

November 1, 2019

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1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**SUBMITTED ELECTRONICALLY VIA REGULATIONS.GOV**

**ATTN:** DOCKET NO. EPA-HQ-OAR-2019-0282

**RE:** SUPPLEMENTAL COMMENT REGARDING THE ENVIRONMENTAL PROTECTION AGENCY'S PROPOSED RULE: "RECLASSIFICATION OF MAJOR SOURCES AS AREA SOURCES UNDER SECTION 112 OF THE CLEAN AIR ACT," 84 FED. REG. 36,304 (JULY 26, 2019).

The Environmental Defense Fund ("EDF") and Sierra Club respectfully submit this supplemental comment on the Environmental Protection Agency's ("EPA" or "the Agency") proposed rule entitled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," 84 Fed. Reg. 36,304 (July 26, 2019) ("Proposed Rule").<sup>1</sup> This supplemental comment is submitted in response to additional information provided by EPA that further identifies the major sources projected to obtain area source status under the Proposed Rule. Analysis of this newly provided information reveals that EPA's proposal raises significant environmental justice concerns, as it threatens to disproportionately subject vulnerable communities to increased toxic air pollution. Rather than address these concerns EPA ignores them, in violation of long-standing principles of rational decision-making. This blind-eye approach also violates Executive Order 12,898, which requires EPA to make environmental justice part of its mission. As discussed below, EPA also arbitrarily ignores important data in its analysis of the Proposed Rule. Because EPA fails to consider the disproportionate impact of its proposed action on vulnerable communities, and because the Agency fails to consider all relevant data, the Proposed Rule is arbitrary and unlawful and should therefore be withdrawn.

**I. EPA'S "ILLUSTRATIVE ANALYSIS" INDICATES THE PROPOSAL WILL SIGNIFICANTLY IMPACT VULNERABLE COMMUNITIES**

Using additional data recently provided by EPA, EDF examined the demographic data of areas near facilities EPA identified as having the potential to increase emission of toxic air pollution under the Proposed Rule. The findings from that analysis show that many of the facilities so identified are located in communities that are already particularly vulnerable to pollution.

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<sup>1</sup> In addition to this comment letter, the signatories here previously submitted comments on the Proposed Rule. *See* Comments of Earthjustice, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club on Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,304 (July 26, 2019), Docket No. EPA-HQ-OAR-2019-0282-0343 (Sept. 24, 2019) [hereinafter Joint Environmental Comments].

## A. Methodology

On September 23, 2019, EPA added to the docket for this rulemaking a spreadsheet containing the name and address of each major source facility that could reclassify to area source status under the Proposed Rule.<sup>2</sup> EDF used this information, together with data from EPA's "illustrative analysis" of potential emission impacts in six selected source categories,<sup>3</sup> to estimate the environmental justice impacts of the Proposed Rule for the sectors included in the illustrative analysis.

The Emission Analysis Spreadsheet contains lists of major sources in the six selected source categories that, under EPA's analysis using risk and technology review (RTR) modeling, would be eligible to reclassify as area sources. For three of the six categories, EPA estimated no emissions increase. The three categories where EPA found there would likely be an emissions increase—Wet Formed Fiberglass Mat (WFFM), HCl Production, and Non-Gasoline Organic Liquid Distribution (OLD)—were used as the basis for analysis to assess the environmental justice impact of these potential source reclassifications.

EDF matched the sources listed in each of these three categories to a street address using either the EIS or FRS ID, depending on which was available, and the Facility Location Spreadsheet. The corresponding FIPS code for each facility—derived from the facility's street address—was matched to EPA's EJScreen database of social, demographic, and economic indicators, provided by census block group. Various demographic indicators<sup>4</sup> were then pulled from the EJScreen database for each census block group in which there was a facility projected to increase emissions. From these values, EDF counted the number of facilities in census block groups with indicators above the 50<sup>th</sup> percentile nationally and above the 75<sup>th</sup> percentile nationally, and calculated the corresponding percentage of the total number of facilities with projected emission increases, both for each source category and overall.<sup>5, 6, 7</sup>

## B. Results

Of the 912 facilities included in EPA's Emission Analysis Spreadsheet across the six selected source categories, EPA estimates that 86 have the potential to increase their emissions of

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<sup>2</sup> Attachment EPA Response to Email from Jim Pew 9-19-19 FRS-EIS-IDs, Docket ID No. EPA-HQ-OAR-2019-0282-0206 (Sept. 23, 2019) [hereinafter Facility Location Spreadsheet].

<sup>3</sup> MM2A Proposal Illustrative Emission Analysis Results-May 2019, Docket ID No. EPA-HQ-OAR-2019-0282-0150 (July 26, 2019) [hereinafter Emission Analysis Spreadsheet].

<sup>4</sup> The categories of data EDF analyzed were: total population; minority population; low income population; minority percent and percentile; low income percent and percentile; individuals above 64 years old percent and percentile; and children below 5 years old percent and percentile.

<sup>5</sup> In several cases, the facility falls right on the border of the census block group. This has important implications for interpreting the results of the analysis, as census block groups should therefore not be taken as proxies for the population that falls within a certain radius of the facility.

<sup>6</sup> EPA found 82 OLD facilities with projected emission increases, but one of the facilities does not have an address listed. It therefore could not be matched to EJ data.

