

C O M M E N T S

Time to Toss It Out? The “Once In, Always In” Policy for “Major Source” Hazardous Air Pollutant Standards

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The U.S. Environmental Protection Agency’s (EPA’s) recent call for regulatory reform suggestions¹ offers a good opportunity for ending a long-standing regulatory overreach: EPA’s “once in, always in” policy (OIAI policy) for standards applicable to a major source of hazardous air pollutants (HAPs) under the Clean Air Act (CAA).²

In brief, the OIAI policy asserts that if a facility ever had HAP potential emissions above levels that trigger a major source control standard, the facility must comply with that standard permanently, even where the facility has since reduced its potential emissions below the trigger levels. The result is needless compliance burden and expense, transactions complicated or threatened by discovery of a once in, always in situation, and unwarranted enforcement actions and penalties.

As discussed in this Comment, the OIAI policy disregards the plain English of the relevant CAA provisions, and is inconsistent with EPA’s interpretations of similar provisions elsewhere in the Act. The legal basis for the OIAI policy has never been apparent; EPA instead has justified the OIAI policy on practical grounds, which today are largely moot.

The OIAI policy presents an attractive candidate for withdrawal under EPA’s recent reform initiative. As a policy rather than a regulation, EPA can revoke it without need for rulemaking.³ The OIAI policy has apparently never been adjudicated, so withdrawal would not create conflicts with prior case law. Lastly, sources dismissed from major source requirements by withdrawal of the OIAI policy would then become subject to existing stan-

dards and other EPA authority under the CAA for non-major HAP sources.

I. Background: CAA Requirements for HAP Sources

Section 112 of the CAA, as substantially amended in 1990, directs EPA to regulate HAP emissions.⁴ Among other things, EPA must adopt emission standards that require Maximum Achievable Control Technology (MACT) for “major sources” of HAP. As the name implies, MACT standards are stringent, in terms of substantive controls as well as inspection, recordkeeping, and reporting requirements. The CAA defines a HAP “major source” as a source that “emits or has the potential to emit” 10 tons per year (TPY) or more of any individual HAP or 25 TPY or more of any combination of HAPs.⁵ EPA may also set lower thresholds for particular sources due to characteristics of the HAP(s) emitted or “other relevant factors.”⁶

EPA has defined “potential to emit” for HAPs essentially as worst-case, maximum emissions (running 24/7/365, at maximum rated capacity).⁷ Emission controls or other limitations are recognized only to the extent that they are federally enforceable (e.g., required by a federally enforceable permit or regulation).⁸ As a result, a facility can be considered a major source subject to a MACT standard for the facility’s industrial category even if the facility’s actual emissions are well below major source levels.

Author’s Note: The author thanks Jim Romanski, Powerhouse EH&S Manager at Yale University and Chair of the Connecticut State Implementation Plan Regulatory Advisory Committee (SIPRAC), for his insightful review and comments.

1. Evaluation of Existing Regulations, 82 Fed. Reg. 17793 (Apr. 13, 2017).
 2. 42 U.S.C. §§7401-7671q; ELR STAT. CAA §§101-618.
 3. See *Perez v. Mortgage Bankers Ass’n*, 575 U.S. ___, No. 13-1041, slip op. at 7-8, 45 ELR 20050 (Mar. 9, 2015) (an agency’s withdrawal of an interpretative rule, even if long-standing, does not require public notice and comment under the Administrative Procedure Act, 5 U.S.C. §553(b)).

4. The CAA lists some 189 HAPs, and authorizes EPA to add or subtract to this list. 42 U.S.C. §7412(b). EPA has deleted three substances from the list. See 40 C.F.R. Part 63, Subpart C.

5. 42 U.S.C. §7412(a).

6. *Id.*

7. 40 C.F.R. §63.2 (definition of potential to emit).

8. *Id.* Due to subsequent case law, EPA also recognizes that a source’s potential to emit HAPs can also be limited by controls that are enforceable as a practical matter. See also Memorandum from John S. Seitz on Release of Interim Policy on *[sic]* Federal Enforceability of Limitations on Potential to Emit, to EPA Regional Offices (Jan. 22, 1996) (responding to holding in *Natl’ Mining Ass’n v. EPA*, 59 F.3d 1351, 25 ELR 21390 (D.C. Cir. 1995)), available at <https://www.epa.gov/sites/production/files/2015-08/documents/pottoemi.pdf>.

