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**MEMORANDUM**

**To:** Donald van der Vaart  
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**From:** Allen Jernigan *MB EA JA*  
Marc Bernstein *MB*  
Department of Justice

**Copy:** Keith Overcash  
Division of Air Quality

**Date:** February 24, 2009

**Re:** Applicability of Clean Air Act §112(j) in light of vacatur of §112 emission standards<sup>1</sup>

In your memorandum of January 13, 2009, you requested guidance regarding the applicability of 15A N.C. Admin. Code 2D .1109 in light of the vacatur of related federal rules under the Clean Air Act ("CAA"). 42 U.S.C. §7401 *et seq.*

Section .1109 implements §112(j) of the CAA, which relates to the hazardous air pollutant ("HAP") control program of §112(d). *See* 42 U.S.C. §7412. Under §112(d), EPA is required to promulgate emission limits (known as maximum achievable control technology standards or MACTs) for HAPs. The MACTs for each source category must be promulgated by deadlines that are set forth in §112(e). If EPA "fails to promulgate a standard for a category" by

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<sup>1</sup> This is an advisory memorandum only. It has not been reviewed or approved according to the procedures for issuing an Attorney General Opinion.

the §112(e) deadline, §112(j) – known as the MACT “hammer” provision – requires sources to apply for HAP permits within a specified period following EPA’s failure. The burden then falls on the permitting authority (which for sources in North Carolina is the State) to develop emission limits to fill the gap left by EPA’s failure.

EPA was required to promulgate MACTs for various types of boilers (the “Boiler MACT”) and brick and clay structural manufacturing processes (the “Brick MACT”) by November 15, 2000. 67 Fed. Reg. 6521, 6524 (Feb. 12, 2002). EPA promulgated the Boiler MACT and Brick MACT in 2003 and 2004, respectively, but both were vacated in 2007. *See NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007) (vacating the Boiler MACT); *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007) (vacating the Brick MACT). The Boiler MACT was vacated because of the vacatur of a rule governing HAPs from incinerators. The incinerator rule was held to be inappropriately narrow in scope causing many sources to fall improperly under the Boiler MACT rule. The vacatur of the incinerator rule diminished the scope of the Boiler MACT, potentially upsetting the calculation of MACT levels for boilers under §112(d) and thereby necessitating vacatur of the Boiler MACT as well. *NRDC*, 489 F.3d at 1261-62. The Brick MACT was vacated because EPA calculated MACT levels based on an erroneous interpretation of §112(d) and because EPA imposed “work practice” standards under §112(h) for a subset of kiln sources without making the findings required to adopt that type of standard. *Sierra Club*, 479 F.3d at 880-84.

We understand your inquiry to relate to the effect of these vacaturs on the deadlines under §112(j). That is, the question is whether the Boiler MACT and Brick MACT were “promulgated,” thereby not triggering §112(j), even though the rules were subsequently vacated.

Vacatur of a federal rule returns all parties to the *status quo ante*. *E.g.*, *Air Transp. Ass’n of Can. v. FAA*, 254 F.3d 271, 277 (*held*, “final” rule was reduced in status to “initial” rule because “initial” rule had been previously vacated), *modified on other grounds*, 276 F.3d 599 (D.C. Cir. 2001). Vacatur is also retroactive. *E.g.*, *Nat’l Fuel Gas Supply Co. v. FERC*, 59 F.3d 1281 (D.C. Cir. 1995). For example, in *Env’tl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004), the CAA required EPA “within eighteen months . . . [to] carry out the Administrator’s regulatory responsibilities . . . .” Although EPA promulgated a rule pursuant to this directive, the rule was subsequently vacated, *see Am. Corn Growers Ass’n v. EPA*, 291 F.3d 1, 3 (D.C. Cir. 2002), which reinstated EPA’s obligation to “carry out” its “regulatory responsibilities . . . .” The intervening vacatur “restored the status quo before EPA promulgated those regulations. That status quo presented a situation wherein EPA had *failed to promulgate* regulations in accordance with the express deadline in §7492(e)(1), despite its nondiscretionary, statutory obligation to do so.” *Id.* (emphasis added); *see also Steel Mfrs. Ass’n v. EPA*, 27 F.3d 642, 647-48 (D.C. Cir. 1994) (*held*, EPA’s view that analogous RCRA hammer was implicated when rule was vacated was reasonable and represented the better reading of judicial opinion).

