61 and part 63 … to ensure that each standard fully complies with the Act and governing judicial rulings." The NRDC Petition contends that EPA must undertake this review "to correct the failure of numerous part 61 and part 63 standards to comply with the Clean Air Act ("CAA") and controlling precedent of the United States Court of Appeals for the District of Columbia Circuit." The petition specifically addresses several source categories within the petroleum and chemical industries including: marine tank vessel loading operations, synthetic organic chemical manufacturing, ethylene production, polymer and resins manufacturing, hydrochloric acid production, oil and natural gas production, and petroleum refineries. For the reasons stated below, we believe EPA should deny the NRDC Petition for rulemaking.

During the development of these standards, EPA followed all the required due process procedures of notice and comment rulemaking. All parties had opportunity to provide ample comment. If there were issues that could have been viewed by any party as any "failure" to comply with CAA provisions, then there was also adequate time to appeal. No appeals were made. In fact, these rulemakings took many comments and were thoroughly vetted by EPA's professional technical staff, EPA's legal staff and the appropriate senior political managers to assure that the EPA professional staff proceeded in an unbiased manner.

The American Petroleum Institute ("API") is the primary trade association of America's oil and natural gas industry, representing almost 400 members involved in all aspects of the industry. The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, a $664 billion enterprise and a key element of the nation's economy. The American Forest & Paper Association ("AF&PA") is the national trade association of the forest products industry, representing forest landowners, pulp, paper, paperboard, and wood products manufacturers. We are writing to offer our perspective on the NRDC Petition. In short, the NRDC Petition invites EPA essentially to implement the § 112 MACT program a second time. As explained more fully below, we believe that this request would require EPA to take action that is beyond the authority of the Agency

and, in any event, is not justified given that the § 112 program requires EPA to ultimately assure that its standards provide an ample margin of safety. We hope that you find these comments useful and we look forward to working closely with the Agency as it formulates a response to the petition.

1. The Clean Air Act narrowly prescribes EPA's authority to review and revise prior MACT determinations. The NRDC Petition asks EPA to exceed its authority.

Once EPA establishes a MACT standard for a particular source category, the Agency has the authority (and the obligation) under § 112(d)(6) to "review and revise as necessary (taking into account developments in practices, processes, and control technologies), emissions standards promulgated under this section no less often than every 8 years." In other words, EPA does not have unfettered discretion to revisit a prior MACT determination once that determination has been issued. Rather, EPA may revise a prior determination only "as necessary" according to explicit statutory criteria.[1]

In 2006, NRDC filed in the D.C. Circuit a multi-faceted challenge to EPA's final residual risk and § 112(d)(6) determinations for the Hazardous Organic NESHAP ("HON"). Among numerous other claims, NRDC argued that EPA is <u>required</u> to make a new MACT determination each time an existing standard is reviewed pursuant to § 112(d)(6). The court quickly dispensed with this argument, concluding that "the words "review and revise as necessary" [cannot] be construed reasonably as imposing any such obligation." *NRDC v. EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008).

More specifically, NRDC asserted that EPA was obligated under § 112(d)(6) to re-determine MACT for certain source types because cost had been considered in determining the MACT "floor" in the original HON rule. The D.C. Circuit disagreed, reasoning that "EPA squarely found that there were no "significant developments in practices, processes and control technologies"" and "[s]ince that is the core requirement of subsection 112(d)(6) and EPA's finding satisfies that requirement, it is irrelevant whether EPA considered costs in arriving at the initial MACT floor and reaffirming that standard in the residual risk rulemaking." *Id.* at 1084.

In short, this holding clearly establishes that EPA is not required to redetermine the MACT "floor" under § 112(d)(6) and that EPA cannot be forced pursuant to § 112(d)(6) to revise an existing MACT determination in order to "correct" an alleged deficiency in that determination based on subsequent judicial decisions. The NRDC Petition represents a thinly-veiled and legally flawed attempt to circumvent this holding.