<sup>7</sup> There are three instances in which there are two facilities located within a single block group. In these cases, the population for that census block was counted just once.

hazardous air pollution under the Proposed Rule. Analysis of these 86 facilities found that more than 120,000 people live in the census blocks where this increase in toxic pollution is projected to occur, including more than 58,000 members of minority groups and more than 50,000 low-income individuals:

**Table 1. Population Living within Census Block Group that Contains a Facility Projected to Increase Emissions**

<b>Source Category</b>	<b>Number of Facilities with Predicted Emissions Increase</b>	<b>Total Population</b>	<b>Minority Population</b>	<b>Low Income Population</b>
WFFM	3	4,416	2,472	2,214
HCI	2	2,522	1,546	914
OLD	81	115,511	54,360	47,266
<b>Total</b>	<b>86</b>	<b>122,449</b>	<b>58,378</b>	<b>50,394</b>

Our analysis also shows that the facilities projected to increase emission of toxic air pollution are disproportionately located in minority communities. As shown in Table 2 below, 78 of these facilities—91 percent—are located in communities where the percentage of minorities exceeds the national median. Further, 40 percent of these facilities are located in communities where the percentage of minorities is greater than 75<sup>th</sup> percentile nationally. In other words, 40 percent of these facilities are located in communities that have a higher percentage of minorities than 75 percent of the country:

**Table 2. Number and Percent of Facilities Projected to Increase Emissions Located in Minority Communities**

<b>Source Category</b>	<b>Minority</b>			
	<b>Number of facilities located in census block groups where the percent minority is above the 50<sup>th</sup> percentile nationally</b>	<b>Percent of facilities located in census block groups where the percent minority is above the 50<sup>th</sup> percentile nationally</b>	<b>Number of facilities located in census block groups where the percent minority is above the 75<sup>th</sup> percentile nationally</b>	<b>Percent of facilities located in census block groups where the percent minority is above the 75<sup>th</sup> percentile nationally</b>
WFFM	3	100%	1	33%
HCI	2	100%	0	0%
OLD	73	90%	33	41%
<b>Total</b>	<b>78</b>	<b>91%</b>	<b>34</b>	<b>40%</b>

Similarly, the Proposed Rule stands to hit low-income communities disproportionately hard. As shown in Table 3 below, 73 percent of facilities projected to increase emissions are located in communities where the percent of the population that qualifies as low-income exceeds the national median, and 31 percent of these facilities are located in communities where the percent of the population qualifying as low-income is greater than 75<sup>th</sup> percentile nationally:

**Table 3. Number and Percent of Facilities Projected to Increase Emissions Located in Low-Income Communities**

Source Category	Low Income			
	Number of facilities located in census block groups where the percent of the population qualifying as low-income is above the 50 <sup>th</sup> percentile nationally	Percent of facilities located in census block groups where the percent of the population qualifying as low-income is above the 50 <sup>th</sup> percentile nationally	Number of facilities located in census block groups where the percent of the population qualifying as low-income is above the 75 <sup>th</sup> percentile nationally	Percent of facilities located in census block groups where the percent of the population qualifying as low-income is above the 75 <sup>th</sup> percentile nationally
WFFM	3	100%	2	67%
HCI	2	100%	0	0%
OLD	58	72%	25	31%
Total	63	73%	27	31%

Our analysis also shows that elderly individuals are particularly vulnerable to the toxic impacts of the Proposed Rule. As shown in Table 4 below, 78 percent of facilities projected to increase emission of hazardous air pollution are located in communities where the percentage of the population above 64 years old exceeds the national median, and 38 percent of these facilities are located in communities where the percentage of the population above 64 years old is greater than 75<sup>th</sup> percentile nationally:

**Table 4. Number and Percent of Facilities Projected to Increase Emissions Located in Communities Where the Proportion of Individuals Above 64 Years Old Exceeds the National Median**

	Above 64 Years Old			
	Number of facilities located in census block groups where	Percent of facilities located in census block groups where	Number of facilities located in census block groups where	Percent of facilities located in census block groups where the percent of

<b>Source Category</b>	<b>the percent of the population above 64 years old is above the 50<sup>th</sup> percentile nationally</b>	<b>the percent of the population above 64 years old is above the 50<sup>th</sup> percentile nationally</b>	<b>the percent of the population above 64 years old is above the 75<sup>th</sup> percentile nationally</b>	<b>the population above 64 years old is above the 75<sup>th</sup> percentile nationally</b>
WFFM	3	100%	3	100%
HCI	1	50%	0	0%
OLD	63	78%	30	37%
<b>Total</b>	<b>67</b>	<b>78%</b>	<b>33</b>	<b>38%</b>

Finally, our analysis demonstrates that small children will be disproportionately harmed by the toxic pollution increases resulting from the Proposed Rule. As shown in Table 5 below, 78 percent of facilities projected to increase emissions are located in communities where the percent of the population younger than 5 years old exceeds the national median, and 31 percent of these facilities are located in communities where the percent of the population younger than 5 years old is greater than 75<sup>th</sup> percentile nationally:

**Table 5. Number and Percent of Facilities Projected to Increase Emissions Located in Communities Where the Proportion of Children Below 5 Years Old Exceeds the National Median**

<b>Source Category</b>	<b>Below 5 Years Old</b>			
	<b>Number of facilities located in census block groups where the percent of the population below 5 years old is above the 50<sup>th</sup> percentile nationally</b>	<b>Percent of facilities located in census block groups where the percent of the population below 5 years old is above the 50<sup>th</sup> percentile nationally</b>	<b>Number of facilities located in census block groups where the percent of the population below 5 years old is above the 75<sup>th</sup> percentile nationally</b>	<b>Percent of facilities located in census block groups where the percent of the population below 5 years old is above the 75<sup>th</sup> percentile nationally</b>
WFFM	1	33%	1	33%
HCI	2	100%	1	50%
OLD	64	79%	22	27%
<b>Total</b>	<b>67</b>	<b>78%</b>	<b>24</b>	<b>28%</b>

