July 26, 2021

Via Email and Regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Docket ID No. EPA-HQ-OAR-2014-0471
Mail Code 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: A2C Comments on EPAs June 11, 2021 Advance Notice of Proposed Rulemaking Entitled "Addition of 1-Bromopropane to Clean Air Act Section 112 HAP List"

To Whom It May Concern:

The Air Advocacy Coalition ("A2C") appreciates the opportunity to submit the following comments on the U.S. Environmental Protection Agency's ("EPA" or "Agency") advance notice of proposed rulemaking entitled "Addition of 1-Bromopropane to Clean Air Act Section 112 HAP List," published at 86 Fed. Reg. 31225 (June 11, 2021) ("ANPR").

The A2C is an ad-hoc coalition comprised of the American Chemistry Council, the American Coke and Coal Chemicals Institute, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, and the U.S. Chamber of Commerce. The purpose of the A2C is to advocate for sensible and effective federal emissions standards under the Clean Air Act ("CAA"). Companies represented by the members of the A2C make and use 1-bromopropane ("1-BP") and, more broadly, will be affected by the precedent established by the legal and policy determinations that are made by this first-ever listing of a new hazardous air pollutant ("HAP") under CAA § 112.

The A2C has five principal comments on the ANPR:

- ❖ The CAA requires EPA to designate new HAPs[1] through notice-and- comment rulemaking, and not by administrative order.

- ❖ Existing emissions standards cannot lawfully apply to emissions of a newly designated HAP unless and until EPA conducts a notice-and-comment

[1] The term "designate a new HAP" is used in these comments to describe the act of establishing a new HAP. Ordinarily, the act of establishing a new HAP is described as "listing." But EPA in the ANPR states that listing a new HAP is an administrative exercise that follows a prior final decision to establish a new HAP. The term "designate a new HAP" is used to prevent confusion as to the meaning of the term "listing."

rulemaking to determine whether to make the standards applicable to the new HAP.

- ❖ Area sources that become major sources by virtue of EPA's designating a new HAP must be considered existing sources under newly applicable National Emissions Standards for HAPs ("NESHAPs") and must be provided a reasonable period of time to comply with such standards or to become a synthetic area sources.

- ❖ There is no statutory deadline for revising existing NESHAPs to reflect a newly designated HAP.

- ❖ HAP air emissions should not be subject to assessment or regulation under the Toxic Substances Control Act ("TSCA") because they are reduced to a sufficient extent under CAA § 112.

Each of these issues is explained in more detail below.

I. EPA must conduct a rulemaking to designate a new HAP.

EPA explains in the ANPR that it granted administrative petitions to list 1-BP in a Federal Register notice on June 18, 2020[2] and, as a result, it is "now obliged by CAA section 112(b)(3) to add 1-BP to the list of HAP." ANPR at 31228. EPA further explains that it "is not soliciting comments on the June 18, 2020 grant of petitions to list 1-BP as a HAP, including the technical bases for the grant, and therefore, has not reopened that decision for comments. EPA intends to treat any comments on the decision to grant petitions to list as beyond the scope of this action/proceeding." *Id.* at 31229.

While the Agency characterizes its decision to designate 1-BP as a HAP as having already been made, it asserts that the decision does not yet have legal effect. Instead, EPA explains that, "Once added to the HAP list, 1-BP will become subject to regulation under CAA section 112." *Id.* This makes it appear that the Agency interprets the CAA as imposing or allowing a two-step process for designating a new HAP – the first step is making the technical/scientific/legal determination through an administrative order that a substance satisfies the CAA § 112(b) criteria and the second step is to make that decision effective by amending the regulatory HAP list through notice-and-comment rulemaking.[3]

This two-step approach is incorrect and unlawful.CAA § 112(b)(2) directs that revisions to the statutory list of HAPs must be made "by rule." CAA § 112(b)(2), 42 U.S.C. § 7412(b)(2). This is an unambiguous instruction from Congress that a decision by EPA to designate a new HAP must be accomplished through notice-and-comment rulemaking. Notably, CAA