The CAA also directs EPA to regulate non-major sources of HAPs, known as “area sources,” on the same industrial category basis as for major sources.⁹ At EPA’s discretion, such regulations may be based on a less stringent standard than MACT.

Since the 1990 amendments, EPA has used this CAA authority to adopt National Emission Standards for Hazardous Air Pollutants (NESHAPs) for approximately 100 categories of major sources and over 70 categories of area sources.

The CAA also requires certain sources, including any HAP major source, to obtain an operating permit. Also known as a Title V permit, an operating permit aggregates any and all federally enforceable requirements applicable to a facility with respect to air emissions, both HAP and non-HAP alike.¹⁰ Particularly for larger facilities, Title V permits can be lengthy (several dozen pages is not unusual). Among other things, a Title V permittee subject to HAP requirements must submit detailed semiannual and annual compliance reports and pay annual permit fees. Title V permit fees are based on all emissions from the facility, regardless of whether the facility became subject to Title V only because of HAP emissions, and can reach thousands or tens of thousands of dollars.¹¹

II. The OIAI Policy

The OIAI policy is a six-page memo dated May 16, 1995, authored by the then-director of EPA’s Office of Air Quality Planning and Standards.¹² In brief, the memo states that if a facility ever has potential emissions of HAPs above major source levels after the first substantive compliance date of a MACT standard applicable to activities at the facility, the facility is “permanently subject” to that standard, even if the facility later decreases its HAP potential to emit to less than major source levels. In other words, once a source is “in” a major source NESHAP, it’s always in.¹³

The OIAI policy asserts the same result with regard to the Title V operating permit program: any facility that is deemed a perpetual major source of HAP due to the OIAI policy is perpetually subject to Title V permitting.¹⁴

There can be a further complication from the domino effect of MACT standards. A facility that becomes a major source of HAPs due to potential emissions of a certain operation is now subject not only to the MACT

standard for that operation, but also to any other MACT standards for other HAP-emitting operations at the facility, even if the HAP emissions from those operations are limited. EPA has claimed that under the OIAI policy, even if the facility were later to eliminate the operation that triggered major source status, the facility would remain subject to the other MACT standards, as well as to Title V.¹⁵

EPA has implemented the OIAI policy since issuance. For example, EPA cited the OIAI policy in bringing an enforcement action against a facility where EPA alleged that under a prior owner/operator, the facility’s HAP potential to emit had increased above major source levels due to apparent control device issues. EPA’s position was that the prior owner/operator’s subsequent repair of the device to restore the potential emissions to non-major levels was not relevant: once in, always in.

As a result, the OIAI policy forces facilities that have not had HAP potential emissions above major source thresholds for years or even decades to continue to comply with MACT standards, as well as with permitting, annual fees, and other requirements under Title V.

Is there ever any escape? Several EPA guidance letters implementing the OIAI policy indicate that a facility can get “out” only if it permanently eliminates any potential to emit the HAP(s) that had originally triggered MACT and Title V applicability.¹⁶ This can produce absurd results. For example, where a HAP-emitting unit now sees only limited use, or where only a small remnant of HAP-emitting units remain, the OIAI policy would require the facility to continue resource-intensive inspection, recordkeeping, and reporting required by the

9. 42 U.S.C. §7412(c), (d)(5).

10. 42 U.S.C. §§7661(2), 7661a(a).

11. See generally 40 C.F.R. Part 70.

12. Memorandum from John S. Seitz on Potential to Emit for MACT Standards—Guidance on Timing Issues, to Regional Office Air Directors (May 16, 1995), available at <https://www.epa.gov/sites/production/files/2015-08/documents/pteguid.pdf> [hereinafter OIAI Policy Memo].

13. See *id.* at 3-5.

14. *Id.* at 6.

15. See National Emission Standards for Hazardous Air Pollutants: Site Remediation, 67 Fed. Reg. 49397, 49406 (July 30, 2002); see also EPA Guidance Letter from Michael P. Kenyon, to David P. Horowitz (June 21, 2000), available at <https://cfpub.epa.gov/adi/pdf/adi-mact-m000010.pdf> (Title V remains applicable under the OIAI policy with respect to other HAP operations at the facility even after the HAP operation that had triggered Title V applicability has been eliminated).