In sum, the above analysis of EPA’s own data indicates that vulnerable communities—those comprised of people of color, low-income individuals, individuals above 64 years old, and children under the age of 5—will bear the brunt of the Proposed Rule’s toxic impacts. Unfortunately, these bleak findings only partly capture the environmental injustice projected to result from EPA’s proposal. First, as the Joint Environmental Comments submitted previously to this docket explain, EPA’s “illustrative analysis” unjustifiably assumes that sources that do not rely on “adjustable” controls will not change their products or practices after reclassifying themselves as area sources.<sup>8</sup> This assumption is unlikely to hold in practice, particularly over the long term, meaning that EPA has likely underestimated the number of facilities from its illustrative analysis set that will increase emissions. In addition, the above results reflect analysis only of the 912 sources included in EPA’s Emission Analysis Spreadsheet. This group is merely a fraction of the 3,912 sources EPA projects would obtain area source status—and therefore potentially increase HAP emissions—under its proposal. Thus it is highly likely that the total population, minority population, and low-income population estimates shown in Table 1 above significantly underestimate the number of vulnerable individuals that will be harmed by the Proposed Rule.

## **II. EPA’S RTR DATA INDICATES THE PROPOSAL COULD RESULT IN SIGNIFICANT AND WIDESPREAD EMISSION INCREASES**

EDF further analyzed the potential increase in HAP emissions from 1,586 of the sources for which EPA provided RTR data,<sup>9</sup> and then used the Facility Location Spreadsheet to identify the cities and states in which those emission increases would occur.

### **A. Methodology**

The “Revised\_MM2A\_Data\_20180911” tab of EPA’s spreadsheet containing cost data<sup>10</sup> contains the list of major sources (for which EPA has RTR data) that the Agency determined could reclassify to area source status under the Proposed Rule. For each source in this tab for which 2014 National Emissions Inventory (NEI) data has been reported, EDF matched that source to a street address, city, and state using either the EIS ID or the FRS ID from the Facility Location Spreadsheet.<sup>11</sup> The potential increase for total facility HAPs was calculated by subtracting the 2014 NEI total facility HAPs emissions from 75% of the total HAPs threshold of 25 tons per year. The potential increase for the single largest HAP was calculated by subtracting the 2014 NEI single largest HAPs emissions from 75% of the single largest HAP threshold of 10 tons per year. The number of facilities and potential emission increase were then aggregated by state as well as by city and mapped using Excel 3D Maps.

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<sup>8</sup> Joint Environmental Comments at 23.

<sup>9</sup> Specifically, and as noted below in Part II.A, those sources for which 2014 National Emission Inventory data has been reported.

<sup>10</sup> MM2A Proposal Economics Inputs and Costs Savings 75%-May 2019, Docket ID No. EPA-HQ-OAR-2019-0282-0148 (July 26, 2019) [hereinafter Cost Savings Spreadsheet].

<sup>11</sup> EDF identified 2,529 unique facilities in the “Revised\_MM2A\_Data\_20180911” tab of EPA’s Cost Savings Spreadsheet. Of those, 943 facilities had no reported NEI data. EDF’s analysis therefore encompasses only 1,586 of the 2,529 included in the aforementioned tab of the Cost Savings Spreadsheet.

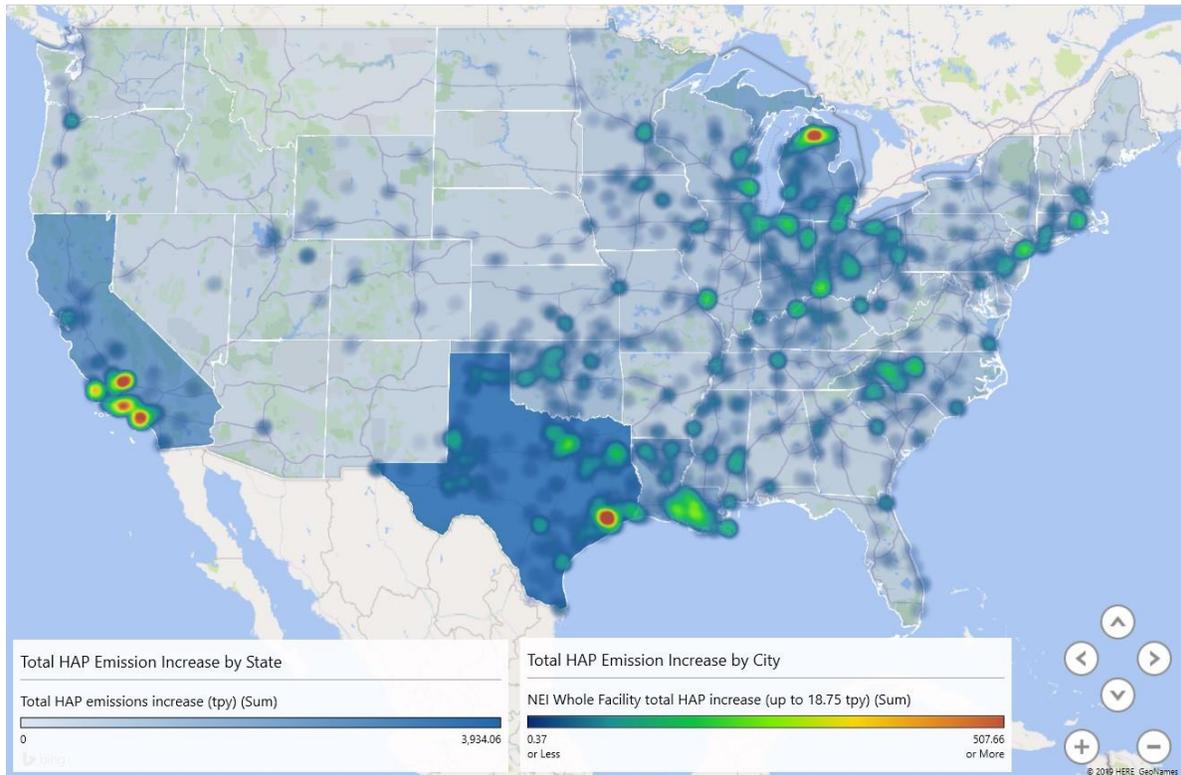
EDF also analyzed the potential emission increase that would result from reclassification for facilities within each source category. The number of facilities in each source category was counted, and the total potential emission increases for both total HAP and single largest HAP were summed. These results were also aggregated up to the source category group level. The number of facilities for which EPA analyzed changes in emissions was summed and compared to the total number of facilities. The same was done for the total HAP emissions increase.