[2] 85 Fed. Reg. 36851 (June 18, 2020).
[3]

§ 112(b)(2) uses the term "list" to describe the designation of a new HAP. This provision does not, as EPA suggests in the ANPR, cause or allow the act of amending the regulatory HAP list to be a non-substantive administrative consequence of a prior decision to designate a new HAP. The CAA clearly directs that the substantive decision to designate a new HAP and the revision of the regulatory HAP list are a single event that must be accomplished through notice-and-comment rulemaking.

We note that CAA § 112(b)(3)(A) provides that "the Administrator shall either grant or deny [a petition to designate a new HAP] by publishing a written explanation of the reasons for the Administrator's decision." CAA § 112(b)(3)(A), 42 U.S.C. § 7412(3)(A). Standing alone, this provision does not necessarily connote notice-and-comment rulemaking. However, as explained more fully below, it must be construed in the broader context of CAA §§ 112(b)(2) and (3). In that broader context, there is no doubt that any decision to designate a new HAP must be made through rulemaking.

For example, all other references in CAA § 112(b)(3) (which broadly is entitled "Petitions to Modify the List") to designating a new HAP or "delisting" an existing HAP use the term "list" to describe the substantive act of making such determinations. CAA §§ 112(b)(3)(B) and (C) state, respectively, that EPA "shall add a substance to the list" and "shall delete a substance from the list" upon specified showings. CAA §§ 112(b)(3)(B), (C), 42 U.S.C. §§ 7412(b)(3)(B), (C). Similarly, CAA §§ 112(b)(3)(D) provides that EPA may "delete" a unique chemical substance belonging to one of the categories of HAPs "not having a CAS [Chemical Abstracts Service] number" (e.g., antimony compounds) from the list upon a specified showing. It is illogical to interpret CAA § 112(B)(3)(A) as authorizing EPA to designate a new HAP by way of an administrative order when all of the companion provisions in that section plainly require a rulemaking to amend "the list."

Similarly, as noted above, CAA § 112(b)(2) – which broadly is entitled "Revision of the List" – unambiguously directs EPA to designate new HAPs "by rule." This clear directive cannot be satisfied if EPA interprets CAA § 112(b)(3)(A) as allowing a new HAP to be designated through an administrative order.

Additionally, CAA § 307(b) provides that judicial review of an EPA action is available when the action constitutes "final agency action." CAA § 307(b), 42 U.S.C. § 7607(b). As EPA notes in the June 2020 Federal Register notice granting the 1-BP listing petitions, CAA § 112(e)(4) provides that a decision to "add a pollutant to the list under [CAA § 112(b)]" is not a final agency action until "the Administrator issues emission standards for such pollutant." CAA § 112(e)(4), 42 U.S.C. § 7412(e)(4). This special provision raises two issues.

First, do certain existing CAA § 112 emissions standards immediately and automatically apply at the time that EPA amends the regulatory HAP list to include 1-BP and, if so, does the immediate and automatic applicability of such standards constitute issuance of emissions standards for 1-BP such that the amendment of the regulatory HAP list causes EPA's decision to

list 1-BP to become a judicially reviewable final agency action? For the reasons explained in Section II, below, EPA is incorrect in suggesting that certain existing CAA § 112 emissions standards immediately and automatically apply upon the listing of 1-BP. Therefore, the listing of 1-BP will not become a final agency action until EPA takes subsequent action through notice-and-comment rulemaking to regulate emissions of 1-BP under CAA § 112. In addition, CAA § 112(e)(4) requires affirmative action by the Administrator for a final agency action to occur – i.e., a new HAP designation becomes final agency action only "when the Administrator ***issues*** emissions standards" for the new HAP. CAA § 112(e)(4), 42 U.S.C. § 7412(e)(4) (emphasis added). No such affirmative action would take place if EPA were to conclude (incorrectly) that previously-issued CAA § 112 emissions standards apply to 1-BP upon its addition to the regulatory HAP list.

