UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Commercial and Industrial Solid Waste Incineration Units: Temporary Use Incinerators and Air Curtain Incinerators Used In Disaster Recovery Interim Final Rule; request for Comment, 90 Fed. Reg. 41,508 (Aug. 26, 2025)	Docket No. EPA-HQ-OAR-2003- 0119

COMMENTS OF SIERRA CLUB, CALIFORNIA COMMUNITIES AGAINST TOXICS, SOUTHERN ENVIRONMENTAL LAW CENTER, HEALTHY GULF, MOUNTAIN TRUE, CLEANAIRE NC, THE COALITION FOR ENVIRONMENT, EQUITY AND RESILIENCE, AIR ALLIANCE HOUSTON, THE COALITION OF COMMUNITY ORGANIZATIONS, CITIZENS' ENVIRONMENTAL COALITION, PUBLIC CITIZEN and EARTHJUSTICE

Submitted via regulations.gov and email on October 10, 2025 by Earthjustice

We submit these comments in opposition to this interim final rule, which carves out an exemption from pollution control requirements for incinerators that the Environmental Protection Agency (EPA) misleadingly describes as "temporary-use" incinerators to be used "during disaster recovery." 90 Fed. Reg. 41,508, 41,508–09 (Interim Final Rule). In practice the Interim Final Rule permits the widespread use of uncontrolled incineration for an indefinite length of time to dispose of any non-hazardous waste present in a declared disaster zone and encourages disaster recovery practices that will likely result in the uncontrolled incineration of hazardous materials as well.

People who have endured natural disasters like the Los Angeles wildfires, the Texas floods, and the hurricanes and storms that recently struck Florida and North Carolina need not suffer additional health harms caused by uncontrolled

waste incineration. Exempting such incineration from pollution control requirements contravenes the Clean Air Act, and the creation of this exemption through an interim final rule—depriving the public of any opportunity to comment on the exemption in a meaningful way—contravenes both the Clean Air Act and the Administrative Procedure Act.

DETAILED COMMENTS

I. The Interim Final Rule is unlawful.

A. EPA has not established good cause to bypass notice and comment.

To promulgate or revise incinerator standards under section 129 of the Clean Air Act, 42 U.S.C. § 7419, section 307(d) of the Act requires EPA to publish a notice of proposed rulemaking, provide an opportunity for comment, including an opportunity for oral presentation, and to provide a response to any comments with the final promulgated rule. 42 U.S.C. § 7607(d)(1)–(6). Here, in blatant violation of section 307(d), EPA issued the Interim Final Rule without providing notice or opportunity for public comment. *See* 42 U.S.C. § 7607(d)(3), (d)(5). EPA also did not provide a summary of "the factual data on which the [] rule is based" or "the methodology used in obtaining the data and in analyzing the data." *See id.* § 7607(d)(3)(A) & (B). Further, because EPA did not provide an opportunity for public comments on a proposed rule, the Interim Final Rule also was not accompanied by a response to comments. *See id.* § 7607(d)(6)(B). The Interim Final Rule therefore violated the procedural requirements of the Clean Air Act.

In the Interim Final Rule, EPA asserts "good cause" to bypass notice and comment rulemaking requirements under the Administrative Procedure Act and therefore did not comply with the procedural requirements for rulemaking under

the Clean Air Act. However, EPA did not have good cause here to bypass notice-and-comment rulemaking when it issued the Interim Final Rule. The APA's good cause exception therefore does not allow EPA to avoid or ameliorate its violation of the requirements of section 307(d) of the Clean Air Act.

To support its assertion of good cause, EPA claims that "[r]ecent disaster events have demonstrated that more incinerators are needed in disaster recovery efforts" and that "[b]ecause hurricane, flood, and wildfire seasons are all underway, with new events continuously creating a critical demand for this authority, the EPA must take immediate action to put in place these temporary-use provisions to ensure that more incinerators are available for recovery efforts during and following emergencies and major disasters." 90 Fed. Reg. at 41,512–41,513. The agency goes on to claim "[p]rior notice and comment would be impracticable given the purpose of this rulemaking to address pressing need, as standard procedures would result in delaying final action until conclusion of many of this year's disaster seasons." *Id.* at 41,513. The agency further claims notice and comment rulemaking is "unnecessary" because the new exemption is essentially the same as a "long-standing" exemption in EPA's standards for other solid waste incinerators, (OSWI). *Id.*

There are several flaws in EPA's argument that there is good cause to bypass public participation in rulemaking, including that (1) there is no factual support for the proposition that more incinerators are needed for disaster recovery; (2) there is no factual support for EPA's assumption that temporary exemption from Clean Air Act requirements is necessary to increase incineration capacity; (3) there is no factual support in the record that allowing time for notice and comment would create a threat to public health and safety; and (4) there are material differences between the action taken in the Interim Final Rule and the 2005 OSWI rule.

First, EPA simply asserts, without any record basis whatsoever, that "more incinerators are needed." To be sure, climate change exists and is causing more frequent natural disasters, including more frequent and severe hurricanes, floods, and wildfires. Nowhere does the agency offer the slightest evidence or explanation for its assumption that the debris from these natural disasters should be burned or that "more incinerators" are needed to burn it, much less that there is the sort of emergency in this regard necessary to support its invocation of the good cause exception. The lack of any factual support in the record for EPA's asserted "need" for more incineration capacity alone is fatal to EPA's good cause claim.

Second, EPA assumes that to meet its desire to allow for the operation of "more incinerators" in disaster recovery efforts, it must exempt them from the Clean Air Act and allow them to operate without meeting any pollution control requirements. EPA does not explain why existing commercial and industrial waste incinerators (CISWI) that are already meeting Clean Air Act emission standards need to be or should be excused from meeting control requirements just because they choose to "combust debris in an area declared a state of emergency by a local or state government or the President." 40 C.F.R. § 60.2556(a). Nor does the agency provide any explanation for assuming that air curtain incinerators should be exempted from emission standards when they burn waste other than "wood waste, yard wastes, and clean lumber," 42 U.S.C. § 7429(g)(1)(C), particularly in light of the agency's own findings (left unmentioned in the Interim Final Rule) that allowing air curtain incinerators to burn demolition debris instead of just vegetative waste causes their emissions of metals, dioxins/furans, polyaromatic hydrocarbons (PAH) and other highly toxic pollutants to increase dramatically—in some instances by orders of magnitude. *See* EPA, Managing Debris after a Natural Disaster: Evaluation of the Combustion of Storm-Generated Vegetative and C&D

Debris in an Air Curtain Burner: Source Emissions Measurement Results (2016) ("EPA Air Curtain Incinerator Study"), Ex. A hereto, at Chapter 5; *see also* Ex. B hereto (containing 2008 materials relating to study planning). EPA also fails to grapple with the evidence that, prior to promulgation of the Interim Final Rule, CISWI and air curtain incinerators were used in North Carolina to clean up Hurricane Helene debris without requiring a regulatory exemption from emissions standards that protect public health.