Due to data limitations, this analysis was not able to account for certain factors that would affect the extent to which these sources could increase emissions after reclassification, including other Clean Air Act regulations and state-level regulations that affect HAP emissions from these sources, as well as facility-level characteristics that influence HAP emissions. As such, this analysis should be taken as indicative of the potential impacts of the rule. At the same time, the 1,586 sources included in this dataset represent only 40.5% of the 3,912 sources nationwide that EPA estimates could reclassify as area sources, meaning that this analysis may well understate the potential impacts of the proposal.

## B. Results

Our analysis indicates that EPA’s proposal could have far-reaching detrimental impacts, of a magnitude and scope that the Agency fails to acknowledge in the proposal. Below, Map 1 shows a state-and-city view of the potential increase in total HAP emissions under the Proposed Rule. Here again we note that Map 1 reflects the potential emissions increase of only 1,586 of the 3,912 sources projected to obtain area source status under the Proposed Rule:

**Map 1. Potential Increase of Total HAP Emissions by State and City for 1,586 Sources**



As indicated by the map, these potential emissions increases are widespread, and in fact could occur in 48 states. Also apparent from the map, however, is that the potential emissions increases tend to cluster in certain states and cities. Below, Table 6 presents the top ten states by potential emissions increase for total HAP. The data indicate that Texas, California, Michigan, and Louisiana are particularly at risk of seeing increases in total HAP emissions under the Proposed Rule:

**Table 6. Top 10 States by Potential Emissions Increase for Total HAP**

<b>State</b>	<b>Number of Facilities</b>	<b>Total HAP emissions increase (tpy)*</b>
TX	491	3934
CA	401	2623
MI	186	2118
LA	203	1713
OH	103	1335
IN	91	1136
OK	90	991
NC	81	955
WI	75	797
MS	65	792

\*Rounded to the nearest ton

Similarly, Table 7 presents the top ten cities by potential emissions increase for total HAP. These data reveal that many cities could experience upwards of 115 tons per year—230,000 pounds—of increased toxic air pollution:

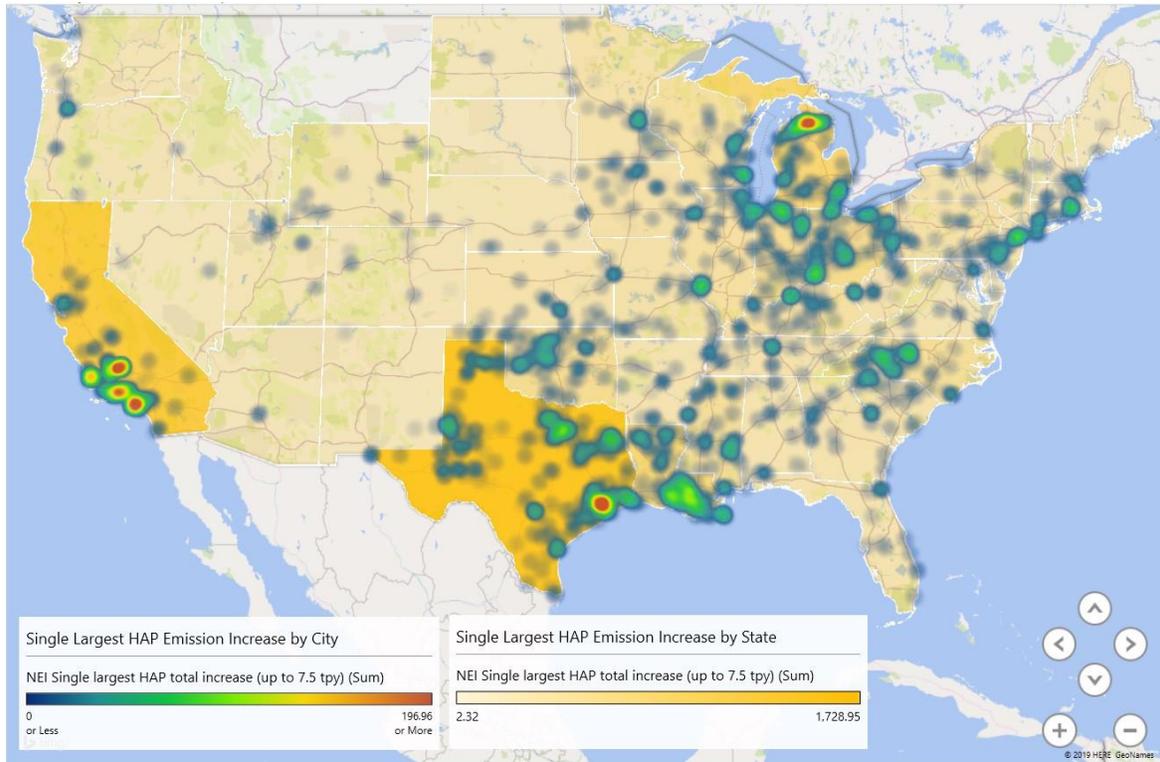
**Table 7. Top 10 Cities by Potential Emissions Increase for Total HAP**