In *Southern Alliance for Clean Energy v. Duke Energy Carolinas, LLC*, 1:08-cv-318, 2008 U.S. Dist. LEXIS 97485 (W.D.N.C. Dec. 2, 2008), *appeal pending*, No. 08-2370 (4th Cir.), the defendant was issued an air permit that was in part based on a federal determination pursuant to §112(n)(1)(A) that rendered §112 inapplicable to the permit. Section 112(n)(1)(A) relates specifically and only to electric utility steam generating units and not, for example, to sources subject to the former Brick and Boiler MACTs. The defendant then initiated construction in reliance on that permit. The §112(n)(1)(A) determination was subsequently vacated, making §112 applicable. The court held that the vacatur restored the parties to the *status quo*, resulting in the necessity for immediate remedial measures to assess potential noncompliance under the statutory provisions of §112 that applied in the absence of the vacated rule. The court specifically determined that the subsequent vacatur of the rule rendered the statute applicable “at the time [the defendant] began its construction . . . and the completion of a MACT process was required before construction began.” *Id.* at \*10. EPA appears to have endorsed this view in the context of §112. *See* 67 Fed. Reg. 6792, 6794 (Feb. 13, 2002) (“The consequence of vacating the present [§112] rule before EPA promulgates a replacement rule is that the statutory ‘hammer’ provisions would operate with respect to major sources.”).

The above discussion indicates that the general rule of retroactivity applies to vacatur that occurs in the context of §112. As *Southern Alliance* confirms, this is the case despite the result that a regulated party may be held accountable for not acting in the past even though the law at the time required no action. Although the court in *Southern Alliance* was addressing issues relating to an electric utility steam generating source, its analysis was not founded on §112(n)(1)(A) specifically. To the extent relevant, the Brick and Boiler MACTs share the same context as *Southern Alliance*, that is, the general procedural framework of §112.

Arguments to the contrary have been made asserting that vacatur is not tantamount to a “failure to promulgate.”<sup>2</sup> The argument suggests that promulgation occurs when the rule is published in the Federal Register and subsequent vacatur does not upset that fact even if it renders the rule a legal nullity. Although this interpretation may have been endorsed under other statutes, *see, e.g., Horsehead Res. Dev. Co., Inc. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997) (RCRA), it appears to be inconsistent with the use of the term “promulgate” under the CAA. *See Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 23 (D.C. Cir. 1979) (*held*, “promulgation” under the CAA does not mean publication in the Federal Register); 42 U.S.C. §7607(b)(1) (deeming publication in the Federal Register to be “notice of . . . promulgation” of a rule as distinguish from simply “promulgation” of the rule); *see also Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989) (*held*, under the Clean Water Act, “[p]romulgation means issuing a document *with legal effect*.”) (emphasis added). Moreover, this argument, even if correct, does not address

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<sup>2</sup> *See* Am. Forest & Paper Ass’n, *White Paper Explaining Why the Clean Air Act’s §112(j) “MACT Hammer” Is Not Triggered by the D.C. Circuit’s Vacatur of the Boiler MACT Rule* (June 29, 2007).

the specific circumstance at issue here. Compare *Horsehead Res.*, 130 F.3d at 1093 (*held*, under RCRA “promulgate” refers to publication in the Federal Register), with *Steel Mfrs.*, 27 F.3d at 647-48 (*held*, under same statute vacatur invokes the hammer).

More specifically, §112 itself provides that,

[t]he determination of priorities for the promulgation of standards pursuant to this paragraph is not a rulemaking and shall not be subject to judicial review, except that, *failure to promulgate* any standard pursuant to the schedule established by this paragraph *shall be subject to review under section 304 of this Act*.

42 U.S.C. §112(e)(3) (emphasis added). Section 304 authorizes citizens to sue to compel EPA to perform nondiscretionary duties, such as the promulgation of standards on established schedules. The reasoning of *Envtl. Def. v. Leavitt, supra*, strongly suggests that the promulgation of a standard under the CAA and the subsequent vacatur of such standard renders EPA subject to suit under §304 to compel the promulgation of the standard. Thus, in the language of §112 itself, promulgation followed by vacatur amounts to a “failure to promulgate . . . .”

Therefore, remedial action is now required to address sources formerly subject to the Boiler MACT and Brick MACT. In *Southern Alliance*, the court declined to enjoin ongoing construction under similar circumstances. 2008 U.S. Dist. LEXIS 97485 at \*25-\*26. However, the court established an expedited schedule to assure compliance. See Judgment ¶5, *Southern Alliance*, 1:08-cv-318 (W.D.N.C. Dec. 2, 2008). In accordance with *Southern Alliance*, cessation of operations at sources formerly subject to the Boiler and Brick MACTs is not immediately required but prompt remedial measures should be pursued.