Third, even if EPA's complete failure to support its assumption that more uncontrolled incinerators are somehow a solution to debris caused by natural disasters were not fatal, the agency also fails to demonstrate it has "good cause" to proceed without notice and comment and neglects its obligation to support the need to do so with evidence. The D.C. Circuit has "repeatedly made clear that the good cause exception is to be narrowly construed and only reluctantly countenanced." *Mack Trucks Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (cleaned up). "As the legislative history of the APA makes clear, [] the exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations...." *Am. Fed. of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (cleaned up); *see also Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) ("The exception excuses notice and comment in emergency situations, or where delay could result in serious harm.") (cleaned up).

Importantly, the APA's good cause exception is appropriate only where regulatory delay would threaten public health or welfare *and* those threats have been documented in the administrative record. *See, e.g.*, *Hawai'i Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (outlining factual showing agency made in support of good cause); *Util. Solid Waste Activities Grp.*

v. EPA, 236 F.3d 749, 754–55 (D.C. Cir. 2001) (providing examples of what might constitute good cause). But in the Interim Final Rule EPA does not even claim than an emergency exists, let alone explain why its desire to permit uncontrolled burning of disaster waste in CISWI and large-capacity air curtain incinerators is an emergency that justifies exempting those incinerators from pollution control requirements without going through notice and comment rulemaking or making the sort of evidentiary showing necessary to support such a claim. Although EPA claims that the hurricane and wildfire seasons are now underway, EPA does not even assert, much less show, that a single person will be harmed if disaster debris continues to be managed responsibly, with construction and demolition debris being sent to landfills and vegetative debris being chipped and used for mulch or combusted in well-regulated air curtain incinerators, rather than all of this debris being burned in incinerators with no control requirements. (EPA also does not explain why it delayed issuance of the Interim Final Rule until the start of the hurricane and wildfire seasons, and countenancing such unexplained delay would create a classic moral hazard.) The complete absence of any evidence of any actual emergency is fatal to EPA's assertion of the good cause exception. The sort of conclusory, *ipse dixit* assertions EPA offers instead are not sufficient.

EPA offers no meaningful explanation (much less evidence) of how any delay caused by allowing notice-and-comment to the EPA's effort to exempt these incinerators would threaten public health or welfare. This is particularly so where current regulations already (unlawfully, *see* Part I.C., *infra*) authorize "temporary use" of other solid waste incinerators (OSWI) for combusting disaster debris. 90 Fed. Reg. at 41,511. In sum, EPA provides no explanation or evidence in the Interim Final Rule to show why existing incineration capacity is not sufficient, to show that the Interim Final Rule would actually expand capacity, or to demonstrate

that any delay in expanding capacity during notice and comment would threaten public health or welfare.

EPA's purported effort to align the treatment of CISWI and large air curtain incinerators in disaster areas with EPA's 2005 OSWI rule—which purports to apply to certain very *small* air curtain incinerators—is not the sort of "emergency" for which courts have found the invocation of the good cause exception appropriate. Instead, courts have reserved the good cause exception for circumstances where there is an evident threat to public health and safety from delay, such as an emergency rule aimed at blunting an anticipated surge in COVID-19 cases during a pandemic, *see Biden v. Missouri*, 595 U.S. 87 (2022) (per curiam), or targeted aviation safety rules following seven fatal helicopter accidents in the previous nine months, *see Hawai'i Helicopters Ass'n v. FAA*, 51 F.3d 212 (9th Cir. 1995).

EPA's claim that notice and comment are "unnecessary" because its OSWI rule includes the same exemption is both false and irrelevant.

To begin with, the Clean Air Act requires EPA to comply with section 307(d) in all rulemakings to which this provision applies. 42 U.S.C. § 7607(d), That EPA took comment on an issue in a previous rulemaking twenty years ago does not make it "unnecessary" to comply with the requirements of section 307(d) in a separate rulemaking now. Indeed, the implications of EPA's contention that a twenty-year-old discussion of an exemption in another rulemaking obviates the need for notice and comment in this rulemaking now is breathtaking. EPA has addressed similar issues in different rulemaking for decades. By the agency's logic, it can now dispense with notice-and-comment rulemaking on a wide swath of issues just because they address an issue EPA has

touched on before. Moreover, EPA ignores the practical implication of its argument. The purpose of the Clean Air Act's notice and comment requirements is to ensure that real people impacted by the agency's rules have an opportunity to comment on them and that EPA has the benefit of their input and responds to it. People interested in commenting on a provision in one rule will not necessarily have any reason to comment on the same or similar provision in another rule for the obvious reason that they may not be impacted by the other rule.

Further, the exemption in 2005 OSWI rule has been flatly unlawful since the time it was promulgated. It was challenged in the D.C. Circuit and—although EPA neglects to mention this fact—the agency sought and obtained a voluntary remand rather than defend the rule as promulgated. To the extent EPA has ever responded to that remand, it did so only in the OSWI rule amendment issued earlier this year, *see* 90 Fed. Reg. 27,910 (June 30, 2025) – which is also flatly unlawful and which has also been challenged in the D.C. Circuit, *see* Sierra Club v. EPA (D.C. Cir. No. 25-1182). At no point has there been a lawful OSWI rule with an exemption of the sort EPA has promulgated in the Interim Final Rule. For this reason as well, EPA's reliance on the 2005 OSWI rule to claim that it need not provide notice and comment on the Interim Final Rule also fails. In addition, despite nearly 20 years of experience since the 2005 OSWI rule was promulgated, EPA provides no evidence to support the proposition that existing incineration capacity has proved insufficient for the stated purpose.