<b>Facility City</b>	<b>Facility State</b>	<b>Number of Facilities</b>	<b>Total HAP emissions increase (tpy)*</b>
BAKERSFIELD	CA	41	470
GAYLORD	MI	32	352
HOUSTON	TX	27	270
LOUISVILLE	KY	11	152
ATLANTA	MI	9	146
FILLMORE	CA	8	145
JOHANNESBURG	MI	10	140
VENTURA	CA	14	136
TAFT	CA	8	121
CINCINNATI	OH	8	116

\*Rounded to the nearest ton

Our analysis revealed similar wide-reaching detrimental impacts for individual HAP emission increases. Below, Map 2 shows the potential increase for the single largest HAP emission by state and city. This map, like Map 1 above, reflects the potential emissions increase of only 1,586 of the 3,912 sources projected to obtain area source status under the Proposed Rule:

**Map 2. Potential Increase of Single Largest HAP Emission by State and City for 1,586 Sources**



Similar to the potential total HAP increases presented above, these potential emissions increases are widespread and cluster around Texas, California, Michigan, and Louisiana. Below, Table 8 presents the top ten states by potential emissions increase for the single largest HAP:

**Table 8. Top 10 States by Potential Emissions Increase for Single Largest HAP**

State	Number of Facilities	Single HAP emissions increase (tpy)*
TX	491	1444
CA	401	1000
MI	186	788
LA	203	646
OH	103	482
IN	91	415
OK	90	371
NC	81	346
MS	65	290
WI	75	266

\*Rounded to the nearest ton

Table 9 likewise presents the top ten cities by potential emissions increase for the single largest HAP. These data reveal that many cities could experience upwards of 40 tons per year—80,000 pounds—of increased toxic air pollution:

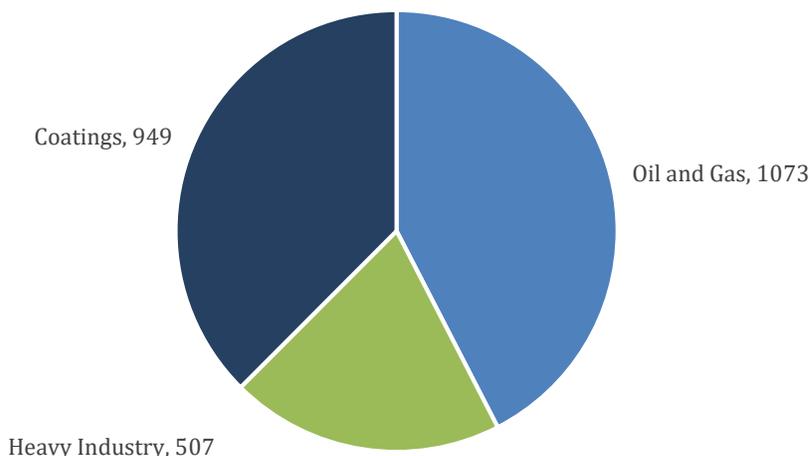
**Table 9. Top 10 Cities by Potential Emissions Increase for Single Largest HAP**

Facility City	Facility State	Number of Facilities	Single HAP emissions increase (tpy)*
BAKERSFIELD	CA	41	182
GAYLORD	MI	32	134
HOUSTON	TX	27	106
ATLANTA	MI	9	57
FILLMORE	CA	8	56
JOHANNESBURG	MI	10	53
VENTURA	CA	14	50
LOUISVILLE	KY	11	50
TAFT	CA	8	44
LONG BEACH	CA	9	44

\*Rounded to the nearest ton

Our analysis also reveals that EPA’s illustrative emissions analysis fails to assess an important source category group. The Agency’s illustrative analysis includes only coating and heavy industry sources. As illustrated by Chart 1 below, these groupings represent only 1,456 of the 2,529 unique facilities for which EPA provided RTR data. But as Chart 1 also illustrates, the other 1,073 unique facilities—a full 42 percent—are oil and gas production sources, sources that EPA chose not to consider in its illustrative analysis<sup>12</sup>:

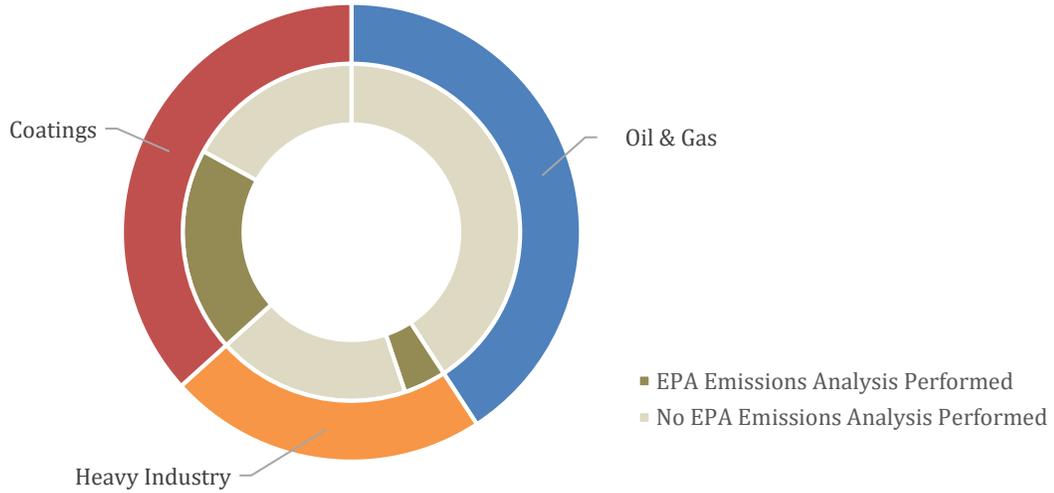
**Chart 1. Number of Facilities Eligible for Source Reclassification by Source Category Group**



