

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NEW JERSEY, <i>et al.</i> ,	)	
	)	
Petitioners,	)	Docket No. 05-1097
v.	)	and consolidated cases
	)	05-1098, 05-1159, 05-1160,
UNITED STATES ENVIRONMENTAL	)	05-1163, and 05-1174
PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

**ENVIRONMENTAL PETITIONERS’ MOTION FOR A STAY PENDING REVIEW  
AND FOR EXPEDITED CONSIDERATION**

Petitioners Chesapeake Bay Foundation (“CBF”), Environmental Defense (“ED”), National Wildlife Federation (“NWF”), Natural Resources Council of Maine (“NRCM”), Natural Resources Defense Council (“NRDC”), The Ohio Environmental Council (“The OEC”), Sierra Club, U.S. Public Interest Research Group (“U.S. PIRG”), and Waterkeeper Alliance (collectively, “Environmental Petitioners”) hereby move for a stay of respondent EPA’s action removing the coal-and oil-fired electric generating industry (“power plants”) from the list of source categories for which the Clean Air Act (“CAA” or the “Act”) requires strict air toxics standards. 70 Fed. Reg. 15,994 (March 29, 2005) (“delisting”). In addition, Environmental Petitioners move for expedited consideration by this Court. *See* D.C. Cir. R. 27(f); D.C. Cir. Handbook at 33.

In December 2000, EPA placed power plants on the list of source categories that must be regulated under the Clean Air Act’s highly protective control program for the hazardous air pollutants (“HAPs”) listed in CAA § 112(b), 40 U.S.C. § 7412(b). In March 2005, however, EPA reversed its position and delisted power plants, thereby shunting them out of this program.

The CAA allows EPA to delist a source category that emits HAPs *only* if it first determines that the category poses minimal health and environmental risks. 42 U.S.C. § 7412(c)(9)(B). EPA made no such determinations before delisting power plants and the agency's delisting therefore is flatly unlawful. Because EPA's delisting decision will cause serious and irreparable harm to Environmental Petitioners' members before the present case can be resolved, a stay pending review is needed.<sup>1</sup>

All State petitioners have indicated that they consent to this motion and are in support of the relief it seeks. Counsel for Environmental Petitioners has contacted or attempted to contact all opposing counsel by telephone to inform them of this motion.<sup>2</sup>

## **BACKGROUND**

### **I. FACTUAL BACKGROUND.**

Domestic power plants emit vast quantities of toxic air pollution. There are over 1,100 units at more than 450 power plants nationwide, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000), and collectively they are the largest domestic source of manmade mercury pollution, emitting approximately 48 tons each year. 69 Fed. Reg. 4,652, 4,691 (Jan. 30, 2004). In addition, coal-

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<sup>1</sup> Environmental Petitioners already have requested that EPA stay the challenged delisting, Letter from Jon Mueller, Chesapeake Bay Foundation *et. al*, to Administrator Johnson (Mar. 30, 2005); Letter from James S. Pew, Earthjustice, to Administrator Johnson (May 17, 2005) (Attached hereto as Exh. 1), but EPA has denied those requests. Letter from Assistant Administrator Holmstead to Peter J. Harvey, Attorney General of New Jersey, and Jon P. Devine, Jr., NRDC, at 2 (June 24, 2005) (hereinafter "EPA Reconsideration Letter") (Attached hereto as Exh. 2).

<sup>2</sup> Environmental Petitioners' counsel were unable to reach counsel for intervenor-respondents Cinergy Corp., State of Kansas, and State of Nebraska by telephone, but left telephone messages for them.

burning plants annually emit 56 tons of arsenic, 62 tons of lead compounds, 62 tons of chromium compounds, 23,000 tons of hydrogen fluoride, and 134,000 tons of hydrochloric acid.<sup>3</sup>

The adverse public health and environmental effects of power plants' toxic emissions are both serious and long lasting. Mercury pollution from power plants, for example, is deposited on soil and in water, where it persists and transforms chemically into a highly toxic form (methylmercury) that accumulates in the tissues of fish.<sup>4</sup> Over 13 million lake-acres and 750 thousand river-miles in the U.S. are subject to mercury fish consumption advisories.<sup>5</sup> Human exposure to mercury most commonly occurs through the consumption of contaminated fish, which can cause significant health effects. Mercury is particularly toxic to developing fetuses and young infants exposed during periods of rapid brain development.<sup>6</sup> Affected children are at risk of developmental and neurological harm, such as delayed developmental milestones, reduced neurological test scores, and at high doses, cerebral palsy.<sup>7</sup> It has been estimated that as many as 630,000 children born in the United States each year may be at risk of neurological impairment due to high maternal blood-mercury levels.<sup>8</sup> The total cost of lost U.S. population IQ points due to *in utero* methylmercury exposure has been estimated at between \$3.14 billion

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<sup>3</sup> U.S. EPA, Study of Hazardous Air Pollutant Emissions from Electric Steam Generating Units: Final Report to Congress, EPA-453/R-98-004A, at ES-5, Table ES-1 ("Utility Report to Congress").

<sup>4</sup> U.S. EPA, Mercury Study Report to Congress, Vol. III: Fate and Transport of Mercury in the Environment, EPA-452/R-97-005, Docket A-92-55, Item I-A-21, at 2-12 to 2-14 (Dec. 1997).

<sup>5</sup> EPA, *Fact Sheet: National Listing of Fish Advisories* (Aug. 2004), EPA-823-F-04-016 at 2 (Aug. 2004) available at <http://www.epa.gov/waterscience/fish/advisories/factsheet.pdf>.

<sup>6</sup> National Research Council, *Toxicological Effects of Methylmercury*, 38, 53-54, 95 (2000) ("NRC Report") available at [www.nap.edu/books/0309071402/html](http://www.nap.edu/books/0309071402/html).

<sup>7</sup> NRC Report at 4, 16-18.

<sup>8</sup> Kathryn R. Mahaffey, et al., Blood Organic Mercury and Dietary Mercury Intake: National Health and Nutrition Examination Survey, 1999 and 2000, 112 *Envtl Health Persps.* 562 (Apr. 2004). See also Kathryn R. Mahaffey, *Methylmercury: Epidemiological Update*. Presentation at Fish Forum 2004, available at:

[http://www.ewg.org/issues\\_content/mercury/ppt/Fish\\_Forum\\_2004.ppt](http://www.ewg.org/issues_content/mercury/ppt/Fish_Forum_2004.ppt).

and \$19.91 billion per year.<sup>9</sup> A separate study found that between \$0.1 billion and \$6.5 billion in diminished lifetime economic productivity is attributable to *in utero* exposure to power plant mercury emissions.<sup>10</sup> Significant evidence also links methylmercury exposure to cardiovascular disease.<sup>11</sup>

The other HAPs emitted by power plants, which include arsenic, chromium, nickel, cadmium, dioxins, lead compounds, hydrochloric acid, and hydrogen fluoride,<sup>12</sup> can cause a wide variety of additional adverse health effects, including central nervous system damage, cancer, and more.<sup>13</sup>

## II. STATUTORY AND REGULATORY BACKGROUND.

In 1990, Congress amended section 112 of the CAA to classify nearly 200 contaminants as HAPs and create a rigorous national pollution control program to lower their emissions. In particular, Congress directed EPA to list all categories of major sources of HAPs, and then develop highly protective emission standards (also known as “maximum achievable control technology,” or “MACT,” standards) for each listed industry. 42 U.S.C. § 7412(c)(1) (requiring EPA to establish an initial list of categories by November 15, 1991); (d)(1) (requiring § 112(d) regulations for each category listed under § 112(c)); (d)(2) (requiring the maximum achievable degree of reduction in emissions of each listed HAP that a category emits). For power plants, the 1990 Amendments instructed EPA to study power plants’ toxic emissions, report the results of

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<sup>9</sup> G. Rice & J.K. Hammitt, Harvard University Center for Risk Analysis, Economic Valuation of Human Health Benefits of Controlling Mercury Emissions from U.S. power plants, Docket OAR-2002-0056, Item 5749 (2005) (submitted by Northeast States Coordinated Air Use Management).

<sup>10</sup> Leonardo Trasande, *et al.*, Public Health and Economic Consequences of Methylmercury Toxicity to the Developing Brain, 113 *Envtl Health Persps.* 590 (2005).

<sup>11</sup> U.S. EPA, Regulatory Impact Analysis of the Clean Air Mercury Rule: Final Report, Appendix C, Docket OAR-2002-0056, Item 6201 (Mar. 2005).

<sup>12</sup> Utility Report to Congress, Vol 1, at 7-17 to 7-18 & Vol. 2 at Appendix E.

<sup>13</sup> Utility Report to Congress, Tables 5-1 & 5-2 (Feb. 1998).

its study to Congress, and regulate power plants under § 112 if “such regulation is appropriate and necessary.” 42 U.S.C. § 7412(n)(1)(A).