In any event, setting aside the fact that EPA accepted a voluntary remand of the 2005 OSWI rule to address problems raised in legal challenges to the rule, EPA's actions in the Interim Final Rule involve numerous additional deficiencies that could not or would not have been addressed in comments on the 2005 OSWI rule. First, the 2005 OSWI rule's purported legal authority rested on analysis that

would not apply to CISWI. *See* Part I.C., *infra*. Second, CISWI are already subjected to pollution control requirements and the decision to exempt them from the continuous application of those requirements implicates different questions than the categorical decisionmaking about OSWI undertaken in the 2005 rule. Third, both CISWI and large-capacity air curtain incinerators operate differently and are sited differently than the OSWI covered by the 2005 rule and implicate additional considerations. In particular, the fact that some large-capacity air curtain incinerators are portable may create siting issues as well as concerns about localized emissions impacts given their significant capacity relative to the OSWI and small air curtain incinerators covered by the 2005 rule. Finally, there has been twenty years of additional performance testing and scientific research on the potential harmful environmental impacts of uncontrolled incineration of disaster debris that could not have been addressed in comments on the 2005 rule or considered by the agency in making its decision then. Among these is EPA's own EPA Air Curtain Incinerator Study showing that these incinerators' emissions of highly toxic pollutants increase by orders of magnitude when they are used to burn construction and demolition waste. *See* Ex. A. EPA's blithe assertion that notice and comment was "unnecessary" simply because it considered comments two decades ago on a different rule excluding different incinerators for temporary use to burn disaster debris is simply mistaken.

Here the only consequence of delay to allow time for notice and comment are the predictable regulatory costs for operators of CISWI to continue complying with existing pollution control requirements during the pendency of the rulemaking process. EPA does not identify a single disaster or debris site that would be negatively impacted if EPA were to follow this process, which the agency claims it can complete in just a few months. (A process that could already have been

completed had the agency proposed this exemption earlier, given the purported emergency and the agency's apparent reliance on Hurricane Helene and other natural disasters in 2024.) Courts have long expressly rejected the notion that the risk of incurring predictable regulatory costs creates the sort of "emergency" that justifies bypassing notice and comment. *See Mack Trucks*, 682 F.3d at 94 (holding that moving quickly in order to relieve a regulated entity of its compliance burden is not good cause to bypass notice and comment); *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1381 (Fed. Cir. 2017) (holding that "an assertion of mere pocketbook (or balance-sheet) harm to regulated entities is generally not sufficient to establish good cause as nearly every agency rule imposes some kind of economic cost").

Finally, this flaw in the Interim Final Rule is not cured simply because EPA is offering a belated opportunity to provide comment after the Rule has already gone into effect. In the absence of good cause, the promulgation of the Interim Final Rule violated the "procedure required by law" and the Rule must be "set aside." 5 U.S.C. § 706(2)(D). The Clean Air Act and APA require publication of agency proposals for public comment in order to afford affected parties an opportunity to provide input *before* the agency reaches a final decision on policy. Publication of an interim final rule, even if it permits after-the-fact comment, pretermits that process and allows an agency's uninformed predispositions to become calcified in a policy decision that the agency is unlikely to meaningfully revisit regardless of the comments subsequently received. Section 307(d) of the Clean Air Act legislates a detailed and carefully reticulated process that must precede the promulgation of final Clean Air Act regulations that Congress intended to ensure fully vetting and consideration of public concerns. In the absence of good cause, EPA has no legal authority to circumvent this statutorily required process.

Simply allowing *post-hoc* comments neither comports with this required process nor cures the failure to comply with it.[1]

B. EPA has not established good cause to make the Interim Final Rule effective immediately upon publication.

The APA also requires that any final rule be published in the *Federal Register* "not less than 30 days before its effective date" unless "otherwise provided by the agency for good cause found." 5 U.S.C. § 553(d)(3). The Interim Final Rule instead provides that it becomes effective immediately upon publication. 90 Fed. Reg. at 41,508. For the same reasons explained above, EPA has not established good cause to bypass this advance publication requirement.

C. There is no legal basis in the Clean Air Act to exempt covered incinerators from emissions standards "during disaster recovery."

Sections 129(a)(1) and 302(k) of the Clean Air Act require EPA to promulgate appropriate pollution control standards that apply on a "continuous basis" for *all* solid waste incineration units without exception, including specifically CISWI. The plain text of the statute provides for no exceptions apart from four express definitional exclusions carefully drawn by Congress in section 129(g)(1). The fact that Congress considered which solid waste incinerations to exclude and identified four specific, narrow exceptions precludes EPA's claimed license to draw additional, extra-statutory exceptions of its own. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative

[1] Furthermore, as discussed below, the opportunity to provide *post hoc* comments on the Interim Final Rule is not a meaningful offer given EPA's failure to provide the information required to support regulatory proposals under the Clean Air Act's rulemaking provision. *See* 42 U.S.C. § 4607(d)(3); Part II.A., *infra*.

intent." *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)).

This understanding is reinforced by Congress's decisions to limit EPA discretion and instead impose objective, evidence-based criteria for the appropriate emission limitations on incinerators in section 129. Consistent with other changes in the 1990 Clean Air Act amendments, Congress required EPA to establish emissions limitations on new incinerators and provide emissions guidelines for existing units based on an evidence-based analysis of what is achievable through application of the full range of potential control measures rather than conferring discretion on the EPA Administrator to make their own judgments on what units are covered or what emission limits are appropriate. Congress further limited EPA's discretion to determine what is "achievable" by establishing mandatory minimum stringency ("floor") requirements that ensure standards cannot be less stringent than the emission level actually "achieved" by the best performing units. 42 U.S.C. § 7429(a)(2); *Northeast Maryland Waste Disposal Auth. V. EPA*, 358 F.3d 936, 954–55 (D.C. Cir. 2004); *Sierra Club v. EPA*, 479 F.3d 875, 878–80 (D.C. Cir. 2007). This accords with other aspects of the 1990 amendments limiting EPA discretion because Congress recognized that the previous discretionary regime had failed to result in sufficiently stringent emission standards to make Americans healthy again. *See generally Sierra Club v. EPA*, 551 F.3d 1019, 1027–28 (D.C. Cir. 2008) (explaining why Congress confined EPA discretion in the 1990 amendments); *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008) ("In 1990, concerned about the slow pace of EPA's regulation of HAPs, Congress altered section 112 by eliminating much of EPA's discretion in the process.").