Second, is the administrative record of EPA's decision to list 1-BP still open, or is there an ongoing opportunity to supplement the record? EPA seems to suggest in the ANPR that the record is closed because the Agency makes a point of saying that it "is not soliciting comments on the June 18, 2020 grant of petitions to list 1-BP as a HAP, including the technical bases for the grant, and therefore, has not reopened that decision for comments. EPA intends to treat any comments on the decision to grant petitions to list as beyond the scope of this action/proceeding." ANPR at 31229.

Yet, EPA at the same time makes it clear that the June 2020 decision to grant the 1-BP listing petitions is not the product of notice-and-comment rulemaking (e.g., the June 2020 Federal Register publication is called a "Notice" rather than a "Final Rule," 85 Fed. Reg. at 36851). As such, it is not subject to the strict procedural rulemaking requirements of CAA § 307(d), which include the requirement to establish fixed periods for public review and comment on proposed rules and, correspondingly, limit judicial review to objections "raised with reasonable specificity during the period for public comment." Because EPA has determined that the notice granting the petitions to list 1-BP was not a rule, there is no legal basis for setting a fixed deadline for commenting on EPA's 1-BP listing decision and no legal basis for EPA to reject additional relevant comments, at least until EPA conducts a notice-and-comment rulemaking to amend the regulatory HAP list to add 1-BP. Note that these procedural issues would not exist if EPA had in the first instance made the decision to designate 1-BP as a HAP through notice-and-comment rulemaking.

II. Existing HAP emissions standards that are not pollutant-specific do not apply to a newly designated HAP without further rulemaking.

EPA asserts that it has determined that "the requirements of certain NESHAP could apply immediately to facilities using 1-BP" after 1-BP is added to the regulatory HAP list, "without changes to existing rule language." ANPR at 31230. As detailed below, this assertion is legally flawed because the statute requires EPA to conduct further rulemaking to determine whether and how existing standards apply to a new HAP.

EPA describes four examples of where NEHSAPs might apply immediately.

First, EPA explains that "the numeric limits in coating rules are often based on a limitation on the amount of organic HAP per unit, which often results in facilities reducing the HAP content of their coatings in order to comply with the limits." *Id*. In such cases, "The addition of 1-BP to the HAP list could immediately impact compliance calculations for many NESHAP for coating operations because these rules often define HAP by a direct reference to the HAP list published (and modified) under CAA section 112(b) and codified in 40 CFR part 63, subpart C." *Id*.

Second, EPA notes that "several source category rules also include work practice requirements that require the use of 'low HAP' or 'no HAP' products for either cleaning or adhesive activities." *Id*. at 31231.

Third, "[s]everal NESHAP have requirements that apply to emission sources that are defined to be 'in HAP service' or 'using HAP based Materials.'" *Id*.

Lastly, "some rules regulate halogen emissions from specific process units but define halogen to include only a subset of halogens (e.g., chlorine and fluorine, or just fluorine)." *Id.*

EPA's assertion that certain existing emissions standards might immediately apply to a newly designated HAP is incorrect and contrary to the statute. The CAA requires that § 112-compliant emissions standards be established for each HAP emitted from affected sources in a regulated source category. *Nat'l Lime Ass'n v. EPA*, 233 F. 3d 625, 634 (D.C. Cir. 2000); CAA § 112(d)(1), 42 U.S.C. § 7412(d)(1) ("standards must be established for "hazardous air pollutants listed for regulation pursuant to [CAA § 112(c)]."). Moreover, such standards must be based on actual emissions information from the average of the best performers (for existing source standards) and the best controlled similar source (for new source standards). CAA §§ 112(d)(3), 42 U.S.C. § 7412(d)(3).