16. See, e.g., EPA Guidance Letter from Steven Riva, to Raymond F. Yarmac (June 19, 2009), available at <https://www.epa.gov/sites/production/files/2015-08/documents/onceinalwaysin.pdf> [hereinafter Riva Guidance Letter] (facility that reduced its potential and actual HAP emissions below major source levels through reformulation and emission controls would still be required to “comply permanently” with the MACT standard for major sources in the relevant industry category and with Title V permitting requirements); EPA Guidance Letter from Michael Alushin, to William Turetsky (Oct. 25, 2005), available at <https://cfpub.epa.gov/adi/pdf/adi-mact-m060016.pdf> [hereinafter Alushin Guidance Letter] (facility remains subject to MACT standard even where the facility is no longer part of a HAP major source but is now independently owned, and separated from the major source by property owned and operated by an unrelated third party); Memorandum from William T. Harnett, to John Courcier, on the Applicability of the May 16, 1995 Memorandum “Potential to Emit for MACT Standards—Guidance on Timing Issues” for Subpart T Sources Who Become Non-Major After the Compliance Date of the Standard (Mar. 23, 2000), available at <https://www.epa.gov/sites/production/files/2015-08/documents/issue21f.pdf> (indicating that permanent shutdown of the HAP source that had triggered major-source Title V applicability was necessary for the facility to no longer be subject to Title V permit requirements).

relevant MACT standard. The OIAI policy would also require the facility to maintain and periodically renew and pay fees for a Title V permit.

To further complicate matters, in at least one instance, EPA has recognized that a temporary increase of HAP potential emissions should *not* lock a facility forevermore into major source status. In adopting a MACT standard for site remediation, EPA noted that applying the OIAI policy in this context could create disincentives to beginning site cleanups, or selecting the most protective and permanent remediation approach if a facility thereby risked temporarily becoming a major source—and due to the domino effect, becoming subject to other MACT standards that had not been applicable when the facility was only an area source. Claiming “the uniqueness of . . . [the site remediation] source category,” EPA in 2003 created a “special exception” to the OIAI policy for the site remediation MACT standard.¹⁷ Otherwise, EPA has continued to claim that where a facility’s HAP potential emissions exceed major source levels at any time after the first substantive compliance date of a MACT standard, the OIAI policy requires a facility to “comply permanently” with such standard.¹⁸

III. Does the CAA Support the OIAI Policy?

Given the permanent and burdensome consequences of the OIAI policy, one would expect it to be clearly anchored in the terms or structure of the CAA. Review of the CAA and the rationale offered by the OIAI policy indicates otherwise.

The OIAI policy memo at its outset quotes the CAA’s definition of “major source” of HAP: a source that “emits or has the potential to emit” HAPs over the 10 TPY/25 TPY thresholds.¹⁹ The memo also notes that this definition is consistent with the definitions of major source and similar terms regarding applicability of the Title V permit program, as well as the New Source Review (NSR) preconstruction permitting program for non-HAPs.

The OIAI policy memo acknowledges that the CAA “does not directly address a deadline” for a source to avoid a major source MACT by shifting to area source status.²⁰ However, the memo asserts that “the structure of section 112 strongly suggests certain outer limits for when a source may avoid a standard through a limit on its potential to emit,”²¹ and such a deadline is “consistent with the language and structure of the . . . [CAA].”²² For this conclusion, the memo relies entirely on a policy concern: EPA was worried that if a source were allowed to

exit a MACT standard by restricting itself to area (non-major) status, the source might then increase its actual emissions from low, MACT-controlled levels to just under HAP major source levels. EPA believed this would undermine the CAA’s goal of controlling HAP emissions from major sources.²³

These points merit further consideration. As an initial matter, note that the CAA defines HAP major source emission levels using the present tense: emits or has the potential to emit. The definition does not say “emitted or had the potential to emit” at some past time. Rather, the CAA defines a HAP major source based on its current configuration and, equally importantly, the legally enforceable constraints that determine the facility’s potential to emit.

Further, and as indicated by the OIAI policy, the CAA uses the same “emits or has the potential to emit” language in defining a “major stationary source” subject to NSR and a “major source” subject to Title V permitting.²⁴ Yet, EPA has long understood these definitions to allow a once-major source to avoid NSR or Title V permitting at any time by obtaining enforceable limits at minor source levels on the facility’s potential to emit. The OIAI policy offers no explanation for how the identical language in the definition of major source of HAP should lead to the exact opposite result with respect to MACT standards.