Courts have recognized that the Clean Air Act, as amended, is intended to ensure appropriate pollution control standards for "*any* facility that combusts *any*

commercial or industrial solid waste material at all." *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1257–58 (D.C. Cir. 2007) (emphasis added). Congress itself carefully considered whether to make exceptions to this general rule and identified only four narrow exceptions not applicable here.[2] 42 U.S.C. § 7429(g)(1). There is no legal authority under the Act for discretionary exemptions from pollution control standards established for solid waste incinerators. And the Interim Final Rule itself identifies no statutory basis for the "temporary" exemptions the Rule confers.

Courts have expressly rejected efforts by EPA to create extra-statutory exemptions from pollution control requirements in other Clean Air Act contexts. *See, e.g.*, *Sierra Club v. EPA*, 551 F.3d at 1027–28 (rejecting EPA attempt to exempt major sources of hazardous air pollutants from Clean Air Act emission standards during periods of startups, shutdowns, and malfunctions); *U.S. Sugar v. EPA*, 830 F.3d 579, 607 (D.C. Cir. 2016). EPA's assertion of discretion here to exempt CISWI and air curtain incinerators from otherwise applicable pollution controls for "temporary use" during declared disasters likewise "belies the text, history and structure" of the Clean Air Act. *Sierra Club*, 551 F.3d at 1028.

In explaining why it believes it has statutory authority for the Interim Final Rule, EPA principally relies upon the fact that the agency has previously concluded that the Clean Air Act leaves EPA "discretion to delineate" which categories of OSWI are covered by section 129(a)(1)(E), and the EPA's 2005 OSWI rule excluded OSWI "when used on a temporary basis to combust debris during disaster recovery." 90 Fed. Reg. at 41,510 (citing 70 Fed. Reg. 74,780,

[2] Including air curtain incinerators that burn only "wood wastes, yard wastes and clean lumber." 42 U.S.C. § 7429(g)(1).

74,875 (Dec. 16, 2005). EPA asserts that the Interim Final Rule is "based on the same authority and for the same reasons." *Id.* at 41,511.

This reasoning has multiple flaws. To begin with, the legal analysis underlying the exemption for temporary use of incinerators for disaster cleanup in the 2005 OSWI rule is wrong. Consistent with the case law construing the Clean Air Act discussed above, section 129 of the Clean Air Act requires EPA to set pollution control standards for *all* OSWI that meet the statutory definition of a "solid waste incineration unit" and did not confer discretion on the EPA Administrator to determine which categories of other solid waste incinerators it would regulate. Indeed, it was to address the problems with the 2005 rule created by this legal requirement, as reflected in several contemporaneous court decisions, that EPA accepted a voluntary remand of the rule in response to legal challenges.

In any event, even if the Clean Air Act were properly understood to confer discretion on EPA regarding which other solid waste incinerators to regulate, that would not mean that EPA also has statutory authority to create discretionary exclusions for the four categories of solid waste incineration units that are statutorily defined in the Act, including commercial and industrial solid waste incinerators. EPA cannot bootstrap any discretion it might have with respect to OSWI to circumvent Congress's clear requirement to impose continuous emissions limitations on the statutorily identified categories of incinerators.

EPA's own explanation of its statutory authority in the Interim Final Rule underscores the internal inconsistencies of this reasoning. As the Rule notes, the Clean Air Act "specifically describes" four categories of incinerators based on the types of waste burned, before turning to the "unspecified" other categories of solid waste incineration units. 90 Fed. Reg. at 41,510. The Rule further explains that

EPA asserted "discretion to delineate those 'other' categories of solid waste incineration units" because they were not statutorily specified, unlike the first four categories. *Ibid.* But this explanation of why the EPA believes that it has discretion to define which categories of OSWI to regulate is flatly inconsistent with any claim to discretion in the CISWI context. It is precisely because, in EPA's view, OSWI was *unlike* CISWI and the other three statutorily defined categories that EPA claimed in 2005 that it had discretion with respect to determining which categories of OSWI to regulate. Therefore EPA cannot coherently claim discretion to exclude CISWI from emission limitations for "temporary use" to burn disaster debris "based on the same authority and for the same reasons" as explained in the 2005 OSWI rule. EPA thus identifies no viable statutory authority for the actions taken in the Rule.

Finally, the Interim Final Rule is also contrary to law because the Clean Air Act requires *all* emission standards and emission limitations—including those promulgated for incinerators under section 129—to apply on a "continuous basis." *See* 42 U.S.C. § 7602(k). As courts have recognized, this language reflects Congress's requirement that emission limitations under the Clean Air Act apply on a continuous basis and assure continuous emission reduction. *See, e.g.*, *Sierra Club v. EPA*, 551 F.3d at 1027–28; *U.S. Sugar*, 830 F.3d at 607. The Interim Final Rule violates this statutory requirement without legal basis by providing for so-called temporary exemptions from the application of emission limitations for purposes of disaster recovery.

II. The Interim Final Rule is arbitrary and capricious.

The Interim Final Rule is also arbitrary and capricious because there is no meaningful evidentiary support for the Rule in the administrative record, the Rule is not rationally related to the evidence before the agency, EPA failed to meaningfully consider alternative approaches, and EPA failed to consider several important aspects of the problem that the Rule purportedly addresses.

A. The Interim Final Rule is not supported by substantial evidence and there is not a rational relationship between the facts in the administrative record and EPA's decision.

It is axiomatic that final agency rules must be supported by the evidence before the agency during the rulemaking process and there must be a rational connection between the facts found by the agency and the agency's decision. Here EPA has provided no factual support for its decision. As described above, there is no evidence in the record that there is an emergency that requires interim final action; there is no evidence that any delay that might result from proceeding on these issues with a proposed rule and soliciting public comment would threaten public health or safety. There is also no evidence that incineration is the best approach to managing disaster debris or that there is not currently sufficient incineration capacity to address any disaster-related needs even if it were. Nor is there any evidence that uncontrolled incineration of disaster debris poses less of a threat to public health and safety than other approaches to disaster recovery.

