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June 21, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Pruitt:

I write to inform you that the Environmental Protection Agency's (EPA's) Region V is overstepping its authority and acting contrary to long-standing EPA policy. Region V has issued a notice of violation to MGPI of Indiana, LLC (MGPI) for constructing and planning to construct a total of ten new whiskey aging warehouses at its distillery in Lawrenceburg. This action will not only cost jobs, but is also legally unjustifiable: Region V failed to provide "fair notice" of the alleged violation because its position is contrary to decades of EPA guidance, which fully supports MGPI's position. Region V's argument is also in violation of EPA's regional consistency regulations, and further depends on an invalid "indefinite" stay issued under a statutory provision that is explicitly limited to only 90 days. No formal lawsuit has yet been filed. I recommend your intervention before Region V files such a suit, which will only make these issues more difficult to resolve.

I. Region V insists on unproven control technology not required anywhere in the country.

MGPI's new whiskey aging warehouses are part of a broader strategy that has been simultaneously good for the environment and the economy: MGPI converted a coal-fired boiler to natural gas, purchased new energy-efficient equipment, and installed state-of-the-art emissions control technology. This activity has doubled the number of jobs MGPI provides to the region, to over 100. All the while, air pollution in the Lawrenceburg area has *decreased* significantly, with the area recently coming into "attainment" for ozone standards.

Despite these improvements, Region V is not satisfied with the measures that MGPI has implemented, and has asserted that MGPI must go further and control the "angels' share" emissions during the whiskey aging process. As whiskey ages, a small amount of the product naturally and unavoidably evaporates out of the barrels and into the air. The EPA has, for decades, taken the view that these are "fugitive emissions", generally not subject to regulation; the EPA first announced this position as long ago as 1978. State environmental regulators in Kentucky, Ohio, Maryland, Tennessee, and Indiana itself agree. There is good reason for this: studies, including those by EPA, have shown that barrel environment is critical in whiskey aging, and even minor changes in air conditions could interfere with this environment and ruin the

aging process. Despite this, Region V is demanding that MGPI install costly and unproven emissions control technology, which may ruin the quality of MGPI's whiskey.

II. Region V did not provide “fair notice” of the policy MGPI has allegedly violated.

Beyond being economically harmful, Region V's action also rests on dubious legal grounds. Under the “fair notice” doctrine, agencies like the EPA have an obligation to tell the regulated community the “rules of the game” in advance of bringing an enforcement proceeding for allegedly violating them. Yet as of the date of the alleged violation, EPA's statements of position to the regulated community consistently reiterated that angels' share emissions were fugitive. Indeed, EPA headquarters publicly announced this position in a 2000 letter to Senator Bob Smith (R, NH), then Chairman of the Committee on Environment & Public Works. The EPA's Region IV, which contains the whiskey distilleries in Kentucky and Tennessee, shares this view. One study could not find “*any facility in the nation*” that is mandated to control emissions from whiskey aging operations.¹ Even California does not regulate these emissions from its own distilleries, recognizing that control technology would interfere with the whiskey aging process.

Companies like MGPI are entitled to rely in good faith on consistently articulated EPA policies such as this. I have serious concerns about Region V attempting to hold MGPI liable for failing to anticipate that Region V would take a position contrary to the rest of the agency, and state regulators. As the late Justice Scalia put it for a unanimous Supreme Court decision: “It is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct ... which is in fact different than the rule or standard formally announced.”² Notably, courts have previously determined that the EPA failed to provide fair notice of an alleged violation when the positions of regional offices and headquarters conflicted.³

III. Region V's stance flaunts EPA's regional consistency guidelines, putting future economic growth in Indiana at risk.

Region V's position not only calls into question basic principles of due process, but also violates the EPA's own regulations meant to assure fair and uniform application of the Clean Air Act. The EPA has promulgated “regional consistency” guidelines that require actions taken under the Act to be consistent with both headquarters policy and the activities of other regions.⁴ As

¹ San Joaquin Valley Unified Air Pollution Control Dist., Appendix K: Reasonable Available Control Technology Analysis (RACT) for Wine Fermentation, Wine Storage Tanks, and Brandy Aging at 12-13 (Apr. 30, 2007) (emphasis added), available at https://www.valleyair.org/Air_Quality_Plans/docs/AQ_Ozone_2007_Adopted/28%20Appendix%20K%20April%202007.pdf.

² *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

³ *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995).

⁴ *See* 40 C.F.R. § 56.1 *et seq.*

discussed, Region V's position conflicts with policy at every level—state, other EPA regional offices, and EPA headquarters—and cannot stand under these guidelines.

Far from an abstract legal violation, Region V's policy is already beginning to have negative effects on economic growth in Indiana, which the guidelines are designed to prevent. MGPI wishes to further expand its business, and requires additional aging warehouses. MGPI has identified available warehouse space across the river in Kentucky, under the jurisdiction of EPA's Region IV. Because Region IV (like every EPA regional office other than Region V) adheres to the agency's longstanding position with regard to fugitive whiskey emissions, MGPI can age its whiskey there without having to navigate inconsistent regulatory interpretation and enforcement. Unless the position taken by a staff lawyer in Region V is reversed, MGPI will be forced to locate this and perhaps future expansions in Kentucky rather than Indiana. The regional consistency guidelines are meant to avoid just this type of situation where inconsistent regional positions cause economic development to be redirected from one state to another.

IV. Region V improperly relies on an invalid stay to manufacture a violation.

Region V's enforcement case is all the more questionable because it relies on a stay that has long since expired. In 2008, President Bush's EPA issued a rule clarifying that fugitive emissions—such as MGPI's angels' share emissions—should generally not be counted when determining whether a new construction project can proceed. In 2009, President Obama's EPA stayed that rule pursuant to the Clean Air Act, which authorizes EPA to stay rules pending reconsideration, but *only* "for a period not to exceed three months."⁵ That three month stay has turned into an indefinite one: the 2008 rule is still on hold, nine years after it was supposed to take effect. The EPA has not even proposed potential revisions to the 2008 rule. Courts have held this tactic invalid, under both the Administrative Procedure Act and the Clean Air Act.

V. Action is required.

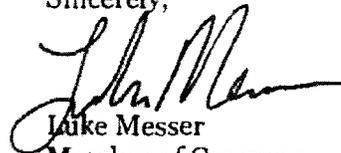
As you can see, Region V's action is an example of regional overreach, with significant adverse policy, economic, and legal consequences if allowed to continue.

I hope that you will take action to ensure that Region V does not continue this conduct. To date, Region V has only issued a notice of violation. The matter has not yet come to formal litigation, meaning there is an opportunity for Region V to reconsider its decision before the adverse consequences are fully felt. As Administrator, you have made clear your commitment to ending regulatory overreach, including by EPA regions. Asking Region V to reconsider its pending notice of violation would further this agenda, and help rein in a regional office that is pursuing minimal environmental advantage at the cost of concrete economic growth in the American heartland.

⁵ 42 U.S.C. § 7607(d)(7)(B).

EPA Administrator Scott Pruitt
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Sincerely,



Luke Messer
Member of Congress

cc: Justin Schwab
Deputy General Counsel
U.S. Environmental Protection Agency