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[1] *Cf. New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) ("Thus, EPA can point to no persuasive evidence suggesting that section 112(c)(9)'s plain text is ambiguous. It is therefore bound by section 112(c)(9) because "for [] EPA to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it," *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996), <u>showings EPA has failed to make.").</u>

The NRDC Petition should be denied for three reasons. First, as explained above, once EPA makes a MACT determination for a particular category, § 112(d)(6) provides the only authority for the Agency to later review and possibly revise the determination. NRDC asserts that EPA should re-issue existing MACT standards as necessary to correct alleged flaws in the original MACT determinations. In essence, the NRDC Petition asks EPA to invoke §§ 112(d)(2) and (4) to reissue MACT determinations as if the existing determinations had not been issued. EPA does not have such authority. Section 112(d)(6) expressly authorizes EPA to review existing determinations. The existence of this express authority forecloses the Agency's ability to invoke §§ 112(d)(2) and (4) for a given source category when a MACT determination has already been issued for the source category. The D.C. Circuit has already rejected this interpretation that § 112(d)(6) obligates EPA to "to completely recalculate the maximum achievable control technology." *NRDC v. EPA*, 529 F.3d at 1083.

Second, the NRDC Petition could also be seen as an invitation for EPA to revise prior MACT determinations under the authority of § 112(d)(6). But, such prior determinations may be revised only "as necessary (taking into account developments in practices, processes, and control technologies)." Alleged legal flaws in the original MACT determinations are not "practices, processes, and control technologies" that are properly within the scope of a § 112(d)(6) review. The NRDC Petition relies almost entirely on allegations that prior MACT standards were legally deficient, rather than presenting evidence that there have been developments in practices, processes, or control technologies since the promulgation of the standards that would necessitate revising the standards under §112(d)(6).[2]

Lastly, and fundamentally, the NRDC Petition is effectively an unlawful effort to challenge issues that can only have been raised during the 60-day period provided under § 307(b)(1) of the Clean Air Act for seeking judicial review of the various MACT standards at issue. The unstated premise of the NRDC Petition is that the petition creates a new and time-unlimited opportunity to raise (and eventually litigate) issues that could have been raised at the conclusion of the original rulemaking. This premise is flatly wrong because it would render the express § 307(b)(1) 60-day time limit a nullity.[3]

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[2] It is the petitioner's burden to identify new developments necessitating revision to the emission standards pursuant to § 112(d)(6). See *NRDC v. EPA*, 529 F.3d at 1083. Also, note that, even if the NRDC Petition had focused on allegations that there have been significant developments in practices, processes, and control technologies that necessitate revision of the MACT standards (rather than arguing for application of different legal standards in re-promulgating MACT standards), the D.C. Circuit has commented that EPA's determination that there have been no such developments would be granted "significant deference" by the Court. *NRDC v. EPA*, 529 F.3d at 1084 n.8.

[3] While eventually concluding that "we do not have to decide this question," the D.C. Circuit in *NRDC v. EPA* expressed concern about allowing a *post hoc* challenge to a prior MACT determination, observing that the time period for challenging the HON MACT determination "had long since passed" and that Petitioners had not discussed "the significance of the fact that the initial MACT standards were unchallenged."

2. In any event, EPA has broad discretion in deciding how to respond to the NRDC Petition and has ample justification to deny it.

Above and beyond the legal limitations described above, the NRDC Petition at its heart is a rulemaking petition. As recently as 2007, the U.S. Supreme Court held that, "Refusals to promulgate rules are [] susceptible to judicial review, though such review is "extremely limited" and "highly deferential."" *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (internal citations omitted). Indeed, "an agency's refusal to initiate a rulemaking is evaluated with a deference so broad as to make the process akin to non-reviewability." *Cellnet Communication, Inc.* v. *FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992). In other words, EPA has great discretion in deciding how to respond to rulemaking petitions.