While the Interim Final Rule contains unsupported and conclusory agency assertions on some of these points, it cites no empirical support for any of them. But the rulemaking provisions of the Clean Air Act require that any proposal to promulgate Clean Air Act regulations include a "statement of basis and purpose" that includes a summary of "the factual data on which the proposed rule is based"

and "the methodology used in obtaining the data and in analyzing the data." 42 U.S.C. § 4607(d)(3). Furthermore, "[a]ll data, information, and documents" on which the proposed rule relies must be "included in the docket on the date of publication of the proposed rule." *Id.* Here, the docket for the Interim Final Rule provided on the date of publication[3] contains literally no supporting evidence for EPA's decision. The only recent information the docket contains is a copy of the Rule itself, one three-page letter from the air curtain incinerator industry (Docket No. EPA-HQ-OAR-2003-0119-2758), and a two-page draft internal EPA memorandum addressing the impact of the Rule on small businesses (Docket No. EPA-HQ-OAR-2003-0119-2759).

EPA's decision to promulgate the Interim Final Rule despite the utter lack of factual support for its conclusions in the record was arbitrary and capricious. When there is no material evidence in the record, by definition there cannot be a rational connection between the facts found by the agency and the agency's final decision. The EPA's unsupported and self-serving conclusory assertions in the Interim Final Rule are not sufficient.

B. The EPA failed to consider alternative approaches in promulgating the Interim Final Rule.

Sound decisionmaking for agency policy decisions depends upon robust analysis of the pros and cons of alternative approaches to the problem. Here, EPA did not consider any alternative approaches to the problems posed by disaster debris other than uncontrolled incineration. Two self-evident alternatives to uncontrolled incineration of disaster debris would be (1) incineration with

[3] As reflected on the docket on regulations.gov, where "[a]ll documents in the docket are listed." 90 Fed. Reg. at 41,508.

appropriate pollution controls and subject to the protective standards required by the Clean Air Act; and (2) removing debris to appropriate landfills or chipping vegetative debris to create mulch. The Interim Final Rule contains no meaningful analysis of these alternatives, including why they are not feasible, instead simply assuming (without evidence) that the uncontrolled incineration authorized by the Rule would simply "supplant[] alternative combustion options." 90 Fed. Reg. at 41,513. There is no explanation or factual analysis for why incineration is the only viable option for managing disaster debris. There is no explanation or evidentiary basis for EPA's assumption that the alternatives to incineration are not reasonable or safe. Nor does the Rule provide a meaningful explanation or evidentiary support for its assumption that incineration with appropriate pollution controls would not be feasible. Instead EPA assumes uncontrolled incineration is the only option. Without meaningful consideration and analysis of alternative approaches to managing disaster debris, the Interim Final Rule is arbitrary and capricious.

C. The EPA failed to consider several important aspects of the problem in promulgating the Interim Final Rule.

Rational rulemaking decisions require careful consideration of all important aspects of the issue before a final decision is made. But the cursory facts and explanations provided by EPA in the Interim Final Rule show that the agency failed to consider several important aspects of the environmental consequences of allowing uncontrolled combustion of disaster debris. Rather than engaging in meaningful, evidence-based analysis of the environmental consequences of the Interim Final Rule, EPA instead blithely asserts in a single conclusory sentence that because "cleanup responses are required during and following a disaster or emergency, we anticipate that this action to add zero or de minimis environmental

impacts due to this action supplanting alternative combustion options." 90 Fed. Reg. at 41,513.

This unsupported assumption underscores EPA's failure to consider several important and interrelated aspects of the problem, including any evidence-based analysis of potential environmental harms from the uncontrolled incineration of disaster debris under the exemption; the discrete and unique environmental harms that might occur because air curtain incinerators are portable and may place emissions sources in residential or other heavily populated areas; the harmful emissions impact of using air curtain incinerators to combust non-vegetative waste as found by EPA's own research; other scientific research into emissions and air quality impacts during the two decades since the 2005 OSWI rule; the likelihood that operations of incinerators exempted by the Rule will cause or contribute to exceedances of the National Ambient Air Quality Standards; the likely composition of disaster debris and how that would affect emissions from its uncontrolled incineration; the potential for increased environmental harms from the indefinite periods of uncontrolled incineration effectively authorized by the Rule; and the potential impact of uncontrolled incineration of disaster debris on endangered or threated species or their critical habitat. EPA's failure to consider these important aspects of the issue renders its decision to implement the Interim Final Rule arbitrary and capricious.

1. *EPA failed to assess or consider the potential harmful environmental impacts of uncontrolled incineration of disaster debris.*

The Interim Final Rule does not meaningfully evaluate its likely consequences in terms of emissions from uncontrolled incineration of disaster debris. In fact, EPA did not even attempt to estimate the likelihood or extent of harmful emissions of air pollutants from the uncontrolled incineration of disaster

debris or to establish that the alleged harmful environmental effects of any delay in removing the debris outweighed the harmful environmental effects of uncontrolled incineration. The sparse administrative record reflects no meaningful attempt to assess, based on factual evidence, what those emission consequences might look like. Instead EPA simply asserts, without providing any empirical support, that "in emergency situations, quick removal of debris is of utmost importance to maintain public health and safety," 90 Fed. Reg. at 41,512 (citing 70 Fed. Reg. at 74,879), and assumes without further analysis that incineration in units that do not have to meet any emission standards or monitoring requirements is the only option for quick removal. The failure to evaluate the likely environmental consequences of such uncontrolled incineration is arbitrary and capricious.

2. *EPA failed to assess or consider the discrete and unique potential harms of allowing uncontrolled incineration of disaster debris by portable air curtain incinerators.*

The Interim Final Rule authorizes the temporary use of large-capacity air curtain incinerators for disaster recovery without implementing any pollution control requirements for them. To explain its reasons for authorizing this exemption, EPA primarily relies on the reasoning it offered two decades ago to support its decision to provide exemptions for OWSI for temporary use in disaster recovery in a 2005 rule. However, there are important differences between permanently sited OSWI facilities and small air curtain incinerators addressed by the 2005 rule and the large-capacity air curtain incinerators exempted by the Interim Final Rule, because some large-capacity air curtain incinerators are portable and their "temporary use" on site for disaster recovery could have significant localized emission impacts. Unlike permanently situated incineration facilities, when the impact on the local environment will be considered in the permitting process, and unlike small air curtain incinerators with limited capacity,

this Rule effectively authorizes large-scale uncontrolled incineration directly in residential neighborhoods and other heavily populated areas. EPA made no effort to evaluate the discrete and unique harmful impacts on public health and the environment that such large-scale, onsite incineration might cause. The failure to evaluate this issue or to explain why the agency concluded that the benefits of such large-scale onsite incineration outweighed the self-evident threats to public health and safety was arbitrary and capricious.