The OIAI policy’s claim that it “follows most naturally from the language and structure of the statute”²⁵ is further undercut by EPA’s recognition that for at least one category of HAP emissions (site remediation), the policy would create unwanted disincentives and environmental risk, and therefore should not apply.

Even aside from that point, justifying the OIAI policy as consistent with the CAA goal of controlling HAP emissions from major sources is circular reasoning: the question is what constitutes a major source. As noted, EPA understands the Title V program to allow sources to avoid it by taking enforceable limits at any time to cap below major source thresholds. EPA apparently does not view this as undercutting the CAA goal of requiring operating permits for major sources.

23. *Id.* at 5.

24. See 42 U.S.C. §7602(j) (defines “major stationary source” and “major emitting facility” for CAA purposes generally); §7479(1) (defines major emitting facility subject to NSR permitting in attainment areas); §§7661, 7661a(a) (defines major source for Title V permitting as including any source subject to NSR permitting or other major stationary source). EPA’s NSR and Title V regulations provide likewise. See 40 C.F.R. §51.166(b)(1) (i) (defines major stationary source subject to NSR permitting in attainment areas); §51.165(a)(1)(iv)(A) (defines major stationary source subject to NSR permitting in nonattainment areas); §70.2 (defines major source subject to Title V permitting). With respect to Title V, the inconsistency between the OIAI policy and EPA’s approach in non-HAP programs is particularly stark: EPA’s Title V regulations define a Title V major source by incorporating back-to-back the definitions of major source of HAP and a major stationary source of non-HAPs, with both definitions using the same “emits, or has the potential to emit” language. Yet, the OIAI policy essentially states that a major source of non-HAPs can avoid Title V by being legally limited to minor status, but a major source of HAPs cannot.

25. OIAI Policy, *supra* note 12, at 5.

17. National Emission Standards for Hazardous Air Pollutants: Site Remediation, 68 Fed. Reg. 58172, 58176 (Oct. 8, 2003).

18. Riva Guidance Letter, *supra* note 16, at 1; see also Alushin Guidance Letter, *supra* note 16.

19. OIAI Policy, *supra* note 12, at 2 (quoting 42 U.S.C. §7412(a)(1)).

20. *Id.* at 3.

21. *Id.* at 2.

22. *Id.* at 3.

A. Chevron Deference

It might be argued that the OIAI policy is allowable under *Chevron* deference. In brief, the U.S. Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council* held that if the relevant statutory provisions are ambiguous, a court must sustain the implementing agency's interpretation of the provisions so long as it is "based on a permissible construction of the statute."²⁶ In particular, the agency's interpretation shall, if reasonable, be upheld even if other interpretations are arguably more reasonable or otherwise superior.²⁷

Therefore, the first step in a *Chevron* analysis is to ask whether the statutory language in question is ambiguous. Here, the relevant CAA provisions clearly are not. The language uses the present tense. No argument is apparent for how this is ambiguous, and might be plausibly interpreted as "previously emitted or had the potential to emit." Also, to the extent that the "potential to emit" element within the definition of major source is not clear, EPA has resolved this through regulations that anchor the concept in enforceability.²⁸ Withdrawing the OIAI policy would leave this resolution intact.

B. Auer Deference

If not *Chevron* deference, is the OIAI policy permissible under *Auer* deference? In *Auer v. Robbins*, the Supreme Court held that an agency's interpretation of ambiguous provisions in its own regulations is entitled to judicial deference unless the interpretation is "plainly erroneous or inconsistent with the regulation."²⁹ However, the OIAI policy addresses only the CAA's definition of a HAP major source. The OIAI policy does not reference the EPA's regulatory definition of the term (which in any event merely repeats verbatim the CAA's definition).³⁰ Therefore, *Auer* is not relevant to the OIAI policy.

IV. But Is OIAI Sound Policy?

A. Rationale Stated by the OIAI Policy

As noted, the 1995 EPA memo that creates the OIAI Policy justifies it on a single rationale: a concern that a source with potential HAP emissions above the CAA's major source levels might seek to evade a MACT by reducing potential emissions to below major source levels and then increasing actual emissions to a level just below major source/MACT-applicability levels.