After completing the required study, and based on extensive scientific evidence,<sup>14</sup> EPA determined on December 20, 2000 that regulating power plants under CAA § 112 was “appropriate and necessary.” 65 Fed. Reg. 79,825 (Dec. 20, 2000). At the same time, EPA added coal- and oil-fired power plants to the § 112(c) list of industries for which MACT rules are required. *Id.* at 79,830-31. By placing this industry on the § 112(c) list, EPA triggered a nondiscretionary obligation to issue § 112(d) standards for power plants within two years. 42 U.S.C. § 7412(c)(5). Several years later, instead of meeting that obligation, EPA announced that it was eliminating the duty to set MACT standards by removing power plants from the § 112(c) list. 70 Fed. Reg. 15,994 (Mar. 29, 2005).

The Clean Air Act strictly limits EPA’s authority to remove a source category from the § 112(c) list by requiring the agency to make highly specific determinations about the health and environmental risks that category poses. 42 U.S.C. § 7412(c)(9)(B). EPA did not make either of these determinations, and asserts it has no obligation to do so. 70 Fed. Reg. at 16,032-33.

## ARGUMENT

Four factors govern whether to grant a stay of agency action pending judicial review: (1) whether the moving party is “likely to prevail on the merits”; (2) whether without a stay the moving party is likely to be “irreparably injured”; (3) whether the issuance of a stay would “substantially harm other parties interested in the proceedings”; and (4), whether a stay is in the public interest. *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *see also* D.C. Cir. R. 18(a)(1); D.C. Cir. Handbook at 32-33. Here, as

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<sup>14</sup> NRC Report; Utility Report to Congress, Vols. 1-2; Mercury Report to Congress, Vols. I-VIII.

shown below, all four factors strongly favor a stay. For the same reasons, this case also meets the requirements for expedited consideration. D.C. Cir. Handbook at 33.

**I. BECAUSE EPA’S DELISTING CONTRAVENES THE CLEAN AIR ACT, PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS.**

The Act contains only one provision for removing source categories that emit listed HAPs from the § 112(c) list:

The Administrator may delete any source category from the list . . . *whenever the Administrator makes the following determination or determinations, as applicable:*

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that *no* source in the category . . . emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source . . . .

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from *no* source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source . . . .

42 U.S.C. §§ 7412(c)(9)(B) (emphasis added).<sup>15</sup> From § 112(c)(9)(B)’s words, it is entirely clear that Congress did not intend EPA to remove any HAP-emitting source category from the § 112(c) list unless the agency first demonstrates that the health and environmental risks from that category fall below the specific levels set forth in §§ 112(c)(9)(B)(i) & (ii). Because EPA did not purport to make either of the § 112(c)(9)(B) determinations with respect to power plants, the agency’s delisting contravenes the Clean Air Act. *See Gerber v. Norton*, 294 F.3d 173, 185

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<sup>15</sup> Separately, § 112(c)(9)(A) allows EPA to delist source categories that do not emit any listed HAPs. 42 U.S.C. § 7412(c)(9)(A).

(D.C. Cir. 2002) (“When a statute requires an agency to make a finding as a prerequisite to action, the agency must do so.”).

The unlawfulness of EPA’s attempt to evade § 112(c)(9)’s delisting requirements is confirmed by the undisputed applicability of other § 112 provisions that, just like § 112(c)(9), were triggered by the agency’s decision to place power plants on the § 112(c) list. For instance, EPA admits that its listing triggered § 112(c)(2)’s requirement to issue § 112(d) MACT standards for power plants. 42 U.S.C. § 7412(c)(2) (“For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section”); 67 Fed. Reg. 6521, 6524, n.b. (Feb. 12, 2002) (acknowledging that listing required EPA to issue §112(d) standards). Likewise, EPA admits that its listing required sources to obtain case-by-case MACT standards as a precondition for the construction of any new power plants. 42 U.S.C. § 7412(g)(2)(B); 40 C.F.R. § 63.40(c) (providing that listing triggers § 112(g) requirements for power plants).<sup>16</sup> EPA also notes that its listing triggered § 112(e)(4), which exempts decisions to list industries for regulation from judicial review until final MACT standards are issued for the source category. 42 U.S.C. § 7412(e)(4); 70 Fed. Reg. at 15,996 (asserting that the listing of power plants under §112(c) was shielded from judicial review by § 112(e)(4)).

EPA cannot pick and choose the statutory requirements it will obey. Listing power plants triggered all the other § 112 provisions that are conditional on source category listings. It also triggered the applicability of § 112(c)(9)’s delisting requirements EPA itself has acknowledged as much. When the agency developed its initial § 112(c) list, the agency considered adding power plants to the list at that time, but stated that a subsequent delisting action “would be

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<sup>16</sup> See also Memorandum from John Seitz, U.S. EPA, to Regional Air Office Directors at 1 (Aug. 1, 2001) (same) (attached hereto as Exh. 3).

subject to the risk-based findings required under section 112(c)(9).” 56 Fed. Reg. 28,548, 28,550-51 (June 21, 1991).

EPA now takes a different position, arguing that even though § 112(c)(9) governs the removal of *other* source categories from the § 112(c) list, it does not apply to *power plants*. 70 Fed. Reg. at 16,032-33. By its terms, however, § 112(c)(9) applies to the removal of “any source category” from the § 112(c) list, and it contains no exception for power plants. 42 U.S.C. § 7412(c)(9)(B). Further, § 112(c)(9) contains no reference to § 112(n)(1)(A), the provision from which EPA seeks authority for its delisting. Finally, § 112(n)(1)(A) says nothing whatsoever about removing power plants from the § 112(c) list and, therefore, cannot possibly authorize the agency’s action. *See Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (EPA “has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.”).

EPA next seeks to rely on its alleged “inherent authority.” 70 Fed. Reg. at 16,033. EPA has no “inherent authority” to list or delist source categories, but only such authority as the Clean Air Act § 112(c) confers. *Michigan*, 265 F.3d at 1081. *A fortiori*, EPA cannot avoid §112(c)(9)’s specific requirements by invoking “inherent authority.” *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (“EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area”). Attempting to bolster its claims to “inherent authority,” EPA cites § 112(e)(4) and *UARG v. EPA*, No. 01-1074 (D.C. Cir. July 26, 2001), for the proposition that its listing decisions are not “final agency action” and that the agency can reverse such decisions “at any time” without making the determinations required by § 112(c)(9). 70 Fed. Reg. at 16,033. Section 112(e)(4) merely provides that judicial review of the *listing* of a source

category under § 112(c) of the Act is not available until after emission standards are issued. 42 U.S.C. § 7412(e)(4). It lends no support to EPA's contention that it can ignore § 112(c)(9) and *delist* source categories under an "inherent authority" that does not exist. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485 (2001) ("The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.").

EPA's last argument is that it can delist categories without complying with § 112(c)(9) when it is merely correcting "an error" made at the time of listing. 70 Fed. Reg. at 16,033. Pointing to three prior occasions when it delisted categories after determining that they lacked major sources, EPA suggests that it engaged in the same sort of "error" correction here by reversing its "appropriate and necessary" determination. *Id.* Once the power plant industry was listed, however, EPA had no choice but to abide by § 112(c)(9)'s requirements. EPA's previous failures to follow § 112(c)(9) neither alter that provision's meaning, nor excuse the agency's present failure to comply. *See F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) ("we do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation").<sup>17</sup>

In any case, EPA's present action is completely distinguishable from prior delistings. It is undisputed that the power plant category contains major sources of HAPs and presents a

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<sup>17</sup> It bears emphasis that a category may create serious health and environmental threats even if it contains no major sources. An "area" (*i.e.*, non-"major") source can emit up to ten tons a year of any single HAP or twenty-five tons a year of any combination of HAPs. 42 U.S.C. § 7412(a)(1)-(2). It is by no means unreasonable that Congress, which expressly recognized the threat presented by area sources in Clean Air Act § 112(k)(1), 42 U.S.C. § 7412(k)(1), made no exception from the requirements in § 112(c)(9) for source categories that were initially listed pursuant to § 112(c)(1) but then discovered to contain only area sources. Indeed, Congress clearly spelled out the only circumstances under which EPA may delist a category without making the risk determinations set out in § 112(c)(9)(B)(i) and (ii): where, because the only substances a category emits have been removed from the § 112(b) list of hazardous air pollutants, that category emits no HAPs at all. 42 U.S.C. § 7412(c)(9)(A).

significant threat to public health and the environment. 70 Fed. Reg. 15,995 n. 4 (“No one would dispute that certain Utility Units would meet the definition of a ‘major source’ based on the quantity of HAP emitted from such units”). Further, even if EPA’s previous delistings were lawful, the agency’s decision to delist power plants was not based on any *objective* “error” (such as whether there are major sources in the industry) but on the present Administrator’s *subjective* disagreement with a previous Administrator’s finding. 70 Fed. Reg. at 16,033. Such disagreement is irrelevant under § 112(c)(9), which strictly limits EPA’s discretion to change its position as to whether a source category belongs on the § 112(c) list. 42 U.S.C. § 7412(c)(9). See *Whitman*, 531 U.S. at 485.