3. EPA entirely ignored its own prior findings that use of air curtain incinerators to combust non-vegetative wastes results in significant toxic emissions.

EPA entirely failed to consider the environmental harms likely to result from allowing air curtain incinerators to burn non-vegetative waste notwithstanding that agency's own prior findings about such use. EPA's own study established that allowing air curtain incinerators to burn demolition debris instead of just vegetative waste causes their emissions of metals, dioxins/furans, polyaromatic hydrocarbons (PAH) and other highly toxic pollutants to increase dramatically—in some instances by orders of magnitude. *See* EPA Air Curtain Incinerator Study, Ex. A, at Chapter 5. But instead of analyzing these potential harmful effects of providing air curtain incinerators an exemption and then explaining why they are outweighed by other considerations, the Interim Final Rule simply ignores this information (findings from its own research) and assumes with no evidentiary support whatsoever that the toxic emissions from air curtain incinerator use for disaster recovery would be comparable to incineration in other facilities. This was arbitrary and capricious.[4]

[4] EPA also did not explain why it had legal authority to treat air curtain incinerators as exempt when such incinerators are undertaking activities outside

4. EPA relied on stale science, ignoring developments in scientific research into emissions and air quality impacts for the past two decades.

EPA asserted that it promulgated the Interim Final Rule "for the same reasons" as the 2005 OSWI rule. 90 Fed. Reg. at 41,511. Indeed, review of the sparse administrative record that purportedly supports the Rule on regulations.gov shows that EPA did not consider any new performance test data, scientific research, or other factual information in developing the Rule. *See* Part II.A., *supra*. But agency decisions in 2025 should consider the most up-to-date evidence available rather than relying on stale information that is more than two decades old. EPA itself has done considerable research into harmful emissions, including specifically the sorts of uncontrolled emissions authorized by the Rule discussed above, and state environmental and public health agencies and academics have done large amounts of scientific research into emissions and their impacts on air quality and public health in the two decades since the promulgation of the 2005 OSWI rule.[5] EPA's failure to consider this information in promulgating the Interim Final Rule was arbitrary and capricious.

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those excluded in section 129(g)(1) of the Clean Air Act. Congress plainly intended air curtain incinerators to be regulated as solid waste incineration units, with applicable emission limitations, when used to combust solid waste other than "wood wastes, yard wastes and clean lumber." 42 U.S.C. § 7429(g)(1). Notably, Congress specifically required air curtain incinerators that only combust vegetative material and clean lumber to comply with opacity limits as a condition of being excluded from other emission standards. *Id.*

[5] For instance, just in 2023, the Oregon Department of Environmental Quality conducted extensive performance testing evaluating air curtain incinerator emissions. *See Air Curtain Incinerator Emission Testing*, Or. Dep't of Env't Quality, https://perma.cc/576Q-2VYM. The Interim Final Rule does not mention, much less analyze the significance, of this recent pertinent research.

5. EPA failed to consider the potential impact of uncontrolled incineration of disaster debris against the backdrop of existing ambient air quality.

The Interim Final Rule also does not take into account how uncontrolled incineration of disaster debris might impact ambient air quality, including whether it would likely result in exceedances of National Ambient Air Quality Standards. But given background ambient air quality it is likely that permitting uncontrolled incineration of disaster debris will result in air quality that threatens public health and safety in light of EPA's own air quality standards. The failure to consider this aspect of the problem was arbitrary and capricious.

In particular, EPA's unlawful exemption of large-capacity air curtain incinerators from applicable emission standards will have significant implications for areas recovering from natural disasters such as southern Appalachia, a region that continues to rely on such incinerators to dispose of the enormous amount of debris left in the wake of Hurricane Helene. While using air curtain incinerators to dispose of vegetative material may be a slightly better alternative to open burning, these operations still pose considerable risk to public health—especially if they are not well regulated or used to burn non-vegetative disaster debris.

These risks to public health are underscored when placed in the context of existing ambient air quality. In most areas of the country, material use of air curtain incinerators for disaster recovery as authorized by the Interim Final Rule will likely cause or contribute to exceedances of the primary annual National Ambient Air Quality Standards (NAAQS) for fine particulate matter ($PM_{2.5}$).

The Clean Air Act requires EPA to adopt a primary NAAQS for each criteria pollutant, including $PM_{2.5}$, by establishing a maximum ambient concentration that EPA determines "is requisite to protect the public health," while

allowing for "an adequate margin of safety."[6] Exposure to concentrations of air pollutants above these standards is presumptively unhealthy. Exposure to $PM_{2.5}$ pollution is known to have a "causal relationship" with mortality, primarily due to its effects on the cardiovascular and respiratory systems.[7] In addition to being deadly for certain individuals, $PM_{2.5}$ exposure can cause nonfatal heart attacks, decrease lung function, and aggravate respiratory conditions such as asthma and irritation of the airways.[8] In fact, there is no safe exposure level for $PM_{2.5}$. In spite of this significant risk, the Interim Final Rule unlawfully exempts significant sources of $PM_{2.5}$ emissions from applicable emission standards, including those for particulates.

This harm is not theoretical or speculative. Recent air dispersion modeling shows there is a significant risk that large air curtain incinerator operations will cause NAAQS exceedances—including exceedances of the primary annual NAAQS for $PM_{2.5}$, which was recently revised to 9.0 micrograms per cubic meter ($\mu g/m^3$).[9] In the spring of 2024, the U.S. Forest Service conducted air dispersion modeling in support of an application to operate a large-capacity air curtain incinerator in Washington State. Despite using a 500-foot buffer area based on the manufacturer's "safety recommendations," the screening-level modeling predicted

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[6] 42 U.S.C. § 7409(b)(1); *see also* 40 C.F.R. § 50.2(b) (2024) ("National primary ambient air quality standards define levels of air quality which the [EPA] Administrator judges are necessary, with an adequate margin of safety, to protect the public health.").

[7] *See* Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16,202, 16,224–25, 16,277 (Mar. 6, 2024).