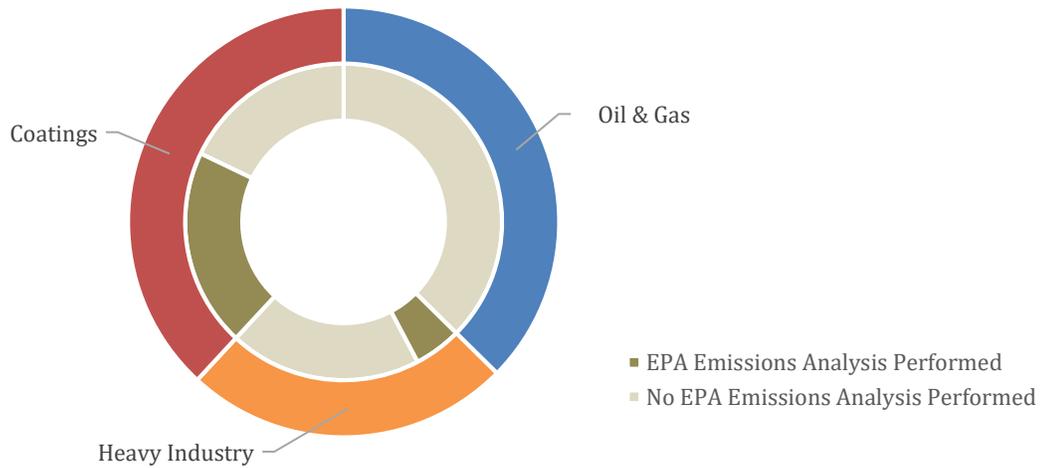
<sup>12</sup> EPA asserts that its RTR data overestimates the number of major source oil and gas production facilities. As noted below in Part III.B, however, EPA arbitrarily and unlawfully fails to explain how it arrived at that conclusion.

Finally, our analysis indicates that EPA’s illustrative analysis considered an exceedingly small proportion of the number of facilities eligible to reclassify, as illustrated by Chart 2, and the potential increase in HAP emissions under the Proposed Rule, as illustrated by Chart 3:

**Chart 2. Number of Facilities Eligible for Source Reclassification by Source Category Group**



**Chart 3. Total Potential HAP Emission Increase (tpy) with Source Reclassification by Source Category Group**



### III. LEGAL ANALYSIS

#### A. EPA's Failure to Consider Environmental Justice is Arbitrary and Unlawful.

Agency decision-making is arbitrary and capricious if the agency “entirely fail[s] to consider an important aspect of the problem” before it.<sup>13</sup> Here, EPA has failed to consider arguably the most important aspect of the problem.

Section 112 of the Clean Air Act addresses emissions of hazardous air pollutants,<sup>14</sup> known to cause cancer, reproductive damage, and other serious health effects.<sup>15</sup> The impacts of this toxic pollution are primarily local in nature, a fact reflected in the language and structure of the Act. In addition to reducing aggregate emissions across categories, Congress made clear that section 112 is meant to protect those “most exposed to emissions” from individual sources within a category.<sup>16</sup> Because section 112 emphasizes health risks to “the individual,” the Proposed Rule’s impact on vulnerable communities was an important aspect of the problem that EPA should have considered.

EPA, however, gives no consideration to the location of facilities projected to become area sources. This is arbitrary and unlawful. The location of facilities subject to the Proposed Rule is crucial to understanding who—and how many—will be impacted.<sup>17</sup> The analysis above shows EPA’s proposal will disproportionately subject people of color, low-income individuals, the elderly, and the young to increased levels of toxic air pollution. As noted above, 91 percent of facilities projected to increase emissions are located in communities where the percentage of minorities exceeds the national median, and 40 percent of these facilities are located in communities where the percentage of minorities is greater than 75<sup>th</sup> percentile nationally. Moreover, at least 73 percent of these facilities are located in communities where the percentage of the population qualifying as low-income, above 64 years old, or below 5 years old exceeds the national median. All told, the more than 120,000 people will be exposed to increased toxic air pollution under the Proposed Rule, including more than 58,000 people of color and more than 50,000 low-income individuals.

These data highlight the arbitrary and unlawful nature of EPA’s proposal. As the Joint Environmental Comments explain, the Agency’s proposal to interpret section 112 as allowing reclassification is not only not compelled by the statute, it is contrary to the statutory text, structure, and purpose of section 112.<sup>18</sup> The findings above only underscore why EPA’s radical proposed

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<sup>13</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>14</sup> 42 U.S.C. § 7412.

<sup>15</sup> U.S. EPA, Health and Environmental Effects of Hazardous Air Pollutants (last visited Oct. 26, 2019), <https://www.epa.gov/haps/health-and-environmental-effects-hazardous-air-pollutants>.

<sup>16</sup> 42 U.S.C. § 7412(f)(2)(A); *see also* 42 U.S.C. § 7412(c)(9) (categories may be delisted only if “no source in the category ... emits” pollution in quantities causing “a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed”).

<sup>17</sup> At a minimum, the Agency’s cost-benefit analysis of the Proposed Rule should change depending on whether, for example, the vast majority of facilities projected to obtain area source status are located in less-populated rural areas on the one hand, versus more-populated urban areas on the other.

<sup>18</sup> *See* Joint Environmental Comments at 2-19.

reinterpretation of section 112 is an unreasonable reading of the statute: it allows major sources to reclassify and increase emissions of dangerous air pollution that will disproportionately harm people section 112 was enacted to protect. EPA attempts to bypass these concerns by ignoring them, leaving others to conduct analysis the Agency should have conducted itself. Rational decision-making requires more.