The HAP-specific and source-specific inquiries necessarily used to set existing emissions standards did not consider and could not have considered relevant information about 1-BP because 1-BP was not a HAP when the existing § 112 emissions standards were promulgated. Therefore, existing emissions standards cannot lawfully "automatically" apply to 1-BP after it is "listed" because, absent further rulemaking, there is no guarantee that existing emissions standards are "112-compliant" as applied to 1-BP. *See Sierra Club v. EPA*, 551 F. 3d 1019, 1028 (D.C. Cir. 2008) (a generally applicable requirement to minimize HAP emissions is not "112-compliant").

It makes no difference to this conclusion that the various types of emissions standards EPA cites in the ANPR as possibly applying immediately to 1-BP are not HAP-specific. For example, an emissions standard expressed as a "limitation on the amount of organic HAP per unit" (one type of standard identified by EPA in the ANPR as possibly immediately applying to 1-BP) uses "organic HAP" as a surrogate in place of individual emissions standards for each organic HAP emitted by the given affected sources. The use of such surrogate emissions

standards is permissible, provided the use of the surrogate is "reasonable." *Nat'l Lime* at 637. To be "reasonable," the surrogate emissions standard must "reflect what the best source or best 12 per cent of sources in the relevant subcategory achieved with regard to the HAP", which "requires the surrogate's emissions to share a close relationship with the emissions of the HAP." *U.S. Sugar v. EPA*, 830 F. 3d 579, 628 (D.C. Cir. 2016). Without further inquiry, EPA has not demonstrated that an existing surrogate emissions standard is "reasonable" as applied to 1-BP and interested parties have not had the opportunity to comment on EPA's reasoning. That determination must be made through subsequent rulemaking for each relevant standard.

Similarly, EPA may have established existing non-HAP emissions standards based on a finding that switching to 1-BP is a viable compliance alternative. Such a determination would no longer be valid if and when 1-BP becomes a HAP.

III. Area sources that become major sources due to EPA's designation of 1-BP as a HAP must be considered existing sources under newly applicable NESHAPs and must be provided at least three years to come into compliance with newly applicable NESHAPs.

EPA explains in the ANPR that designating 1-BP as a HAP may cause certain HAP area sources to become major sources. EPA notes that "information from TRI … suggests that several sources could become major HAP sources when considering their current 1-BP emissions." ANPR at 31231. Becoming a major source may cause such a source to become subject to major source NESHAPs to which the source was not subject as an area source. "This could include source categories that have requirements applicable to the 1-BP emission sources or could include general source categories, such as industrial boilers." *Id*.

In addition to our concerns raised elsewhere in these comments concerning the process steps that the Agency needs to take before designating a new HAP, we have concerns with three important issues that the ANPR raises. First, sources that become major due to the designation of a new HAP should be considered "existing" for purposes of newly applicable major source emissions standards. The term "new source" is defined to mean "a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulation under this section establishing an emission standard ***applicable*** to such source." CAA § 112(a)(4) (emphasis added), 42 U.S.C. § 7412(a)(4). Regarding NESHAPs that might apply to emissions of a new HAP, for the reasons explained above, existing § 112 emissions standards do not immediately and "automatically" apply to sources of a new HAP. Instead, EPA must undertake rulemaking to extend such standards to apply to the new HAP. As a result, there are no "applicable" emissions standards for area sources that become major sources due to the "listing" of a new HAP.

More generally, the statute is silent as to how existing emissions standards should be construed to apply to affected sources that become newly subject to NESHAPs due to the designation of a new HAP. It would be inappropriate to apply new source standards to area sources that become major sources due to the designation of a new HAP because existing area sources typically are not designed with an eye toward meeting *inapplicable* major source

standards that would become applicable major source standards only after a new HAP designation. As a result, it could be inordinately costly or infeasible to retrofit an existing area source to meet newly applicable new source standards. The definition of "new source" clearly contemplates that a potentially affected source will be on notice of a proposed and final rule that might impose new source standards on the source. Such notice (and the corresponding ability to do necessary compliance planning) does not exist when a source becomes major due to the designation of a new HAP.