[8] *Health and Environmental Effects of Particulate Matter (PM)*, Env't Prot. Agency (May 23, 2025), https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm.

[9] 40 C.F.R. § 50.20(a); 89 Fed. Reg. at 16,202.

exceedances of the NAAQS for $PM_{2.5}$, PM_{10}, and NO_2.[10] For purposes of evaluating compliance with the primary annual NAAQS for $PM_{2.5}$, the model predicted the impact from one air curtain incinerator alone (i.e., not including background concentrations) was between 2.7 µg/m^3 (for flat terrain) and 5.2 µg/m^3 (for complex terrain).[11] Notably, this modeling predicted that maximum $PM_{2.5}$ impacts would occur "at the end of the safety distance (500 feet or 152.4 meters)" for the flat terrain scenario, and even farther away—359 meters, or 1,178 feet—for the complex terrain scenario.[12]

The U.S. Forest Service's screening-level modeling relied on emission factors derived from the results of recent performance testing for large-capacity air curtain incinerators, which was conducted by the Oregon Department of Environmental Quality in the spring of 2023.[13] But even when the U.S. Forest Service performed a "refined" modeling analysis using a much less conservative emission factor for $PM_{2.5}$—which was derived from tests conducted on a small-capacity air curtain incinerator in 2002[14] and an air curtain incinerator of unknown

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[10] U.S. Forest Serv., *Buttermilk Creek Revised Modeling Report* at 6–9 (Feb. 7, 2024). A copy of this "screening-level" modeling report is included for reference as Exhibit C.

[11] *See id.* at tbl.4 (flat terrain scenario) and tbl.5 (complex terrain scenario). These tables show total $PM_{2.5}$ concentrations that include a background concentration of 4.4 µg/m^3; we therefore calculate impacts from the ACI of 2.7 µg/m^3 (for flat terrain) and 5.2 µg/m^3 (for complex terrain).

[12] *Id.* at 7–8.

[13] *See Air Curtain Incinerator Emission Testing*, Or. Dep't of Env't Quality, https://perma.cc/576Q-2VYM.

[14] U.S. Forest Serv., *Refined Modeling Analysis for Buttermilk Creek Carbonator Project*, 7 (Mar. 11, 2024) (describing a performance test conducted by the U.S. Department of Agriculture in October 2002 "using an Air Curtain Model S-217

capacity in 2003[15]—the Service determined "it was not possible to demonstrate compliance with the NAAQS using the maximum material processing rate of 15 tons/hour."[16] After running another model using the less conservative emission factor combined with a lower throughput rate, the resulting modeled $PM_{2.5}$ impact was 2.55 µg/m^3.[17]

Notably, before reducing the throughput rate, the U.S. Forest Service's 2024 modeling analysis revealed exceedances of the primary annual NAAQS for $PM_{2.5}$—even when using outdated emission factors—despite the fact that the background concentration was determined to be just 4.4 µg/m^3.[18] In contrast, EPA's compilation of certified 2024 monitoring data shows that the vast majority (over 95%) of U.S. counties have a background $PM_{2.5}$ concentration that exceeds 4.4 µg/m^3.[19] In fact, even using the lowest, least conservative modeled impact from the U.S. Forest Service's 2024 analysis (2.55 µg/m^3), large air curtain incinerator

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ACI, having a capacity of 6 tons per hour). A copy of this "refined" modeling report is included for reference in Exhibit C.

[15] *Id.* (describing a performance test conducted by the U.S. Department of Agriculture in June 2003 "using a McPherson Model M30 ACI," and noting that "[t]he burn rate of the unit was not identified").

[16] *Id.* at 7.

[17] *Id.* at 10 tbl.8.

[18] *Id.* at 11 tbl.9.

[19] *See* U.S. Env't Prot. Agency, *PM2.5 Design Valies, 2024 (xlsx)*, at tbl.4a (June 3, 2025), https://www.epa.gov/system/files/documents/2025-06/pm25_designvalues_2022_2024_final_05_28_25.xlsx (showing that 519 of the 541 listed counties have a 2022–2024 design value of 4.5 µg/m^3 or higher).

operations in over 77% of all U.S. counties would likely cause or contribute to a NAAQS violation based on those counties' background concentrations.[20]

This risk is only exacerbated by EPA's unlawful exemption of such units from emission standards. Allowing large-capacity air curtain incinerators to operate without complying with applicable emissions standards could contribute to NAAQs exceedances for $PM_{2.5}$ in communities recovering from natural disasters. For example, this practice could cause such exceedances in western North Carolina communities, which are still recovering from the devastating impacts of Hurricane Helene. Regulatory air monitors are located in Asheville[21] and Hickory,[22] North Carolina. These areas are similar to the complex terrain scenario in Washington State's air dispersion modeling because they are both in the foothills of the Blue Ridge Mountains. Adding the predicted impact for complex terrain (5.2 µg/m^3) to the current $PM_{2.5}$ background concentration at the air monitoring site in Asheville, North Carolina shows that the operation of just one ACI would result in ambient $PM_{2.5}$ concentrations of 11.3 µg/m3.[23] Similarly, in Hickory, North Carolina, the operation of just one ACI would result in ambient PM2.5 concentrations of 13.3 µg/m3.[24] Both of these values far exceed the primary annual NAAQS for

[20] *See id.* (showing that 419 of the 541 listed counties have a 2022–2024 design value of 6.5 µg/m^3 or higher).

[21] AQS Site ID 37-021-0034

[22] AQS Site ID 37-035-004

[23] *See* U.S. Env't Protection Agency, *PM2.5 Design Values, 2024 (xlsx)* at tbl.5a (last updated June 3, 2025), https://www.epa.gov/system/files/documents/2025-06/pm25_designvalues_2022_2024_final_05_28_25.xlsx (showing certified 2022–2024 design values for each PM2.5 monitoring site in Column M).

[24] *Id.*

$PM_{2.5}$, meaning communities in these areas would be exposed to levels of air pollution that is presumptively unhealthy—and potentially deadly.

EPA's failure to consider how the uncontrolled incineration of disaster debris would affect background ambient air quality, including the likelihood that it would lead to harmful exceedances of appliable NAAQS, or to consider the scientific evidence of how air curtain incinerator use impacts ambient air quality, was arbitrary and capricious.