## **II. WITHOUT A STAY, EPA’S DELISTING DECISION WILL CAUSE IRREPARABLE HARM.**

### **A. Absent A Stay, EPA’s Delisting Will Increase Petitioners’ Members’ Exposure To Toxic Emissions From New Power Plants.**

EPA’s decision to remove power plants from the source category list had the immediate effect of relaxing the pollution control requirements for newly-constructed power plants.<sup>18</sup> Because new plants will be permitted and built, and may even begin operation, while the present case is under review, that relaxation of standards will increase petitioners’ members’ exposure to highly toxic pollution.<sup>19</sup> Such exposure, and the resulting risk of adverse health effects that

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<sup>18</sup> See, e.g., Letter from David M. Rusoff, Staff Attorney, Montana Department of Environmental Quality, to Anne Hedges, MEIC, at 2-3 (May 27, 2005) (hereinafter “MDEQ Letter”) (Attached hereto as Exh. 4) (concluding that neither federal nor Montana law required MACT limits following EPA’s delisting action, “unless a stay of the effect of EPA’s recent rulemaking is ordered in court or the rulemaking is found by the courts to be invalid.”).

<sup>19</sup> Recent cases challenging Clean Air Act regulations have taken between seventeen and twenty-one months. See, e.g., *Bluewater Network v. EPA*, 372 F.3d 404 (D.C. Cir. 2004) (approximately seventeen months); *Mossville Env’tl. Action Now v. EPA*, 370 F.3d 1232 (D.C. Cir. 2004) (approximately twenty-one months). However, because EPA’s action contains many new and centrally relevant elements for which it was impracticable to raise an objection during the public comment period, several parties have been forced to file petitions for reconsideration pursuant to

Environmental Petitioners' members will suffer during the pendency of the present litigation, can never be undone. Likewise, the mercury and other persistent and bioaccumulative toxins that will enter the food chain during the pendency of the present case can never be taken out. The *only* way to prevent these harms is to grant a stay.

There is ample reason to believe that new coal-fired generating units will be built and even begin operation in the near future. The National Energy Policy declares:

Based on current estimates, the United States will need about 393,000 MW of new generating capacity by 2020 to meet the growing demand. If the U.S. electricity demand continues to grow at the high rate it has recently, we will need even more generating capacity. *To meet that future demand, the United States will have to build between 1,300 to 1,900 new power plants; that averages out to be more than 60 to 90 plants a year, or more than one a week.*<sup>20</sup>

A significant amount of the new capacity built in the coming years will rely on coal; according to the Energy Information Administration, approximately 87 gigawatts of new coal capacity will be built by 2025.<sup>21</sup> These construction projects are likely to receive government support, because an Executive Order directs federal agencies to “expedite their review of permits or take other

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CAA § 307(d)(7)(B). *See* NRDC *et al.*, Petition for Reconsideration, OAR-2002-0056 (May 31, 2005); New Jersey *et al.*, Petition for Reconsideration (May 31, 2005). EPA has indicated that it will reconsider the rule. EPA Reconsideration Letter at 2. In several prior cases in which such petitions have been filed, EPA has significantly delayed the litigation pending the agency's action on reconsideration. *See, e.g., Northeast Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936 (D.C. Cir. 2004) (case held in abeyance for slightly more than 18 months during reconsideration, and then litigated, resulting in a total of 36 months between the filing of the case and the rendering of the court's opinion). If EPA is successful in delaying this case as it has others and the agency's action is not stayed, then approximately three years are likely to have elapsed by the time this litigation is complete and the agency's unlawful delisting is vacated.

<sup>20</sup> National Energy Policy Development Group, National Energy Policy, at p. 5-10 (May 2001), available at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf> (emphasis added).

<sup>21</sup> Energy Information Administration, Annual Energy Outlook: 2005, Docket OAR-2002-0056, Item 5999, at 6 (Feb. 2005).

actions as necessary to accelerate the completion of [energy-related] projects, while maintaining safety, public health, and environmental protections.”<sup>22</sup>

Indeed, many parts of the country are currently seeing a boom in new coal-fired power plant permitting and construction. All told, EPA is tracking approximately 70 proposed coal-fired projects throughout the nation.<sup>23</sup> The record shows that States have approved eighteen permits for new coal-fired projects since the December 2000 listing decision.<sup>24</sup> For example, the Wisconsin Public Service Commission broke ground on a new coal-fired 500 MW generating unit at its Weston Plant in November 2004. The unit, located in Wausau, Wisconsin, is scheduled to commence commercial operation by 2008.<sup>25</sup> Similarly, Tucson Electric Power Company is building two new units at its Springerville Generating Station in eastern Arizona. The project was approved on February 14, 2002, and construction of one of the new units began in late 2003. The owner of the new unit expects that it will become operational by 2006.<sup>26</sup> Also, the MidAmerican Energy Company obtained a permit on June 17, 2003, to build a new generating unit at the Council Bluffs Energy Center in Iowa. Construction of the new unit began in September 2003, and the plant is projected to become operational in summer 2007.<sup>27</sup>

Because of this rapid pace of construction, EPA’s delisting will quickly have adverse effects on Environmental Petitioners’ members. Before EPA removed power plants from the

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<sup>22</sup> Executive Order 13212, Actions To Expedite Energy-Related Projects, 66 Fed. Reg. 28,357 (May 18, 2001), as amended by 68 Fed. Reg. 27,429 (May 15, 2003).

<sup>23</sup> See U.S. EPA, National Coal-Fired Utility NSR Spreadsheet, (listing coal-fired construction projects in various stages, from conceptual to operational), available online at <http://www.epa.gov/ttn/catc/dir1/natlcoal.xls>.

<sup>24</sup> Memorandum from Jim Eddinger to Robert Wayland, Statistical Analysis of Mercury Test Data to Determine BDT for Mercury Emissions, Docket OAR-2002-0056, Item 6192, Appendix A (Mar. 15, 2005).

<sup>25</sup> Declaration of David Schoengold ¶ 16.

<sup>26</sup> *Id.* ¶ 14.

<sup>27</sup> *Id.* ¶ 11.

§ 112(c) list, *no* new power plant that would emit sufficient toxic pollution to make it a “major” source could be built “unless the Administrator (or the State) determine[d] that the maximum achievable control technology emission limitation under this section for new sources will be met.” 42 U.S.C. § 7412(g)(2)(B). By delisting power plants, however, EPA rendered this requirement inapplicable, so that now, new plants will not have to meet MACT standards. As a result, they will emit more toxic air pollution than was the case before EPA’s delisting.<sup>28</sup> Further, because companies’ significant construction investments during this litigation will not be easily undone,<sup>29</sup> the construction choices based on EPA’s delisting could well cause new plants to continue to emit more toxic pollution even after that delisting is vacated than would be the case if the Court stayed the rule and case-by-case MACT requirements continued to apply.

As shown in the attached declarations, Petitioners’ members live, breathe, and recreate in areas downwind from and downstream from new power plants that are or could be affected by EPA’s delisting. Petitioners’ expert identified 16 new coal-fired projects likely to be under construction or in operation by 2008. Declaration of David Schoengold ¶¶ 26-30. For 15 of these projects, Petitioner NRDC alone has 240 members in the same ZIP codes as the projects and 2,837 members in the same counties as the projects. Declaration of Linda Lopez ¶ 7. Any other new construction projects, wherever they may be built, are also likely to affect Petitioners’ members. *See id.* ¶ 6 (NRDC has 490,274 current members, including members in every state); Declaration of Gene Karpinski ¶ 6 (Petitioner U.S. PIRG has approximately 29,750 members, including members in every state); Declaration of Megan Contakes ¶ 4 (Petitioner Environmental Defense has over 300,000 members and activists nationwide, including members in every state). It is well established that power plant HAP emissions, including emissions of toxic metals such

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<sup>28</sup> MDEQ Letter at 2-3.

<sup>29</sup> Declaration of David Schoengold ¶ 27.

as mercury and arsenic, and other particulate-bound emissions, can be deposited in significant amounts near their source.<sup>30</sup> Absent a stay, Petitioners' members will be exposed to new power plants' toxic emissions and their exposure will be greater in the absence of MACT standards. *See, e.g.*, Declaration of Farwell Smith (Environmental Defense member living near site of new coal-fired power plant to be built in Roundup, Montana); Clyde Anderson (Sierra Club member living near site of new coal-fired power plant to be built in Council Bluffs, Iowa).