With respect to Title V permitting, the OIAI policy memo does not provide a separate rationale, but instead

states only that under Title V applicability criteria, coverage under a MACT automatically triggers Title V.

Even aside from the gap between the OIAI policy and the plain language of the CAA, the stated rationale for the OIAI policy is further insufficient as legal matter: to the extent a former major source would increase its actual emissions of a HAP after becoming an area (non-major) source, the CAA gives EPA multiple tools to regulate such emissions:

- As noted, the CAA directs EPA to regulate HAP emissions from both major and area sources.³¹
- Under the CAA's "Urban Air Toxics" program, EPA must issue HAP standards for area sources representing 90 percent of the area source emissions of the 30 HAPs that EPA determines to present the greatest threat to public health in the largest number of urban areas.³²
- EPA can require additional reductions in HAP emissions at either major or area sources where existing regulation has not provided an "ample margin of safety to protect public health."³³
- EPA can lower major source thresholds for HAP sources of particular concern.³⁴

Under these authorities, EPA has adopted NESHAPs for over 70 categories of area sources to date.³⁵ For some categories, EPA had written the MACT standard to apply to both major and area sources.³⁶ It is true that to date, for certain industrial source categories, EPA has adopted a major source NESHAP but not an area source NESHAP. However, if additional area source NESHAPs are warranted, EPA clearly has the statutory authority to adopt them. That EPA has chosen to focus its rulemaking resources on other issues rather than additional area source NESHAPs does not justify creating a policy at odds with the plain text of the CAA.

26. 467 U.S. 837, 842-43, 866, 14 ELR 20507 (1984).

27. See *id.* at 866.

28. See *supra* note 8.

29. 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 19 ELR 20743 (1989) (in turn, quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

30. See 40 C.F.R. §63.2 (definition of major source).

31. 42 U.S.C. §7412(d)(5); CAA §112(d)(5).

32. 42 U.S.C. §7412(c)(3); CAA §112(c)(3). Curiously, the OIAI policy memo notes this urban toxics authority, as well as the "residual risk" authority per CAA §112(f)(2), 42 U.S.C. §7412(f)(2), and states that "Together, the Residual Risk Standards and the Urban Area Source Standards ensure protection of public health beyond that achieved by implementation of the MACT standards for major sources." Policy at 6. This observation seems to undercut the OIAI policy's claim that MACT standards must be extended to non-major sources.

33. CAA §112(f)(2), 42 U.S.C. §7412(f)(2). See also note 22.

34. CAA §112(a)(1), 42 U.S.C. §7412(a)(1) ("The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than . . . [10 TPY individual HAP/25 TPY aggregate HAPs], on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors."). See also 40 C.F.R. §63.2 (definition of major source) (providing similarly).

35. See 40 C.F.R. Part 63 and EPA listing of area sources NESHAPs. U.S. EPA, *Compilation of Area Source Rules*, <https://www3.epa.gov/ttn/atw/area/compilation.html>.

36. *E.g.*, 40 C.F.R. Part 63, Subpart N (Chromic Acid Anodizing, Decorative Chromium Electroplating, Hard Chromium Electroplating) and 40 C.F.R. Part 63, Subpart T (Halogenated Solvent Cleaners/Degreasing Organic Cleaners).

The OIAI policy has additional weaknesses from an administrative policy perspective. First, the OIAI policy was expressly adopted as a transitional policy, to be in effect only pending the outcome of a planned future rulemaking to address MACT standard applicability issues.³⁷ In over two decades since issuance of this transitional policy, no such rulemaking has occurred.³⁸

Second, with over 70 area source NESHAPs now in effect, the OIAI policy has become obsolete. When EPA created the OIAI policy in 1995, the agency had just begun the enormous long-term task of developing dozens and dozens of NESHAPs as mandated by the 1990 CAA amendments. Naturally, EPA focused first on developing NESHAPs for major sources, itself a daunting task, and triaged area source NESHAPs to a later time. Under these circumstances, one can appreciate EPA's worries that in the meantime, at least some major HAP sources might follow the standard CAA method of obtaining enforceable limits on their potential emissions and thereby avoid major source HAP controls (which, due to the dearth of area source NESHAPs at that time, could mean avoiding any HAP controls).