### **B. EPA’s Approach to Estimating Costs and Emission Increases is Likewise Arbitrary and Unlawful.**

The Proposed Rule is also arbitrary and capricious because EPA’s illustrative emission analysis excludes, without explanation, information relevant and important to understanding the full impact of the proposal.<sup>19</sup>

As an initial matter, EPA fails to explain why it believes its RTR data overestimate the number of major source Oil and Gas Production facilities.<sup>20</sup> According to the Agency’s Cost Savings Spreadsheet, EPA has RTR modeling data for at least 1,073 major source facilities in the Oil and Gas source category group.<sup>21</sup> In its Cost Analysis Memorandum, however, EPA states that this RTR data is “believed to overestimate the number of major source[]” Oil and Gas Production facilities.<sup>22</sup> The Agency provides no explanation for this belief, but nonetheless uses this bare assertion to whittle down the number of Oil and Gas Production facilities it considers major sources, stating that for the purposes of its cost analysis EPA did not consider an Oil and Gas Production facility to be major unless it was identified as such by *both* RTR and ECHO data.<sup>23</sup> Thus EPA’s cost analysis assumes that there are only 189 major source Oil and Gas Production facilities, as opposed to 1,073.<sup>24</sup>

Relatedly, EPA arbitrarily overlooks important potential ramifications of the Proposed Rule by excluding Oil and Gas Production facilities—*i.e.*, facilities in the oil and gas and natural gas transmission source categories—from its illustrative analysis of potential emission increases. EPA focused its illustrative analysis on “those source categories for which we had RTR modeling

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<sup>19</sup> See *State Farm*, 463 U.S. at 43 (emphasizing that agencies “must examine the relevant data” and cannot “entirely fail[] to consider an important aspect of the problem”).

<sup>20</sup> Going forward, we use this term to collectively refer to those facilities in the oil and gas source category plus those facilities in the natural gas transmission source category.

<sup>21</sup> See Cost Savings Spreadsheet, *supra* note 10. Filtering for sources in the Oil and Gas source category group, the “Revised\_MM2A\_Data\_20180911” tab of the Cost Savings Spreadsheet counts 1,222 sources in this category group. After filtering out duplicates and sources for which no 2014 NEI emissions data is reported, 1,073 facilities remain. See also Chart 1, *supra*.

<sup>22</sup> See Cost Analysis Memorandum from Brian Palmer, Eastern Research Group, Inc., to Eric Goehl, Elineth Torres, Brian Shrager & Larry Sorrels, U.S. EPA, Docket ID No. EPA-HQ-OAR-2019-0282-0127, at 6 (Mar. 2019) [hereinafter Cost Memo].

<sup>23</sup> *Id.*

<sup>24</sup> See *id.* at 25 (Appendix 3) (showing 106 major facilities in the oil and gas source category, and 83 major facilities in the natural gas transmission source category).

data.”<sup>25</sup> To select which source categories to analyze, the Agency began by identifying “the source categories for which EPA had RTR data accounting for 5% or more of the potential reclassifications for the 75% threshold scenario.”<sup>26</sup> Although neither oil and gas facilities nor natural gas transmission facilities account for 5% of reclassifications standing alone, these facilities (both as individual source categories and combined as a source category group) represent such a significant percentage of potential reclassifications that EPA should have considered them in its illustrative analysis.<sup>27</sup> Oil and gas facilities that EPA projects to obtain area source status account for approximately 3.3% of potential reclassifications in the 75% threshold scenario, and natural gas facilities that EPA projects to obtain area source status account for approximately 2.8% of potential reclassifications in that scenario. Moreover, the Proposed Rule indicates that oil and gas facilities are likely to use adjustable controls that can be turned off or otherwise made less effective after reclassification.<sup>28</sup> EPA’s failure to analyze large source categories where harmful emission impacts are particularly likely to occur overlooks an important consequence of its Proposed Rule, and renders EPA’s analysis of the proposal arbitrary and unlawful.

Underscoring the arbitrariness of EPA’s choice to exclude Oil and Gas Production facilities from its six-category illustrative analysis, EPA includes in that analysis three source categories that account for a significantly smaller percentage of reclassifications. From the list of six source categories that each account for 5% or more of the potential reclassifications in the 75% scenario, EPA selects three for its illustrative analysis. The other three categories chosen for the illustrative analysis are Metal Cans, Wet-Formed Fiberglass Mat Production (WFFM), and HCl Production. Ostensibly, EPA selected these additional source categories to ensure representativeness, stating that it chose these categories because their compliance methods differ from those used by the coating and heavy industry source categories already selected for the illustrative analysis.<sup>29</sup> Notably, though, the Metal Cans, WFFM, and HCl Production source categories respectively contain only 1, 5, and 3 facilities projected to obtain area source status in the 75% scenario. The oil and gas and natural gas transmission source categories, by comparison, contain 56 and 47 sources, respectively, projected to obtain area source status in the 75% scenario. Crucially, these Oil and Gas Production sources use adjustable controls for compliance—the same reason EPA

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<sup>25</sup> Emissions Analysis Technical Support Memorandum from Elineth Torres, U.S. EPA, Docket ID No. EPA-HQ-OAR-0282-0143, at 18 (May 2019) [hereinafter Emissions Memo].

<sup>26</sup> *Id.* (parentheses omitted).