The harm to Petitioners' members will not be remedied by EPA's separate recent rule issuing new source performance standards ("NSPS") for power plants under § 111. 70 Fed. Reg. 28,606 (May 18, 2005). EPA's NSPS do not purport to regulate emissions of non-mercury HAPs, such as arsenic and dioxins, *at all*. By comparison, States' case-by-case MACT permits under § 112(g) must contain emission standards for each HAP that power plants emit. Specifically, § 112(g) provides that State standards must reflect "the maximum achievable control technology emission limitation *under this section* for new sources," 42 U.S.C. § 7412(g)(2)(B) (emphasis added), and "this section" — i.e., § 112 — unambiguously requires EPA to set emission standards for each hazardous air pollutant that a category emits. 42 U.S.C. §§ 7412(d)(1), (2). *National Lime Ass'n v. EPA*, 233 F.3d 625, 633-634 (D.C. Cir. 2000).

Consistent with this requirement, several state-issued permits issued since December 2000 have included limits for non-mercury HAPs, including acid gases, beryllium, cadmium, arsenic, chromium, cobalt, manganese, and selenium. Schoengold Declaration ¶¶ 23-25. Without a stay, the Act will no longer require states to impose such limits on utilities' HAP emissions.

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<sup>30</sup> Utility Report to Congress, Vol. 1 at 7-35 to 7-39 & 10-21 to 10-42.

Moreover, EPA’s NSPS emission limits for mercury are substantially less protective than MACT standards would be. This is evident in a simple comparison between the MACT standards the agency proposed in January 2004 and the final NSPS. Even though the proposed standards were too weak to satisfy the statutory requirements,<sup>31</sup> even those lax proposed MACT limits were still significantly more stringent than the final NSPS, as indicated in the chart below.<sup>32</sup>

<b>Coal Rank</b>	<b>Proposed MACT Standards</b>	<b>Final NSPS</b>
<b>Bituminous Units</b>	6 x 10 <sup>-6</sup> lb/MWh	21 x 10 <sup>-6</sup> lb/MWh
<b>Subbituminous</b>	20 x 10 <sup>-6</sup> lb/MWh	42 x 10 <sup>-6</sup> lb/MWh (wet scrubber) 78 x 10 <sup>-6</sup> lb/MWh (dry scrubber)
<b>Lignite</b>	62 x 10 <sup>-6</sup> lb/MWh	145 x 10 <sup>-6</sup> lb/MWh
<b>Coal Refuse</b>	1.1 x 10 <sup>-6</sup> lb/MWh	1.4 x 10 <sup>-6</sup> lb/MWh
<b>IGCC</b>	20 x 10 <sup>-6</sup> lb/MWh	20 x 10 <sup>-6</sup> lb/MWh

EPA’s NSPS limits are also weaker than those contained in numerous state permits implementing § 112(g). For instance, EPA’s NSPS for units burning subbituminous coal allows more than four times greater mercury emissions (78 x 10<sup>-6</sup> pounds per megawatt-hour (lb/MWh)) than Iowa’s § 112(g) permit for the MidAmerican Energy Company’s subbituminous coal-burning plant (17 x 10<sup>-6</sup> lb/MWh). Schoengold Declaration ¶ 11. Similarly, the NSPS would allow many times more mercury to be emitted from Sevier Power Company’s NEVCO Energy plant than the Utah permit allows (3.9 x 10<sup>-6</sup> lb/MWh). *Id.* ¶ 12. All told, nine new power plants already have state mercury emission limits that are stricter than EPA’s NSPS. *Id.* ¶ 8. If these nine plants were allowed to meet EPA’s NSPS instead of their state limits, their aggregate

<sup>31</sup> See, e.g., Comments of the National Tribal Air Association, Docket OAR-2002-0056, Item 2695, at 2 (June 22, 2004) (“We believe that the [MACT] requirements proposed in the rule are not as stringent as those mandated by Section 112 of the Clean Air Act”); Comments of 12 Members of Congress, Docket OAR-2002-0056, Item 2836, at 1 (June 24, 2004) (“None of these proposed approaches is legally supportable under the Clean Air Act, and each of them violates Congress' intent that EPA shall regulate toxic air pollution under Section 112.”).

<sup>32</sup> See 69 Fed. Reg. 4,663 (Jan. 30, 2004) (proposed MACT limits); 70 Fed. Reg. 28,610 (final NSPS limits).

mercury emissions would increase by 1,834 pounds each year. *Id.* ¶ 19. This danger is real; power plant sources that already have received case-by-case MACT permits may be allowed to seek NSPS limits in their place, absent a stay of the delisting rule. The NSPS applicability provision indicates that the new requirements are retroactive, covering projects for which construction began any time after January 2004. 70 Fed. Reg. at 28,653 (to be codified at 40 C.F.R. § 60.45a); *see also* MDEQ Letter at 3 (“If Bull Mountain requests rescission of the MACT emission limit for mercury, the Department will make a decision at that time,” based on all relevant authorities and “the status of the court case challenging EPA’s recent rulemaking.”).

Roughly thirty-six months are likely to elapse before EPA’s unlawful delisting can be vacated. *See supra* n. 19. Because new power plants will be allowed to be permitted and built and to commence emitting toxic emissions during that time without complying with MACT, Petitioners’ members will be irreparably harmed unless the delisting is stayed pending judicial review.

**B. Absent a Stay, EPA’s Delisting Will Prolong Environmental Petitioners’ Members’ Exposure to Toxic Emissions from Existing Power Plants.**

Granting a stay will restore the *status quo* for existing coal- and oil-fired power plants. EPA will once again be statutorily obligated to promulgate MACT limits for the industry, and to ensure that such limits take effect “as expeditiously as practicable.” 42 U.S.C. § 7412(i)(3). Without a stay, however, EPA will make no progress toward issuing a MACT rule, thus delaying by approximately 36 months both the date by which the agency ultimately completes such a rule and the date by which power plants actually reduce their emissions.

As shown in the attached declarations, Environmental Petitioners’ members live, work, and recreate in areas downwind and downstream from existing power plants, including eating fish taken from waters downwind and downstream from existing power plants. *See, e.g.,*

Declaration of Myrtha Allen ¶ 9 (noting concerns about mercury contamination in the fish she eats from the Chesapeake Bay region); Declaration of William Baker ¶ 12 (laboratory testing of hair samples shows that several CBF members have mercury levels that exceed EPA's health advisory of 1.0 micrograms of mercury per gram of hair for women of childbearing years); Declaration of Alyssa Gontang (CBF member who is a woman of childbearing years, consumes fish caught in the Chesapeake Bay area, and has mercury hair levels in excess of EPA's 1.0 micrograms/gram advisory). These members' exposure to existing power plants' toxic emissions will be prolonged and increased in the absence of a stay, as will the damage to their recreational and commercial interests in fishing for uncontaminated fish in uncontaminated waters. *See, e.g.*, Declaration of Eleanor H. Kinney ¶¶ 12, 15 (describing Maine fish consumption advisories and noting that she does not fish out of concern about mercury contamination); Declaration of Marya Alison Bradley ¶ 4 (noting that she and her husband avoid freshwater fish, including from Lake Michigan, because of mercury contamination concerns); Declaration of Michael Ginsburg ¶¶ 4, 16-19 (owner of hiking and fishing resort concerned that increased pollution will adversely affect business). It bears re-emphasis that many of the HAPs that power plants emit, including mercury, lead compounds, and dioxins, are both persistent and bioaccumulative. Power plants emit vast quantities of these toxins each year, *see supra*, and the additional tons emitted as a result of EPA's delisting will contaminate the environment, food sources, and wildlife, long after the delisting is vacated.

The harm to Petitioners' members caused by delaying the issuance of § 112 rules will not be remedied by EPA's promulgation of a cap-and trade program for existing plants under § 111, as the agency has done in a separate recent rule. 70 Fed. Reg. 28,606 (May 18, 2005). First, EPA's cap-and-trade program will not require any pollution reductions until 2010. Second, even

if EPA's cap-and-trade program takes effect, it will only apply to *mercury* emissions, not the thousands of tons of *other HAPs* that power plants emit. By comparison, § 112 standards must require the maximum achievable degree of reduction in each of the HAPs that power plants emit. 42 U.S.C. § 7412(d)(1), (d)(2). *See National Lime Ass'n*, 233 F.3d at 633-634. Third, EPA's cap-and-trade program allows power plants to emit significantly more mercury than § 112 rules would allow.<sup>33</sup> Fourth, EPA's cap and trade program, unlike MACT, will allow existing individual power plants to purchase emissions credits to continue, or in some cases increase, current levels of mercury emissions.