Such a transition rule is particularly appropriate because the transition from area source to major source here would not be caused by choices made by affected sources themselves, which presumably is the case in virtually any other circumstance where an area source becomes a major source. Thus, it cannot be said that affected sources assumed the risk. Moreover, because such transition issues are an important aspect of the regulatory problem before EPA, the Agency must carefully consider them and provide reasonable transition provisions to discharge its duty to engage in reasoned, non-arbitrary decision making.

Second, as EPA notes in the ANPR, a compliance deadline must be specified for newly applicable NESHAPs. ANPR at 31231. EPA should apply 40 C.F.R. § 63.6(c)(5) (part of the Part 63 General Provisions), which provides that existing area sources that become major sources must comply by the deadline specified under applicable NESHAPs for such sources or, where no such deadline is set, "the source shall have a period of time to comply with the relevant emission standard that is equivalent to the compliance period specified in the relevant standard for existing sources in existence at the time the standard becomes effective."

The A2C is not aware of any existing major source NESHAP that specifies a compliance deadline for area sources that become major sources. Thus, § 63.6(c)(5) effectively would impose the same compliance deadline on sources that become subject to a NESHAP by virtue of designating a new HAP as the deadline that was set for existing sources at the time the NESHAP was promulgated. As EPA noted in its June 2020 Federal Register notice granting the 1-BP HAP listing petitions, that means § 63.6(c)(5) "allows three years to comply after 1–BP is added to the HAP list." 85 Fed. Reg. at 36854. That would result in an equitable outcome. EPA should depart from the General Provisions and set a different compliance deadline for particular rules where the default deadline would not be reasonable.

Third, an area source that becomes a major source due to the designation of 1-BP as a HAP should, without limitation, be able to become a synthetic area source. Such an approach is particularly appropriate here because, as noted above, a change from area to major due to the "listing" of 1-BP is not a change that occurs due to choices made by affected sources. It would be due solely to a programmatic change made by EPA that is out of the source's control. The ability to become a synthetic area source also would incentivize sources to reduce their emissions to be below the major source thresholds.

IV. There is no statutory deadline for completing revisions to existing NESHAPs needed to reflect the designation of 1-BP as a HAP.

EPA explains in the ANPR that certain existing NESHAPs may need to be revised to accommodate 1-BP. The Agency notes that, "[t]here is no specific period for promulgating standards for newly listed HAPs under CAA section 112(b)(1)." ANPR at 31229. The A2C agrees with this statement. As explained above, the statute provides a mechanism for designating new HAPs, but is silent on the need for or timing of revisions to existing standards to reflect new HAPs. As a result, EPA should take the time that is reasonably necessary to make such revisions and should not impose on itself an artificial deadline for completing the work.

V. EPA has correctly determined that emissions of 1-BP to the air should be regulated under CAA § 112 rather than TSCA.

EPA addresses in the ANPR the potential overlap between the Toxic Substances Control Act ("TSCA") and the CAA. EPA explains that it completed the final risk evaluation for 1-BP under the amended TSCA in June 2020 and "did not find unreasonable risks to the environment or the general population from the evaluated uses of this chemical." ANPR at 31228. More specifically, in the final TSCA risk assessment for 1-BP, EPA concludes that the Agency "will use the authorities in the CAA to protect against risk from emissions to the ambient air of 1-BP and potential impacts to the public health and the environment." Risk Evaluation for 1-Bromopropane (n-Propyl Bromide), CASRN: 106-94-5, U.S. Environmental Protection Agency, Office of Chemical Safety and Pollution Prevention, EPA Document #740-R1-8013 (August 2020) (available at Risk Evaluation for 1-Bromopropane (n-Propyl Bromide) CASRN: 106-94-5 (epa.gov)) at 59. Consistent with TSCA § 9(b)(1), because risks to health and the environment due to 1-BP air emissions can be "reduced to a sufficient extent" under CAA § 112, there is no need to address 1-BP air emissions under TSCA. In the ANPR, EPA "requests comments on additional measures that might be considered to ensure that the impacts from these two distinct programs (TSCA and CAA) are understood by the regulated community and to ensure that unnecessary compliance burden is mitigated to the extent possible." ANPR at 31232.