Given this discretion, EPA has at least two compelling reasons to deny the NRDC Petition. First, granting the NRDC Petition is not needed to assure adequate protection of health and the environment. In particular, § 112(f) requires EPA to make a determination within 8 years after imposition of each MACT standard of the remaining risk to health or the environment resulting from hazardous air pollutant (HAP) emissions from the given source category. The Agency is required to strengthen the given MACT standards as needed to assure an ample margin of safety. Thus, re-establishing existing MACT standards in the manner requested by the NRDC Petition would be a pointless exercise because EPA already has an affirmative obligation to make sure that HAP emissions from MACT-regulated source categories pose no significant risk to health or the environment.[4] The NRDC Petition does not provide data, and we do not believe they exist, to show that even further control of HAP emissions would be a wise use of limited public and private resources. In essence, the petition asks for EPA to regulate for the sake of regulating. EPA rightfully should decline to engage in such a fruitless exercise. Congress did not intend that section 112 compel EPA to engage in such unnecessary regulation. See S. Rep. No. 101-228, at 175 (1989) ("A sound statutory framework for a program as extensive as the one contemplated here should not force the Agency to regulate a category of sources which present no significant public health risk, simply because units in the category emit a pollutant which has been listed in the statute."). Nothing in the legislative history of the Clean Air Act Amendments of 1990 suggests that Congress intended for EPA to continue to "ratchet down" on technology-based standards beyond what was necessary to comply with the provisions of §112(f) designed to avoid unacceptable residual risk.[5]

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[4] EPA has declared a number of times that "it is appropriate for the Agency to conduct both [the technology and risk] analyses at the same time …." 71 Fed. Reg. 17,712, 17,718 col. 3 (April 7, 2006). *See also* 71 Fed. Reg.17, 720, 17,725 col. 3 (April 7, 2006). Similarly, EPA has stated more than once that its § 112(f)(2) determinations are "key factors" for implementing § 112(d)(6). *See, e.g.,* 71 Fed. Reg. at 17,725 col. 3. These declarations seem to confirm that EPA believes it is rational to take the § 112(f) risk assessments into account in determining what additional restrictions are "necessary," rather than treating § 112(d)(6) as some unconnected directive to continually reduce emission limitations even after unacceptable residual risks have been eliminated.

[5] This is in contrast to the federal Clean Water Act, where there is a stated goal that the discharge of pollutants "be eliminated," which, along with statements in the legislative history, has been cited to

Second, by inviting the Agency to undertake a "comprehensive assessment" of its Part 63 regulations, the NRDC Petition essentially amounts to a request for EPA to go back to the beginning of the MACT program and implement the entire program all over again. Over the 18-year span of the MACT program, EPA has invested tens of thousands of hours and untold millions of dollars in establishing a regulatory program comprised of dozens of categorical MACT standards and numerous other regulations and related actions. Many of the affected industries also performed emission tests and engineering analyses to support the development of MACT standards, expending millions of dollars more. This work has resulted in a body of regulations that, in turn, has caused affected sources to commit the vast resources needed to implement work practices, install and operate air pollution control equipment, and even redesign the very nature of certain manufacturing operations. State and local regulators also have invested untold amounts of time and resources in devising and implementing state-level programs and dealing with the permitting and compliance programs that flow from the federal MACT program.