In some places, existing power plant sources already have been identified as a primary cause of local mercury hotspots.<sup>34</sup> National Oceanographic and Atmospheric Administration ("NOAA") researchers, for example, recently concluded that local (0 – 100 km) power plants are a major cause of the Chesapeake Bay hotspot.<sup>35</sup> People living, working, and recreating in the hotspot areas near existing power plants face continued risk of mercury contamination and continued health risks associated with increased exposure to other HAPs as a result of EPA's

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<sup>33</sup> *Compare, e.g.*, Comments of Northeast States for Coordinated Air Use Management, Docket OAR-2002-0056, Item 5477, at 17 (Jan. 3, 2005) (arguing for MACT standard achieving 90 percent cut in mercury from power plants) *with* 70 Fed. Reg. at 28,606 (adopting caps of 38 tons per year beginning in 2010 and 15 tons per year beginning in 2018, which reflect 21 percent and 69 percent cuts from present annual emission levels, respectively).

<sup>34</sup> Mark Cohen, NOAA, Modeling the Fate and Transport of Atmospheric Mercury in the Chesapeake Bay Region (May 17, 2004) ("NOAA Chesapeake Bay"), available at [http://www.arl.noaa.gov/data/web/reports/cohen/20\\_Ches\\_Bay\\_talk.pdf](http://www.arl.noaa.gov/data/web/reports/cohen/20_Ches_Bay_talk.pdf); *see also* Biodiversity Research Institute, Mercury Hotspot Map, at [http://www.briloon.org/mercury/hot\\_spot.htm](http://www.briloon.org/mercury/hot_spot.htm) (identifying biological hotspots due to high levels of mercury contamination in Northeastern U.S.); Mark Cohen *et al.*, Modeling The Atmospheric Transport and Deposition of Mercury to the Great Lakes, 95 *Env'tl. Res.* 247, 262-63 & fig. 14 (2004)(power plant contribution to Great Lakes mercury hot spots). Similar research conducted in Florida indicates that when local sources of mercury were controlled, fish taken from local waters exhibited reduced fish tissue mercury levels. Florida Department of Environmental Protection, "Integrating Atmospheric Mercury Deposition with Aquatic Cycling in South Florida: An Approach for Conducting a Total Maximum Daily Load Analysis for an Atmospherically Derived Pollutant" (Nov. 2003).

<sup>35</sup> NOAA Chesapeake Bay, at slides 35-40.

delisting decision. Indeed, far from ameliorating the harm caused by EPA's delisting, the cap and trade program will worsen the problem in areas where petitioners' members live, work, and recreate. *See, e.g.*, Declaration of Molly Ross ¶¶5, 6 (describing concerns about the additional mercury and non-mercury HAPs that would be emitted from existing power plants in Colorado near declarant's residence, as a result of EPA's delisting and cap and trade program); Declaration of Michael Ginsburg ¶¶ 4, 16-19 (owner of hiking and fishing resort concerned that EPA's mercury cap and trade program will cause immediate adverse effects on business).

### **III. OTHER PARTIES WILL NOT SUFFER SIGNIFICANT HARM IF THE RULE IS STAYED.**

Staying the delisting rule will not significantly harm EPA. First, the rule is patently unlawful, as the agency failed to comply with CAA § 112(c)(9)'s delisting procedure. *See supra* at 6-10. EPA cannot be heard to complain that it will be harmed by a stay of a rule that represents so clear a violation of the agency's mandate.<sup>36</sup>

Second, by staying EPA's delisting rule, the Court will merely compel EPA to restart its §112(d) MACT rulemaking for the coal- and oil-fired power plant industry *now*, rather than approximately *three years from now*. It does not harm EPA to restart a rulemaking that is undeniably required by the Clean Air Act, and is already more than two years overdue.

Nor will a stay harm any valid industry interest. Staying the delisting rule will simply maintain the previously existing legal landscape for power plants: while the case is pending, new facilities will remain subject to the Act's case-by-case MACT requirements. Industry has no valid interest in the windfall benefits that will be caused, in the absence of a stay, by an unlawful

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<sup>36</sup> Absent a stay, new and reconstructed coal- and oil-fired power plants will avoid installing available and effective pollution control technology during the pendency of this litigation, and Petitioners' members will be irrevocably harmed, as shown above. These are outcomes squarely at odds with the agency's stated mission "to protect human health and the environment." *See* EPA, *About EPA: Our Mission*, at <http://www.epa.gov/epahome/aboutepa.htm#mission>.

further delay in issuing the MACT standards required by the Act. In fact, given Petitioners' high likelihood of success on the merits, *see supra*, industry will be well served by the regulatory consistency that would result from a stay during the period before the rule is vacated.

#### **IV. STAYING EPA'S DELISTING WILL ADVANCE THE PUBLIC INTEREST.**

If EPA's delisting remains in effect during this litigation, it will harm persons who live or recreate downwind or downstream from power plants as well as those who eat fish, catch fish, or otherwise recreate in any of the many areas where power plants' toxic emissions fall. *See* attached declarations. EPA's delisting lifts case-by-case MACT requirements for new coal- and oil-fired power plants, allowing them to avoid installing state-of-the-art pollution controls for mercury and other toxic pollutants, and thus to contribute to the serious mercury problems already confronting neighboring, downwind, and downstream communities. Similarly, by lifting EPA's obligation to issue protective § 112 emission standards for existing power plants, the challenged delisting allows these plants to continue operating for years under significantly less protective emission standards, or no standards at all.

In short, the unlawful delisting not only imposes significant public health costs but, as demonstrated above, flouts Congress's clear mandate to follow the detailed procedure for delisting source categories found in § 112(c)(9). Staying the delisting pending the outcome of this case maintains protective case-by-case MACT requirements and EPA's obligation to issue MACT standards for power plants, and will therefore advance the public interest.

For the foregoing reasons, Petitioners respectfully request this Court to stay the delisting during the pendency of this action. In addition, Environmental Petitioners request expedited consideration.

Respectfully submitted,

Jon P. Devine Jr. (by J.S.P.)

Jon P. Devine Jr.  
John B. Walke  
NRDC  
1200 New York Ave., N.W., Suite 400  
Washington, D.C. 20005  
202) 289-2426

*Attorney for NRDC*

Scott Edwards (by J.S.P.)

Scott Edwards  
Waterkeeper Alliance  
828 South Broadway, Suite 100  
Tarrytown, NY 10591  
914.674-0622, ext. 203  
914.674-4560 (fax)

*Attorney for Petitioners Chesapeake Bay  
Foundation and Waterkeeper  
Alliance*

Dated: July 8, 2005

Jon A. Mueller (by J.S.P.)

Jon A. Mueller  
Director of Litigation  
Chesapeake Bay Foundation  
6 Herndon Ave.  
Annapolis, MD 21403  
(443) 482-2162

*Of Counsel, Chesapeake Bay Foundation*

James S. Pew

James S. Pew  
Earthjustice  
1625 Massachusetts Ave., NW  
Suite 702  
Washington, D.C. 20036-2212  
(202) 667-4500

*Attorney for Environmental Defense,  
National Wildlife Federation, and Sierra  
Club*

Ann Brewster Weeks (by J.S.P.)

Ann Brewster Weeks  
Jonathan F. Lewis  
Clean Air Task Force  
18 Tremont Street, Suite 530  
Boston, MA 02108  
[aweeks@catf.us](mailto:aweeks@catf.us)  
(617) 624-0234

*Counsel for Natural Resources Council of  
Maine,  
The Ohio Environmental Council, and  
United States PIRG*

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March 30, 2005

Hon. Stephen L. Johnson  
Acting Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

By fax: (202) 501-1450

Re: Request for Stay of "Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List," 70 Fed. Reg. 15,994 (March 29, 2005)

Dear Administrator Johnson:

On behalf of the Chesapeake Bay Foundation, the Clean Air Task Force, the National Wildlife Federation, and the Natural Resources Defense Council, we request that you stay the effective date of the final rule identified above (the "rescission rule"). This rule purports to rescind EPA's December 2000 pledge to protect public health by requiring, within three years, "maximum achievable control technology" for hazardous air pollution from power plants. The rule violates the Clean Air Act and ignores EPA's mission "to protect human health and the environment" by downplaying the hazards of mercury pollution from coal-fired electric utilities and ignoring the concerns of the hundreds of thousands of citizens, congressional leaders, health experts, and state and local air quality professionals who submitted detailed critiques of the rule at the proposal stage.

We request a stay pending the outcome of the judicial challenge to the rule filed yesterday, March 29, 2005, on behalf of the State Attorneys General of California, Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, and Vermont. We seek this stay pursuant to 5 U.S.C. § 705, which provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." The D.C. Circuit is likely to vacate and remand the rule given its legal infirmities and the substantial contrary factual evidence. It is also highly likely, however, that the court will take several months to reach this conclusion. In the meantime, the public should not suffer from implementation of an

invalid rule, nor should industry be permitted to rely on and benefit from the rule's unlawful provisions.