The A2C agrees with EPA's determination that air emissions of 1-BP should be regulated under the CAA instead of TSCA. TSCA, as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, clearly anticipates possible overlap between TSCA and the other federal environmental statutes administered by EPA and provides mechanisms for preventing such overlap and the resulting redundant regulatory obligations. Here, it is entirely reasonable, if not necessary, for EPA to regulate air emissions of 1-BP under CAA § 112 rather than TSCA.

CAA § 112 provides a comprehensive and detailed scheme for regulating HAP emissions. It provides precise direction to EPA on myriad important issues, such as distinguishing between major and minor emitters, how to distinguish between new and existing sources, how to identify and organize source categories, how to set numeric emissions standards, where and how work practices standards can be used, and how to assess and address "residual risk."

In contrast, TSCA provides no specific instructions for regulating air emissions. In essence, it simply requires EPA to identify and address "unreasonable risks" to health or the environment. In this case, the general must give way to the specific. Because air emissions of 1-BP can be "reduced to a sufficient extent" under the comprehensive regulatory scheme of CAA § 112, regulation of 1-BP air emissions under TSCA is not warranted.

Notably, EPA did not address in the ANPR the requirements of CAA § 112(f) and, specifically, whether the designation of 1-BP as a HAP has any implications for source categories for which the CAA § 112(f) residual risk review has been completed. EPA's longstanding position has been that CAA § 112(f) imposes a one-time obligation for such review and that there is no requirement to repeat or update the review once it has been completed. *See, Citizens for Pennsylvania's Future v. Wheeler*, 469 F. Supp. 3d 920, 925 (N.D. Cal. 2020) ("EPA contends that a follow-up residual risk review is *not* required by the statute because this type of review is mandatory only in connection with the *initial* technology review."); c*f. Louisiana Environmental Action Network v. EPA*, 955 F. 3d 1088, 1093 (D.C. Cir. 2020) ("EPA under section 112(f)(2) must conduct a one-time review within 8 years of promulgating an emissions standard to, among other things, evaluate the residual risk to the public from each source category's emissions and promulgate more stringent limits as necessary "to provide an ample margin of safety to protect public health.").

The A2C agrees with EPA's longstanding interpretation of CAA § 112(f). But as EPA has noted in other contexts, even where the one-time residual risk review has been completed, "there are other [CAA Section 112] authorities that could be equally effective at addressing the problem [of residual risk from HAP emissions]." EPA Should Conduct New Residual Risk and Technology Reviews for Chloroprene and Ethylene Oxide-Emitting Source Categories to Protect Human Health, U.S. Environmental Protection Agency, Office of Inspector General, Report No. 21-P-0129 (May 6, 2021) at 39. Thus, it remains appropriate to address 1-BP emissions under the CAA rather than TSCA, even for source categories where EPA already has completed the CAA § 112(f) residual risk review.

* * * * * * *

Thank you for the opportunity to submit these comments. We look forward to further engagement with the Agency as the process of designating 1-BP as a HAP is completed. Please do not hesitate to contact me if you have questions or need more information.

Sincerely,

/s/ Keith Petka

Keith Petka
Senior Policy Manager
American Petroleum Institute
Chair – Air Advocacy Coalition

cc: P. Tsirigotis
P. Lassiter
S. Miller