Granting the NRDC Petition would raise the specter of recommitting a substantially similar amount of time and resources into the program. Because EPA and its state counterparts are not agencies with unlimited resources, this would result in a fundamental revision to established substantive and budgetary priorities, undoubtedly resulting in the diminishment or elimination of other key agency programs. In and of itself, it makes little sense from a strategic planning standpoint to "rob Peter to pay Paul" in order to satisfy the NRDC Petition. More importantly, given that granting the NRDC Petition would not result in any significant improvement in health or the environment, shifting Agency resources and priorities to accommodate the petition almost certainly would cause a diminishment in the Agency's ability to protect health and the environment. This further highlights the absurdity of regulating for the sake of regulating rather than regulating for the purpose of protecting public health and the environment. As Justice Breyer noted in his concurrence this spring in E*ntergy Corp. v. Riverkeeper, Inc.*, requiring billions of dollars of new expenditures for insignificant environmental improvements "would make no sense… particularly…in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." 556 U.S. ___, 129 S. Ct. 1498, 1513. This is precisely the kind of situation in which courts have declined to second-guess an agency's judgment about where best to allocate limited agency resources. See, e.g., *NRDC* v. *SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

The United States already has some of the most stringent hazardous air pollutant emission standards in the world. Imposing more-stringent requirements, when by definition those requirements would be beyond what is needed to avoid any unreasonable risk, would put U.S. industry at a significant

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justify making effluent guidelines more-stringent over time. Section 112 of the Clean Air Act also differs from Clean Water Act authorities because the latter establish a series of technology-based requirements for step-wise reductions in discharges, as well as an explicit requirement that technology-based effluent guidelines are to be reviewed and revised periodically according to the same criteria that apply when they were first promulgated. See 33 U.S.C. §§ 1251(a)(1), 1311(b), (1314(b).

competitive disadvantage with no demonstrated benefit. EPA should not embark on a huge new rulemaking effort, and especially one that would put U.S. industry at a huge disadvantage, unless it clearly was required by Congress, which is not the case here.

3. In any event, NRDC's complaints about certain standards applicable to API and ACC members are unfounded.

The NRDC Petition raises particular concerns with a number of MACT standards of importance to API and ACC members, including the standards for marine tank vessel loading operations, synthetic organic chemical manufacturing industry ("the HON"), oil and natural gas production, and petroleum refineries. On closer inspection, NRDC's concerns with regard to these standards hold little weight.

Marine Tank Vessel Loading Operations. With regard to the standard for marine tank vessel loading operations, the NRDC Petition offers two complaints. First, the petition asserts that EPA improperly failed to regulate HAP emissions from two subcategories – existing major source terminals that emit less than 10 tons per year of any individual HAP and 25 tons per year of combined HAP, and existing offshore terminals. The petition argues that the Agency set a "no control" MACT floor, contravening the holding in *National Lime Ass'n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000). The petition also argues that the "exemption" for terminals that actually emit less than 10/25 tpy HAP also contravenes the statutory definition of "major source," which is expressed in term of potential emissions instead of actual emissions.

EPA already has conducted its preliminary risk assessment of HAP emissions from the marine vessel loading source category. That assessment shows that no revision to the existing standards is needed to provide an ample margin of safety to health and environment. 73 *Fed. Reg.* 60432 (Oct. 10, 2008). In other words, establishing further limitations on HAP emissions from this source category would be pointless – EPA would only be regulating for the sake of regulating.

Second, the NRDC Petition generally asserts that "the standards EPA did set fail to reflect the actual emission levels achieved by the relevant best performing sources." NRDC Petition at 15. This claim should be denied simply because it is vague and unsupported by facts or data. NRDC cannot lawfully demand action based on such non-specific, sweeping, and categorical assertions.

Synthetic Organic Chemical Manufacturing Industry (SOCMI). The NRDC petition argues that EPA failed in the HON rule to establish emission standards for Group 1 emission points that reflect the emission level actually achieved by the relevant best performing SOCMI sources, and that it failed to establish emission standards for Group 2 emission points. NRDC Petition at 12.

As NRDC well knows, EPA undertook a thorough analysis of the hazardous air pollutant emissions remaining from SOCMI sources after the application of MACT pursuant to the residual risk and technology reviews required by sections 112(f) and 112(d)(6) of the Clean Air Act. Based on those reviews, it concluded that the HON rule has reduced HAP emissions from controlled emission points by 95-98% and total HAP emissions from HON sources by 500,000 tons per year (tpy). See 71 Fed. Reg. 34422, 34425 (June 16, 2006).