Alternatively, because some or all of the signatories to this letter intend to petition for reconsideration of the rescission rule, we seek a stay pursuant to 42 U.S.C. § 7607(d)(7)(b), which permits the agency to stay the effectiveness of a rule "during ... reconsideration ... for a period not to exceed three months." Reconsideration of the rule is appropriate and necessary because the agency violated notice and comment rulemaking requirements, issuing a final rule that relies on data, modeling results, and legal theories omitted from the proposed rule. Below are several examples of issues on which it was not practicable to raise an objection during the period provided for public comment, and which are centrally relevant to the action EPA has taken. This is only a partial list, but it reveals quite clearly how much the final rule relies on new information and reasoning that EPA failed to reveal to the public, and how little the agency considered the important materials that the public brought to its attention during the comment period.

First and most obviously, EPA did not propose to rescind its prior finding that it is "appropriate" to regulate coal-fired utilities' mercury emissions, but the final rule contains a lengthy discussion of the agency's new conclusion that such regulation is inappropriate. *Compare* 69 Fed. Reg. at 4,683 ("The EPA continues to believe that emissions of Hg from coal-fired Utility Units and emissions of Ni from oil-fired units pose hazards to public health, that coal-fired Utility Units are the largest domestic source of Hg emissions, and that oil-fired units are the primary source of Ni emissions. These findings support a determination that it is appropriate to regulate emissions of Hg and Ni from Utility Units.") *with* 70 Fed. Reg. at 16,003 ("The December 2000 'appropriate' finding lacks foundation because EPA failed to fully account for the Hg emissions remaining after 'imposition of the requirements of th[e] Act.'").

This wholly new rationale for rescinding the December 2000 finding and listing, in turn, depends on a premise that the agency outlined for the first time in the final preamble: the notion that implementation of the so-called Clean Air Interstate Rule ("CAIR") will eliminate the risks to public health from coal-fired utilities' mercury pollution. 70 Fed. Reg. at 16.004. Further, EPA claims that its conclusion that "CAIR" "would result in a level of Hg emissions from Utility Units that would not cause hazards to public health," *id.*, is supported by a raft of *new* pollution transport and mercury deposition modeling that postdates the proposed rule. Indeed, there is a section of the final rule preamble titled "It Is Not Appropriate to Regulate Coal-fired Utility Units Under Section 112 on the Basis of Hg Emissions Because *New Information* Reveals that the Level of Utility Hg Emissions Remaining After Imposition of the Requirements of the CAA Does Not Cause Hazards to Public Health." *Id.* (emphasis added); *see also id.* at 16,005 n.32 ("[W]e conducted *additional* modeling that confirmed that CAIR alone, once implemented, would result in levels of utility Hg that do not cause hazards to public health."); *id.* at 16,011-29 (emphasis added) (summarizing new EPA analysis of impact of utility units on mercury levels in fish).

Second, EPA has reinterpreted a provision in section 112(n)(1)(A) of the Act without prior notice that it might do so. Specifically, EPA now argues that it has the authority to rescind its December 2000 regulatory determination by relying on mercury emission reductions that it predicts might occur as a result of states' implementation of "CAIR." The agency claims that these hoped-for emission reductions inform its assessment of the hazards to public health remaining "after imposition of the requirements of th[e] Act." EPA acknowledges that this view, which was not articulated in the 2004 proposal, is centrally relevant to its final rule. *See* 70 Fed. Reg. at 15,999, n. 13 ("We do not believe that the December 2000 finding *or the January 2004 proposal* properly give effect to all of the terms of section 112(n)(1)(A), including the first sentence of section 112(n)(1)(A). We therefore provide our interpretation of the *central* terms in that sentence above, as those terms are *relevant* to the final actions we are taking today." (emphasis added)).

Third, EPA has newly discovered in section 112(n)(1)(A) the authority to conclude that strict regulation of power plants is not "necessary" if an "alternative legal authority . . . would result in effective regulation, including, for example, its cost-effectiveness and its administrative effectiveness." 70 Fed. Reg. at 16,001. The agency concedes that "[t]his interpretation of the term 'necessary' differs slightly from the interpretation advanced in December 2000 and January 2004." *Id.*

Fourth, the final rule amends a section of the existing Code of Federal Regulations without a prior proposal to do so. *See* 70 Fed. Reg. 16,032, n. 63.

Finally, at the same time that EPA has prevented the public from meaningfully commenting on numerous matters centrally relevant to the rulemaking, the agency has ignored information identified by the public that is centrally relevant to the rulemaking. A team of researchers from the Harvard Center for Risk Analysis working on behalf of the Northeast States for Coordinated Air Use Management (NESCAUM) recently concluded that mercury pollution from coal-fired power plants results in significant productivity costs by impairing American children's brain development and lowering their IQs. The Harvard/NESCAUM team also found that controlling such utilities' mercury pollution could save up to almost \$5 billion by reducing neurological and cardiovascular harm.

EPA has claimed that the study was submitted too late to be considered, but the agency "received the study results by the Jan. 3 deadline," and "officials had been briefed about its methodology as early as last August." Shankar Vedantam, *New EPA Mercury Rule Omits Conflicting Data*, WASHINGTON POST, at A1 (Mar. 22, 2005).<sup>1</sup> In addition, this study was "paid for by the EPA, co-authored by an EPA scientist and peer-reviewed by two other EPA scientists," *id.*, undermining the agency's proffered reason for its attempts to ignore the study's conclusions.

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<sup>1</sup> *See also* NESCAUM Comments to Docket ID No. OAR-2002-0056, at 15-17 (Jan. 3, 2005) (describing results of study).

Hon. Stephen L. Johnson  
March 30, 2005  
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The rescission rule cannot be allowed to remain in effect even for the brief period pending submission and the agency's review of a petition for reconsideration because the power industry is likely to rely on the rule's deregulatory approach in making business decisions in the near term – decisions that will have drastic and irreversible consequences for public health. Accordingly, we ask that you stay the rule pending reconsideration.

Regardless of your response to these stay requests, we reserve the right to seek appropriate judicial relief as expeditiously as possible. In accordance with that approach, we will treat this stay request as denied as of April 11, 2005

Sincerely,

Jon Mueller  
Chesapeake Bay Foundation

Ann Weeks  
Clean Air Task Force

Neil Kagan  
National Wildlife Federation

John Walke, Jon Devine, and Amanda Leiter  
Natural Resources Defense Council



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII  
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA  
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.  
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

May 17, 2005

Stephen L. Johnson  
Administrator  
U.S. Environmental Protection Agency  
1101A EPA Headquarters  
Ariel Rios Building, Suite 4010  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Request To Stay EPA's Final Action Removing Coal- And Oil-Fired Electric  
Utility Steam Generating Units From The Clean Air Act § 112(c) List.

Dear Mr. Johnson:

On March 29, you removed coal and oil-fired electric utility steam generating units ("power plants") from the list of source categories issued under Clean Air Act § 112(c), 42 U.S.C. § 7412(c), 70 Fed. Reg. 15994 (March 29, 2005). Environmental Defense and Sierra Club ("Environmental Petitioners") hereby request that you stay that action. *See* D.C. Circuit Rule 18(a)(1).

As pointed out in public comments, EPA lacked authority to remove power plants from the § 112(c) list, unless it complied with the requirements of § 112(c)(9) — i.e., unless EPA made specific determinations that no power plant emits hazardous air pollutants ("HAPs"): (1) "in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from" such plant; (2) "exceed[ing] a level which is adequate to protect public health with an ample margin of safety"; and, (3) that will result in an "adverse environmental effect." 42 U.S.C. § 7412(c)(9). Because EPA never made any such determination, your removal of power plants from the § 112(c) list ("delisting") was flatly unlawful.

Because the delisting is unlawful, it will be vacated after judicial review by the D.C. Circuit. Unless you stay it, however, the delisting will cause grave and irreparable injury to Environmental Petitioners' members during the period while it is subject to judicial review.

Specifically, if you stay the delisting, you will restore EPA's nondiscretionary duty to issue § 112(d) standards for power plants. Thus, you will put the agency back on a path to issuing the protective emission standards that the public needs and that the Clean Air Act requires. Absent a stay, however, EPA will not restart the process of issuing § 112(d) rules for power plants until its delisting is vacated by the Court. Thus, the agency's ultimate promulgation of § 112(d) rules will be delayed by the same amount of time that it takes for a court challenge in the D.C. Circuit to be briefed, argued and decided.

Cases in the D.C. Circuit typically take about eighteen months. This time period, however, has been dramatically extended in many challenges to EPA actions where EPA's

failure to provide notice and comment opportunity on key issues has led members of the public to file petitions for administrative reconsideration. For example, because of delays in EPA's reconsideration process, Sierra Club's challenge to EPA's regulations for brick and clay kilns (*Sierra Club v. EPA*, No. 03-1202 filed July 15, 2003), has not even been briefed yet. In its rulemaking for power plants, as EPA is well aware, the agency failed to provide notice opportunity on key issues. If members of the public file petitions for reconsideration — and EPA already has received notice that they are likely to do so — it is likely that at least three years will pass before EPA's delisting can be fully reviewed by the Court and vacated. Therefore, absent a stay, EPA's issuance of § 112(d) rules and the toxics reductions that those rules will yield also will be delayed by at least three years.