<sup>27</sup> Using EPA’s arbitrarily reduced set of 189 major source Oil and Gas Production facilities, described immediately above, EPA estimates that there are 103 major source Oil and Gas Production facilities (for which the Agency has RTR data) that will obtain area source status in the 75% threshold scenario. *See* Cost Memo at 25 (Appendix 3) (showing 56 and 47 major facilities in the oil and gas and natural gas transmission source categories, respectively, that EPA projects to obtain area source status in the 75% threshold scenario). To understand what percentage of reclassifications (in the 75% threshold scenario) these 103 facilities represent, one can simply divide those 103 facilities by the total number of facilities with RTR data that EPA already projects to obtain area source status in the 75% threshold scenario, *i.e.*, 1,621, *see id.* at 21 (Appendix 2), plus the additional 103 Oil and Gas Production facilities. That calculation— $103 \div (103 + 1,621)$ —indicates that the 103 Oil and Gas Production facilities EPA projects will obtain area source status in the 75% threshold scenario, and for which EPA admittedly has RTR data, represent roughly 5.97% of the potential reclassifications in that scenario.

<sup>28</sup> *See* 84 Fed. Reg. at 36,330 (noting that all five of the oil and gas sources that have already reclassified used control technologies to meet applicable NESHAP); *see also* Emissions Memo at 7.

<sup>29</sup> *See* Emissions Memo at 19.

proffered for including the Metal Can source category in its illustrative analysis. And yet EPA provides no explanation for its choice to include smaller categories like Metal Cans—which account for less than one one-thousandth of a percent of potential reclassifications in the 75% threshold scenario<sup>30</sup>—while excluding the larger categories that comprise Oil and Gas Production facilities.

Finally, EPA arbitrarily arrives at its estimate of the number of Oil and Gas Production facilities that will obtain area source status. EPA assumes that 52.9% of major source oil and gas facilities will obtain area source status in the 75% scenario. This assumption is “based on the overall fraction of facilities in all categories for which there are RTR modeling files and which could obtain area source status.”<sup>31</sup> But EPA fails to explain why this assumption is warranted. As previously mentioned, the Proposed Rule indicates that Oil and Gas Production sources rely on adjustable emission controls for compliance.<sup>32</sup> EPA does not indicate what proportion of the 3,065 major sources for which it has RTR data use adjustable controls. But if that proportion differs significantly from the proportion of Oil and Gas Production sources that rely on adjustable controls, EPA’s assumption that 52.9% of oil and gas facilities would obtain area source status in the 75% scenario would be unwarranted. EPA’s failure to justify this assumption is arbitrary and unlawful.

### **C. EPA’s Proposed Rule Violates Executive Order 12,898.**

EPA’s proposal also violates Executive Order 12,898. In the Proposed Rule, the Agency incorrectly asserts: “This action is not subject to Executive Order 12898 . . . because it does not establish an environmental health or safety standard. The proposed amendments to the General Provisions are procedural changes and does [sic] not impact the technology performance nor level of control of the NESHAP governed by the General Provisions.”<sup>33</sup> This framing distorts EPA’s obligation under the Executive Order.

Executive Order 12,898 requires federal agencies, including EPA, to make environmental justice part of its mission “*to the greatest extent practicable*.” Specifically, the E.O. requires EPA to “identify[] and address[]” “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” This obligation holds regardless of whether those programs, policies, and activities are substantive or procedural in nature. The key questions are simply whether the action will adversely affect human health or the environment, and whether those impacts will be disproportionately borne.

EPA squarely acknowledges that its Proposal may lead to an increase in hazardous air pollution, stating that “this proposed rule may potentially result in both emissions reductions and increases from a broad array of affected sources,” and that it is “uncertain as to the magnitude,

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<sup>30</sup> Dividing the 1 facility projected to obtain area source status by the 1,621 facilities for which EPA has RTR data and that EPA projects will obtain area source status in the 75% scenario.

<sup>31</sup> Cost Memo at 6.

<sup>32</sup> 84 Fed. Reg. at 36,330.

<sup>33</sup> 84 Fed. Reg. at 36,336.

direction, and distribution in emissions” that will result.<sup>34</sup> Indeed, in just three of the industrial source categories EPA examined—a small fraction of the more than 3,900 major sources across the country EPA estimates could be eligible to reclassify to area source status—the Agency estimated the potential for an addition 2.4 million pounds per year of hazardous air pollution. Notwithstanding the Agency’s attempt to characterize its proposal as mere “procedural changes,” these admissions on the part of the Agency are alone sufficient to trigger EPA’s responsibility to assess whether these pollution increases would be disproportionately borne by vulnerable communities and, if so, consider how to address it.

Of course, 2.4 million additional pounds per year of hazardous air pollution is just the tip of the iceberg. As the above analysis indicates, EPA’s proposal could lead to as much as 49.2 million additional pounds per year of dangerous air pollution from just 1,586 of the more than 3,900 facilities that EPA estimates are eligible to reclassify.<sup>35</sup> This potentially massive increase in HAP pollution only serves to underscore the unacceptable risks that the proposal poses to communities nationwide, and the importance of understanding the geographic distribution of those risks. EPA’s Proposed Rule should have therefore, at the very least, assessed whether minority communities, low-income communities, individuals above 64 years old, and children below 5 years old stand to be disproportionately impacted by these pollution increases. Had it done so the Agency would have found that the costs of its unlawful proposal will indeed be borne by the most vulnerable among us.

## V. CONCLUSION

For the reasons stated above, EDF and Sierra Club once again urge EPA to withdraw this harmful and unlawful proposal. Please direct any inquiries regarding these comments to Lance Bowman, Attorney, Environmental Defense Fund, either by telephone at (202) 572-3346 or by email at [lbowman@edf.org](mailto:lbowman@edf.org).

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<sup>34</sup> 84 Fed. Reg. at 36,332.

<sup>35</sup> We again note that this figure does not take into account other potential limit on emissions, including, for instance, state and local regulations that may prevent or limit emission increases from the facilities analyzed.