In undertaking the residual risk and technology reviews, EPA gathered and analyzed data from three sources: EPA's National Emissions Inventory (NEI), EPA's Toxic Release Inventory (TRI) and industry data supplied voluntarily by ACC members. The NEI data consists of whole facility HAP emissions (not just emission points subject to the HON) as does the TRI data. The ACC data, for the most part, pertained only to processes or units subject to the HON.

In its proposed rule, EPA considered requiring controls on some Group 2 emission points, and solicited comment on that option, but the Agency concluded in the final rule that proposed Group 2 controls "would achieve, at best, minimal emission and risk reductions," i.e., HAP emissions would be reduced by only 1,700 tpy and cancer incidence by just 0.05 cases per year. See 71 Fed. Reg. 76603, 76605 (Dec. 21, 2006).

EPA's residual risk and technology reviews concluded that the current HON standards protect public health with an ample margin of safety within the meaning of section 112(f)(2) and that, pursuant to section 112(d)(6), there have been no "significant developments in practices, processes, or control technologies since promulgation of the original standards in 1994." *Id.*

NRDC challenged EPA's final rule in the D.C. Circuit Court and lost. There is no reason for EPA to revisit the HON rule pursuant to NRDC's petition when EPA has already expended significant resources to review the rule and conclude that remaining emissions from HON sources are at a level which is protective of public health with an ample margin of safety.

Oil and Natural Gas Production. The NRDC Petition argues that EPA unlawfully determined not to set standards for major-source glycol dehydration units with actual annual average natural gas throughputs of less than 85,000 m^3/day or with actual average benzene emissions lower than 0.90 Mg/yr. NRDC Petition at 17.

EPA is at the early stages of its residual risk review for this source category and has not yet completed its risk assessment; however, based on our knowledge of this industry segment, it is highly likely that HAP emissions from this source category are low enough that they will be found to present no significant risk to health and the environment. The Agency should decline to take any action on the NRDC Petition as it relates to this source category at least until the risk assessment is complete and the Agency has determined whether additional controls are needed to assure an ample margin of safety. Additional control measures should be prescribed only as necessary to assure an ample margin of safety.

In addition, NRDC mischaracterizes the threshold requirements as "exemptions" or "no control floors", when in fact these are units that meet the floor standard without additional controls. The *National Lime Ass'n v. EPA* and *Brick* decisions requires that standards be set for all sources, but does not require that controls be installed to meet the standards. Further, thresholds such as these are clearly contemplated by section 112(d)(4).

The NRDC Petition also asserts that "the standards EPA did set fail to reflect the actual emission levels achieved by the relevant best performing sources." NRDC Petition at 17. As explained above in

the context of the marine vessel loading standard, this claim should be denied simply because it is vague and unsupported by facts or data. NRDC cannot lawfully demand action based on such non-specific, sweeping, and categorical assertions.

Petroleum Refineries. The NRDC Petition offers several complaints about the Petroleum Refinery MACT. First, it asserts that it was improper for EPA to set "no control or monitoring requirements for wastewater streams located at refineries with total annual benzene loading of less than 10 megagrams per year." NRDC Petition at 17.

Second, NRDC alleges that the standard is inadequate because it "only regulates benzene emissions" from wastewater at refineries with total annual benzene loading of more than 10 megagrams per year. NRDC Petition at 17. According to NRDC, EPA is obligated to regulate all HAP emissions from wastewater, or show that benzene is an appropriate surrogate.

Third, the petition complains that "EPA's benzene standards do not reflect the actual benzene emission levels achieved by the relevant best performing units." NRDC Petition at 18. As with the similar allegations addressed above, this complaint should be denied because it is vague and unsupported by any data, information, or analysis.