Of course, this temporary practical concern does not justify EPA essentially rewriting the CAA. But in any event, this concern has since become moot: with the many area source NESHAPs now in effect, the OIAI policy represents a temporary practical solution to a problem that is now only vestigial or no longer exists. As noted, to the extent there remain certain categories of HAP area sources not covered by an existing NESHAP, the CAA provides EPA with ample authority to fill any such gaps.

Lastly, although not suggested by the OIAI policy, it might also be argued that the OIAI policy protects against a source evading MACT coverage by repeatedly crossing in and out of major source status. However, such a strategy would need to address the definition of potential to emit, which as noted recognizes only certain enforceable limits. Also, such border-hopping has not been a significant issue in other CAA programs that expressly recognize potential to emit limitations as an alternative to major source status. There is no apparent reason to think it would be an issue for HAP programs. To the extent it would be, targeted clarifications to the HAP regulations would seem effective

to address this issues (e.g., provide that a facility that reverts to major source status must meet the applicable MACT standard immediately upon such reversion absent circumstances warranting otherwise).³⁹

B. Practical Impacts

Beyond legal and policy considerations, the OIAI policy has several negative impacts as a practical matter:

- The OIAI policy substitutes a plain-English reading of the CAA with a “desk-drawer rule” that appears nowhere in the CAA’s HAP program or EPA’s implementing regulations. As a result, the OIAI policy creates a trap for the unwary. Aside from undermining EPA’s legitimacy, this situation raises significant concerns under the Administrative Procedures Act,⁴⁰ as well as fundamental due process generally.
- The OIAI policy in effect would seek to punish even an inadvertent one-time increase in a source’s potential to emit by locking the source forevermore into major source status. When such an excursion occurred in the past under a prior owner or operator, the “gotcha” effect is exacerbated.
- More practically, the OIAI policy effectively discourages a facility from reducing potential and actual emissions of HAPs to below major source levels, even through innovative pollution prevention measures that go beyond MACT. Reductions shy of total elimination of the HAP source would still leave a facility subject to a MACT standard.
- The OIAI policy forces small sources into (or keeps them in) Title V permitting, a program designed for large, complex sources. Title V applications in most states are lengthy, detailed, and complicated, and particularly for a small source, often require engaging outside consultant and legal expertise. As noted, Title V permits often run dozens of pages long. Also as noted, a facility in Title V is subject to detailed semiannual and annual reporting and compliance certifications, and to hefty annual emission-based fees that may reflect mostly non-HAP emissions that have nothing to do with why the facility is subject to the fee in the first place.
- Lastly, requiring Title V permitting for OIAI sources also burdens EPA, state, and local agencies that must issue and oversee the permits, when agency resources are increasingly squeezed even for more important tasks.

In summary, the OIAI policy is inconsistent with the express terms of the CAA. As a practical matter, it is not necessary for appropriate control of HAP emissions,

37. OIAI Policy, *supra* note 12, at 2.

38. EPA has twice proposed to modify or supplant the OIAI policy with revised HAP regulations, but neither proposal was finalized. In 2003, EPA proposed to reduce or eliminate MACT applicability for sources that reduce or eliminate their actual HAP emissions under certain circumstances. 68 Fed. Reg. 26249 (May 15, 2003). EPA took public comments on the proposal, but did not advance it further. In 2007, EPA proposed to withdraw and effectively reverse the OIAI policy, by amending the major source NESHAP applicability regulations to allow major sources to become area sources through enforceable limits at any time. 72 Fed. Reg. 69 (Jan. 3, 2007). Following claims that the 2007 proposal would increase HAP emissions and endanger public health and the environment, a rider tucked into an appropriations bill specifically prohibited EPA from using any appropriated funds to finalize the proposal in the 2008 fiscal year. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, §432. Since that time, EPA has not taken further action on the proposal.

39. See, e.g., 72 Fed. Reg. at 74-75 (EPA discussion of possible options in this regard in the preamble to the 2007 proposed rulemaking).

40. See 5 U.S.C. §553 (requiring public notice and comment for rulemaking).

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and was motivated by considerations that are now moot. Worse, the OIAI policy now discourages HAP emission reductions. Withdrawing the OIAI policy would prevent

further needless headache and expense, conserve regulatory agency resources, and would strengthen EPA's regulatory legitimacy.