6. EPA failed to evaluate the likely composition of disaster debris and how that would affect emissions from its uncontrolled incineration.

EPA also failed to evaluate the likely contents of disaster debris and what that composition might mean for potential emissions from its uncontrolled incineration, much less explain why inspection and segregation of any co-mingled material is not necessary to avoid harmful environmental impacts from uncontrolled incineration. The failure to consider this aspect of the problem was arbitrary and capricious.

There are at least two important aspects of the likely composition of disaster debris that EPA failed to consider. First, it is almost certain that disaster debris will contain some hazardous materials intermingled in a manner that is difficult to detect or segregate. And second, even non-hazardous disaster debris will likely include materials the incineration of which will result in harmful and toxic emissions.

To begin with, EPA did not consider the likelihood that disaster debris will in fact contain hazardous materials and may well do so in a manner that renders it difficult to identify or segregate. While the Interim Final Rule purports to limit uncontrolled disaster debris incineration to "non-hazardous materials" that are "the

remains of something that was destroyed, broken, or discarded as a result of a disaster or emergency," 90 Fed. Reg. at 41,511, simply saying that does not make it so.

The Rule contains no mechanism to ensure that the debris gathered and burned does not, in fact, include hazardous materials. There are numerous sources of hazardous materials that may become imbricated within disaster debris, including mercury and other materials from thermometers and fluorescent or compact fluorescent bulbs; paint supplies such as paints, paint thinners, acetone, polishes, stains, and varnishes; aerosols; automotive supplies such as antifreeze, transmission fluids, gasoline, and motor oils; batteries and rechargeable batteries; household cleaners including ammonia and bleach products; lawn care products including fungicides, herbicides, insecticides, and pesticides; electronics waste; resins in treated lumber; and propane and propane tanks. To the extent that the disaster strikes in commercial or industrial areas, the amount of co-mingled hazardous debris could be even worse.

EPA makes no effort to analyze or provide evidence regarding the likely presence of such hazardous materials within disaster debris, or the extent to which it may be detectable within large piles of disaster debris intended to be incinerated under the exemption provided in the Interim Final Rule. In the absence of any assurance mechanism, it is almost certain that disaster debris incinerated under the exemption will contain such hazardous materials. This is particularly so because following the types of disasters the Rule is intended to encompass—including hurricanes, tornados, large-scale flooding, wildfires, and bioterrorism—it is highly likely that such materials would be intermingled within disaster debris in a manner that would be very difficult to identify and segregate. EPA also provides no evidence or explanation regarding the potential harmful environmental impacts of

incinerating any incidentally present hazardous materials incinerated as disaster debris. The failure to consider and evaluate this issue was arbitrary and capricious.

Second, EPA completely ignores its own findings that burning demolition debris that is classified as non-hazardous vastly increases toxic air pollution. *See* EPA Air Curtain Incinerator Study, Ex. A, at Chapter 5; Part II.C.2, *supra*. Consequently, the agency also failed to consider the harmful emissions that might result from incineration of nonhazardous disaster debris or to analyze the likely contents of disaster debris and likely environmental consequences of incinerating such materials. Debris from major disasters in residential areas will almost certainly include finished and treated wood products, insultation materials, fire retardants including possible asbestos, and the contents of buildings including furniture, consumer electronics, and artificial materials. Debris from commercial and industrial areas likely have materials that would produce even more toxic emissions when burned. As discussed above, given the nature of the disasters that would trigger the exemption, such materials would likely be inextricably intermingled with other disaster debris and would be difficult to identify and even harder to segregate. The EPA also fails discuss its own prior acknowledgement (in its June 23, 2008 response to comments on the Disaster Debris Reduction Pilot Project – St. Bernard Parish following Hurricane Katrina, *see* Ex. B) of the risks of uncontrolled burning of materials containing asbestos in air curtain incinerators.

The sparse administrative record does not contain any factual information about the likely composition of the disaster debris that the Interim Final Rule authorizes to be combusted without pollution controls, and EPA makes no meaningful effort to assess the likely emissions associated with such uncontrolled incineration informed by an evidence-based assessment of the likely composition of the covered debris. The failure to consider the likely composition of the disaster

debris in question and the likely emission consequences of its uncontrolled incineration was arbitrary and capricious.

7. EPA failed to evaluate the potential environmental impacts of effectively authorizing indefinite uncontrolled incineration of disaster debris.

The Interim Final Rule purports to be authorizing "temporary use" of CISWI and large-capacity air curtain incinerators to burn disaster debris. But in light of the indefinite nature of most disaster declarations and the limited constraints in the Rule for continued uncontrolled incineration without any time limitations, the Rule authorizes what is effectively indefinite license to continue uncontrolled incineration in many locations in the United States. Specifically, it allows uncontrolled burning of these wastes for up to eight weeks without notice to anyone, for an additional eight weeks with notice to the permitting authority, and indefinitely with the permitting authority's approval. 40 C.F.R. § 60.2041. This is further exacerbated by the fact that there is often no mechanism and little incentive to terminate disaster declarations. The preamble to EPA's Interim Final Rule misleadingly suggests the exemptions will be temporary but the rule text allows them to operate indefinitely without meeting emission standards or obtaining a permit. Thus, it allows and encourages long-term uncontrolled incineration of disaster debris. EPA's failure to evaluate this practical reality and its consequences for harmful emissions and public health and safety was also arbitrary and capricious.

8. EPA failed to undertake required consultations with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service regarding whether uncontrolled incineration under the Interim Final Rule might affect endangered or threatened species or their habitat.

Finally, EPA also does not address in the Interim Final Rule whether it undertook consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service under section 7 of the Endangered Species Act as required for any agency action that may affect endangered or threatened species or their habitat. *See* 16 U.S.C. § 1536. Uncontrolled incineration of disaster debris will result in the release of harmful and likely toxic emissions that could reasonably be expected to affect and potentially jeopardize listed species when released in the vicinity of critical habitat. The Rule contains no consideration of the threat posed by uncontrolled incineration to listed species much less impose the sorts of restrictions that would be necessary to protect critical habitat of listed species. The failure to undertake consultation and to consider the potential risks to listed species was both arbitrary and capricious and contrary to law.

CONCLUSION

For these reasons, the Interim Final Rule should be rescinded.

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Respectfully submitted,

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