Lastly, the NRDC Petition asserts that the standard unlawfully fails to regulate HAP emissions from miscellaneous process vents with VOC emissions less than 33 kg/day for existing sources and 6.8 kg/day for new sources, Group 2 storage vessel vents, and hydrogen plant vents. NRDC Petition at 18.

EPA has already made a final determination as to the remaining risk to health and environment associated with HAP emissions from petroleum refineries and has prescribed such additional measures deemed necessary to assure an ample margin of safety.[6] Thus, the assertions presented in the NRDC petition are not reasonably actionable given that there is no significant risk to health or the environment related to HAP emissions from the specified sources.

Moreover, EPA reasonably relied on the Benzene Waste NESHAP as a guide for the requirements that should apply to volatile HAP emissions from refinery wastewater operations. While the Benzene Waste NESHAP was directed specifically at benzene emissions, there is no doubt that benzene is an appropriate and representative surrogate for other volatile HAPs that may be present in refinery wastewater. Thus, further regulation of HAP emissions from refinery wastewater is unnecessary and unwarranted.

Lastly, and in any event, HAP emissions from small miscellaneous process vents, Group 2 tanks, and hydrogen plants are *de minimis* as compared to other HAP emissions from refineries and as an objective matter. EPA has ample authority to retain its current approach to such HAP sources.

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[6] *See* http://www.epa.gov/ttn/oarpg/t3/fr_notices/petrefin_ats_fa_011609.pdf, available at http://www.epa.gov/ttn/oarpg/ramain.html#p (posted 1/16/09).

4. NRDC's complaints about standards applicable to AF&PA members also are unfounded.

The NRDC Petition discusses at length various alleged shortcomings of the MACT standards for chemical recovery combustion sources at pulp and paper mills (40 C.F.R. Part 63, subpart MM). Those standards were part of the "Cluster Rule," an integrated hazardous air pollutant and BAT/BCT effluent guidelines rulemaking initiative promulgated by the Clinton Administration that was one of the highest-cost set of environmental requirements ever imposed on an industry sector. The MACT standards that were promulgated for chemical recovery combustion sources were the result of a long process of assessing hazardous air pollutant emissions and controls at pulp and paper mills that included industry collection of over a million dollars worth of stack test data to supplement EPA's database, technical and economic analyses by third-party consultants, and consideration by EPA of a multitude of factors. The Cluster rulemaking included EPA's consideration of the interplay of the various air and water standards being promulgated for pulp and paper mills and which those mills had to comply with essentially simultaneously, at a cost of billions of dollars. Neither NRDC nor anyone else petitioned for review of the subpart MM standards within 60 days of their publication, as required by CAA § 307(b)(1).

The NRDC Petition does not describe any "developments in practices, processes, and control technologies" with respect to control of HAP emissions from chemical recovery combustion sources that have occurred since the subpart MM standards were promulgated. Industry experts are not aware of any significant such developments. Chemical recovery processes and air pollution control equipment used to control emissions from those processes have not undergone any significant change, and certainly there are no new developments that would make revision of the MACT standards "necessary." Thus, the NRDC Petition fails to provide a basis for EPA rulemaking under CAA § 112(d)(6).

In addition, EPA already is far along in its residual risk modeling for pulp and paper mills, which assesses risk not only from the pollutants for which the MACT standards contain specific limits, but for all hazardous air pollutants emitted. We understand that EPA's modeling has shown that there are very few, if any, situations where chemical recovery sources at pulp mills complying with existing MACT standards would present an unreasonable risk to human health or the environment. The industry has generated substantial additional emissions data to assist EPA in that analysis. The industry also has obtained independent risk analyses by consultants expert in risk assessment, which analyses also indicate that there is no significant risk to human health and the environment from emissions complying with the existing MACT standards. Thus, additional and more stringent emission limitations for subpart MM, as the NRDC Petition is seeking, would be unnecessary and unjustified.