Each year, power plants emits scores of tons of hazardous air pollutants into the environment. In 1994 alone, according to EPA's report to Congress, they emitted fifty-one tons of mercury, fifty-eight tons of arsenic, sixty-two tons of lead, and 134,000 tons of hydrogen chloride — as well as vast quantities of other HAPs. Even in tiny quantities, these pollutants can cause cancer, birth defects, developmental damage and other catastrophic health effects. Any delay in the issuance of § 112(d) rules for power plants will prolong and increase Environmental Petitioners' members' exposure to power plants' toxic emissions and to the risk of serious adverse health effects that these emissions can cause. It bears emphasis that power plant emissions include scores of tons of pollutants that are not only highly toxic but also persistent in the environment and bioaccumulative. Absent a stay, the additional emissions of these toxics will contaminate soil, water and wildlife in the places where petitioners members live and recreate for years to come. Such contamination further threatens Environmental Petitioners' members health as well as their interest in fishing and recreating in a clean and safe environment.

By delisting power plants, you also will deprive Environmental Petitioners' members of the protections afforded by emission standards that States have issued or will shortly issue to reduce power plants' toxic emissions. Clean Air Act § 112(g) requires State governments to determine whether any new power plant built within their States will comply with § 112(d) standards. 42 U.S.C. § 7412(g)(2)(B). Because EPA still has not issued such standards, States must make their determination on a case-by-case basis. *Id.* Several new power plants already have obtained case-by-case emission standards from States, and other power plants have applied for such standards. By removing power plants from the § 112(c) list, however, you eliminated § 112(g)'s mandate for States to issue case-by-case standards. Absent a stay, the delisting will deprive Petitioners' members of the protection that these State standards provide.

Significantly, none of the regulatory actions that EPA has taken with respect to power plants will undo, or even substantially mitigate, the harm that will be caused by its delisting.

With respect to existing power plants, the § 111 standards that EPA finalized on March 29 will not require any action whatsoever until 2010. Even then, they will apply only to power plants' mercury emissions and will have no effect on the scores of tons of other HAPs (e.g., arsenic) that power plants emit. Further, EPA's § 111 standards expressly allow States to choose not to require any reductions in power plants' mercury emissions. By comparison, § 112(d) standards for power plants would, by definition, require the maximum achievable degree of

reduction in each of the hazardous air pollutants that power plants emit. 42 U.S.C. §§ 7412(d)(1), (d)(2). *See National Lime Ass'n v. EPA*, 233 F.3d 626, 633-634 (D.C. Cir. 2000).

Regarding new power plants, EPA's proposed § 111 standards are a similarly inadequate substitute. Unlike § 112 standards, they will do nothing to reduce emissions of non-mercury HAPs. Further, EPA's mercury standards under § 111 are significantly less protective than § 112 standards would be. This is evident from a simple comparison between EPA's § 111 standards for power plants and the standards that EPA proposed under § 112(d). Although EPA's proposed § 112(d) standards are significantly less protective than the Clean Air Act requires, they still require far greater mercury reductions than do EPA's final § 111 standards.

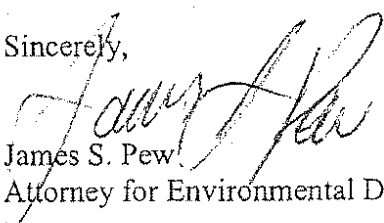
Absent a stay, the harm that will be done by EPA's delisting will be irreparable. The additional tons of toxic pollutants that power plants will emit cannot be put back into their smokestacks. The health risks that Environmental Petitioners' members incur as a result of exposure to such emissions during that time period cannot be undone. Because so much of the pollution from power plants is both persistent and bioaccumulative, the additional emissions will remain in the environment and the food chain for years if not decades to come. Setting stronger standards for power plants at some later date after the delisting has been vacated will do nothing to repair the damage that these emissions cause.

In sum, because EPA's delisting is unlawful, Environmental Petitioners are likely to prevail on the merits of a challenge to it. Further, the delisting will harm Environmental Petitioners' members irreparably both by prolonging and increasing their exposure to hazardous air pollutants and to the resulting risk of adverse health effects and by doing permanent or long term damage to the environment in which they live and recreate. Therefore, a stay is appropriate under the D.C. Circuit Rules and well established D.C. Circuit precedent. D.C. Circuit Rule 18. *See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). *See also* D.C. Circuit Handbook at 32.

To preserve the resources of Environmental Petitioners and EPA and in the interest of judicial economy, Environmental Petitioners hereby requests that EPA stay its extension of the deadline for § 112(j) permit applications pending judicial review. *See* Fed. R. App. P. 18(a)(1).

Please respond to this request no later than May 27, 2005. If you have any questions, please contact me at (202) 667-4500.

Sincerely,

  
James S. Pew

Attorney for Environmental Defense and Sierra Club



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 24 2005

OFFICE OF  
AIR AND RADIATION

Peter C. Harvey  
Attorney General of New Jersey  
25 Market Street  
PO Box 093  
Trenton, NJ 08625-0093

Jon P. Devine, Jr.  
Natural Resources Defense Council  
1200 New York Avenue, NW  
Suite 400  
Washington, DC 20005

Dear Counselors:

On May 31, 2005, EPA received two petitions for reconsideration of the final rule entitled "Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-fired Electric Utility Steam Generating Units from the Section 112(c) List" (the "final Section 112 rule").<sup>1</sup> See 70 Fed. Reg. 15,994 (Mar. 29, 2005). This letter contains EPA's preliminary response regarding those petitions.

Generally, petitioners claim that the final Section 112 rule contains legal interpretations and information that are of central relevance to the final rule, but that were not sufficiently reflected in the proposed rule. Petitioners further contend that they believe that additional information is, or has become, available since the public comment period, and that this information, too, is of central relevance. Finally, petitioners conclude that they did not have an adequate opportunity to provide input on these matters during the designated public comment periods.

EPA recognizes the high degree of public interest in this rule. The public had three opportunities to submit comments, following the January 30, 2004 Notice of Proposed

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<sup>1</sup> One petition was submitted by 14 States: New Jersey, California, Connecticut, Delaware, Illinois, Maine, Massachusetts, New Hampshire, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, and Wisconsin. The other petition was submitted by five environmental groups and four Indian Tribes: Natural Resources Defense Council, Clean Air Task Force, Ohio Environmental Council, U.S. Public Interest Group and Natural Resources Council of Maine; Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Penobscot Indian Nation and Passamaquoddy Tribe of Maine. Both groups are referred herein as "petitioners."

Rulemaking, the March 16, 2004 Supplemental Notice of Proposed Rulemaking, and the December 1, 2004 Notice of Data Availability. EPA received, reviewed, and responded to thousands of documents. Thus, a robust public discussion of the rule has already occurred. Nonetheless, in the interest of ensuring ample opportunity to comment on this important rule, we plan to initiate a reconsideration process. The particular issues EPA plans to reconsider, and the specifics of the reconsideration process, will be set out in a forthcoming Federal Register notice. We are sending this letter now because we wanted to inform you promptly that we are initiating the reconsideration process.

Without prejudging any information that petitioners and other members of the public may provide in the reconsideration process, our preliminary review of the petitions has not persuaded us that our final decisions were erroneous or inappropriate. We will, of course, consider objectively all information generated during the reconsideration process. Our initiation of the reconsideration process, however, should not be taken as an indication that we agree with petitioners' claims.

Petitioners also requested that EPA stay the effect of the final Section 112 rule under Clean Air Act ("CAA") section 307(d)(7)(B) pending administrative reconsideration. For the reasons set forth below, EPA denies all pending stay requests.<sup>2</sup>

EPA promulgated both the final Section 112 rule and the Clean Air Mercury Rule ("CAMR"), 70 Fed. Reg. 28,606 (May 18, 2003), after an exhaustive rulemaking process during which EPA received and considered thousands of comments. These rules represent the first time that EPA has regulated utility mercury emissions. When fully implemented, CAMR will reduce emissions of mercury from U.S. coal-fired power plants by 70 percent. Through CAMR, EPA has created strong incentives for the development of new and highly effective mercury control technologies that can be used both in the U.S. and in other countries to combat the global mercury problem.