Rather than rebut point-by-point the lengthy allegations contained in the NRDC Petition directed at specific emission limitations or pollutants for this source category, in the interest of brevity for this

submission AF&PA simply states that those allegations are unfounded.[7] If EPA were to move forward with the NRDC Petition, AF&PA would provide a very detailed response to those allegations.

5. The NRDC Petition mischaracterizes the recent decision related to the Part 63 startup, shutdown, and malfunction ("SSM") provision.

The NRDC Petition points out that the SSM exemption provisions contained in the Part 63 general provisions at 40 CFR 63.6(f)(1) and (h)(1) were recently vacated by the D.C. Circuit in *Sierra Club v. EPA*, D.C. Cir. No 02-1135 (Dec. 19, 2008). As EPA is aware, that decision is currently the subject of petitions for rehearing, and so it is not yet effective. Industry parties also have requested that, if the decision on the merits is reaffirmed, the Court remand, rather than vacate, the SSM exemption in the General Provisions. It would be premature to base any plan to revise existing MACT standards on a decision still under consideration.

The NRDC Petition also asserts that this decision "renders this exemption null and void in every Part 63 regulation that contains it" and, thus, "once the mandate issues in *Sierra Club*, no source subject to a Part 63 regulation will be exempted from compliance with emission standards during SSM." NRDC Petition at 34. Even if the panel decision in *Sierra Club v. EPA* ultimately is upheld by the D.C. Circuit, the NRDC petition's assertion that the decision eliminates any exemption sources currently have from compliance with emission standards during SSM is patently untrue. Petitioners ignore § 63.1(a)(4)(i), which expressly provides that the "general provisions" contained in Subpart A only apply to a given MACT standard to the extent that the general provisions are specifically identified in that standard. In other words, the requirements of Subpart A do not automatically apply to each MACT standard. Instead, the relevant "general provisions" must be repromulgated on a standard-by-standard basis. The Agency has typically accomplished this by including a table in each standard identifying the provisions of Subpart A that apply to the given standard.

The effect of the *Sierra Club* SSM decision, if upheld, will be to vacate the SSM exemption in the SSM provisions contained in Subpart A. This decision did not, and cannot, vacate the SSM exemptions incorporated into relevant Part 63 categorical standards because those standards were not at issue in the *Sierra Club* litigation. As the Government pointed out in its May 29, 2009 *Response to Petitions for Rehearing En Banc*, "…the vacatur immediately and directly affects only the subset of section 112(d) standards that incorporate 40 C.F.R. sections 63.6(f)(1) and (h)(1) by reference, and that contain no other regulatory text exempting or excusing SSM events." Granted, it likely is true that EPA will need to revise each relevant standard that incorporated the vacated SSM provision. Unless and until EPA revises the relevant standards, the SSM provisions contained in those standards continue to apply. Moreover, many source categories have MACT standards that contain category-specific provisions that apply to SSM events, which provisions may not even mention the SSM exemptions in § 63.6(f)(1) and (h)(1). The determinations EPA made concerning appropriate SSM provisions in those categorical

[7] Additionally, the detailed allegations in the petition about the site-specific MACT requirements for the Weyerhaeuser Cosmopolis, Washington mill are moot because that mill has been shut down for some time.

MACT standards clearly would not be affected if the D.C. Circuit ultimately vacates the exemptions in § 63.6(f)(1) and (h)(1) in *Sierra Club.*

We appreciate the opportunity to offer these comments on the NRDC Petition. As explained above, the Petition demands action from EPA that is not necessary as a legal matter, would take away from other key agency priorities, and would not result in any significant improvement in health or the environment. For these reasons, EPA should deny the petition. If you have any questions, please do not hesitate to contact API's John Wagner at 202-682-8529.

Sincerely,

Howard Feldman,
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American Petroleum Institute

Paul Noe
Vice President of Public Policy
American Forest & Paper Association

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