Staying the Section 112 rule would be a step backward, not forward, in our efforts to reduce utility mercury emissions. There are no pre-existing federal mercury emission standards for existing coal-fired utilities. Thus, because staying the final Section 112 rule would necessitate staying the final CAMR rule, a stay would leave existing U.S. coal-fired power plants free from direct federal regulation of mercury emissions. Regardless of the outcome of the reconsideration process, it is important to keep regulations addressing utility mercury emissions in place, so the states and industry can start planning accordingly and mercury reductions can be realized as soon as reasonably practicable.<sup>3</sup> Again, the final Section 112 rule is part of a larger

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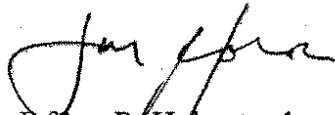
<sup>2</sup> On March 30, 2005, EPA received a letter from four environmental groups requesting a stay of the effective date of the final Section 112 rule under the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, or, alternatively, CAA § 307(d)(7)(B) ("Stay Letter"). The letter was sent on behalf of the Chesapeake Bay Foundation, the Clean Air Task Force, the National Wildlife Federation and the Natural Resources Defense Council.

<sup>3</sup> Even if one believes that CAMR should have been more stringent, that belief would not justify staying the rule. As EPA said in the preamble to the final rule, if future information demonstrates that additional control is warranted, EPA is committed to reopening and reevaluating the CAMR standards.

approach which for the first time imposes a control program, with regulatory deadlines, on mercury emissions from the fleet of U.S. coal-fired power plants. Thus, EPA believes the public interest would be best served by moving forward with our rules, not by delaying their benefits through a stay.

Thank you for your interest in the final Section 112 rule. EPA looks forward to any comments you may supply during the reconsideration process.

Sincerely,



Jeffrey R. Holmstead  
Assistant Administrator

cc: Bill Lockyer, Attorney General of California  
Richard Blumenthal, Attorney General of Connecticut  
M. Jane Brady, Attorney General of Delaware  
Lisa Madigan, Attorney General of Illinois  
G. Steven Rowe, Attorney General of Maine  
Thomas F. Reilly, Attorney General of Massachusetts  
Kelly A. Ayotte, Attorney General of New Hampshire  
Patricia A. Madrid, Attorney General of New Mexico  
Eliot Spitzer, Attorney General of New York  
Susan Shinkman, Chief Counsel, Department of Environmental Protection  
Patrick C. Lynch, Attorney General of Rhode Island  
William H. Sorrell, Attorney General of Vermont  
Peggy A. Lautenschlager, Attorney General of Wisconsin  
Ann Brewster Weeks, Clean Air Task Force  
Douglas J. Luckerman, Law Office of Douglas J. Luckerman  
Jon Mueller, Chesapeake Bay Foundation  
Neil Kagan, National Wildlife Federation

August 1, 2001

SUBJECT: Case-By-Case MACT for New Oil- and Coal-fired Electric Utility Steam Generating Units

FROM: John S. Seitz, Director  
Office of Air Quality Planning and Standards

TO: Regional Office Air Directors

The purpose of this memoranda is to clarify the applicability of the "case-by-case" maximum achievable control technology (MACT) provisions of Clean Air Act section 112(g) to oil- and coal-fired electric utility steam generating units. In addition, we are providing a tool that the States may find useful in their evaluation of individual case-by-case determinations for these units.

The EPA's regulations for case-by-case MACT, which were promulgated in 1996, are set out in 40 CFR, Part 63, Subpart B. Those regulations require case-by-case determinations of MACT by the Title V permitting authority for each major source of HAP which is constructed or reconstructed after the effective date of that permitting authority's section 112(g) program. For electric utility steam generating units, the case-by-case provisions contain an exemption from applicability "unless and until such time as these units are added to the source category list." On December 14, 2000, the EPA announced that it was adding coal- and oil-fired power plants to the section 112(c) list of sources (65 FR 79825; December 20, 2000). Therefore, each coal or oil-fired electric utility steam generating unit which is constructed or reconstructed will now be subject to the case-by-case provisions of the Act until the EPA promulgates a nationally applicable MACT standard to address hazardous air pollutants for this source category. The EPA expects to promulgate a final standard in December 2004.

We have developed a tool that the Title V permitting authorities may find useful in evaluating applications for a case-by-case MACT determination which are submitted by affected facilities within their jurisdictions. The tool will allow permitting authorities and others to evaluate the impact on mercury emissions if certain parameters including type of coal, boiler, or pollution control device are changed. The basis for the tool is the information gathered from the industry during calendar year 1999 on their plants, the coal they burned, and their mercury emissions. The tool has been provided to assist permitting authorities in making the required case-by-case determinations, but no permitting authority is required to utilize it for that purpose. The tool does not include or represent any EPA determination of presumptive MACT, nor does it reflect any decision(s) by the Agency on MACT floors, subcategorization, or other aspects of the MACT standard. The tool may be found at

<<http://www.epa.gov/ttn/uatw/combust/utitox/utoxpg.html>>.

Please note that the December 2000 decision to list coal- and oil-fired power plants does not apply to gas-fired electric utility steam generating units, thereby exempting them from future regulation as electric utility steam generating units under section 112. This exemption does not apply, however, to stationary combustion turbines based on our earlier determination in an interpretative rule<sup>1</sup> that such turbines are not considered “electric utility steam generating units.” Stationary combustion turbines are included on the list of source categories under section 112(c) of the Act and the Emission Standards Division is currently developing MACT standards for this source category. Stationary combustion turbines are subject to separate case-by-case determinations under the interpretative rule noted above. Proposal of these MACT standards is anticipated in the near future, with promulgation following in 2002. These MACT standards will apply to all stationary combustion turbines regardless of their configuration, end use, or location.

This memorandum should fully clarify the need for all new oil- and coal-fired electric utility steam generating units to undergo case-by-case MACT determinations without further action by EPA. If questions should arise, however, please contact Mr. William Maxwell at (919) 541-5430.

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<sup>1</sup> 65 FR 34010; May 25, 2000

MAY 31 2005



Montana Department of  
**ENVIRONMENTAL QUALITY**

Brian Schweitzer, Governor

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.mt.gov

May 27, 2005

Anne Hedges  
Program Director  
MEIC  
P.O. Box 1184  
Helena, MT 59624

Sent by fax and by regular mail

Subject: Your request for the Department's position related to MACT determinations for electric steam generating utility units

Dear Anne:

I'm writing to respond to your April 19, 2005, letter in which you asked several questions related to the status of maximum achievable control technology (MACT) determinations for electric utility steam generating units ("Utility Units"), in view of EPA's recent rulemaking on the issue. I apologize for not responding sooner.

Background:

Administrative Rules of Montana (ARM) 17.8.302(1)(c) adopts and incorporates by reference 40 CFR Part 63, "National Emission Standards for Hazardous Air Pollutants for Source Categories." ARM 17.8.342(1) and (2) require the owner or operator of an affected source, within the meaning of 40 CFR Part 63, to comply with that part and, with certain specified exemptions, require the owner or operator to obtain a Notice of MACT Approval from the Department prior to beginning construction.

40 CFR 63.5 states that the preconstruction review requirements of 40 CFR Part 63 apply to the owner or operator of "new affected sources." 40 CFR 63.2 defines "affected source" in relevant part as an emission source "included in a section 112(c) source category or subcategory for which a section 112(d) standard or other relevant standard is established pursuant to section 112 of the Act." 40 CFR 63.42(c) prohibits construction of a major source of hazardous air pollutants (HAPs) unless the source has been specifically regulated or exempted from regulation under Section 112 or the permitting authority has made a final case-by-case determination pursuant to 40 CFR 63.43.

Section 112(c) of the FCAA requires the U.S. Environmental Protection Agency (EPA) to publish a list of emission source categories and subcategories requiring regulation

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May 27, 2005  
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under Section 112. Section 112(d) requires EPA to promulgate regulations establishing emission standards for each source category listed for regulation. Section 112(n)(1) required EPA to conduct a study of the health hazards to public health posed by Utility Unit emissions of the HAPs listed pursuant to Section 112 and required EPA to regulate Utility Units under Section 112 if EPA found that such regulation was "appropriate and necessary."

Pursuant to Section 112(n)(1), EPA prepared a "Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units – Final Report to Congress" and required HAP emission testing at Utility Units. Based on the report and emission testing, EPA published a finding on December 20, 2000, that it was appropriate and necessary to regulate Utility Units under Section 112, and EPA listed Utility Units as subject to that Section. 65 Federal Register 79825 (December 20, 2000). This listing of Utility Units triggered the requirement, under Section 112(j) of the FCAA, for a case-by-case MACT determination for proposed Utility Units that constituted major sources of HAPs, under Section 112(a)(1) of the FCAA, in the interim until EPA promulgated a MACT standard for Utility Units.

On January 30, 2004, EPA published a rulemaking notice proposing two mutually exclusive alternatives for control of mercury from Utility Units. 69 Fed. Reg. 4652 (January 30, 2004). One alternative was a proposed MACT standard for mercury; the other proposed alternative was to find that regulation of Utility Units under Section 112 was not appropriate and necessary and to, instead, regulate HAPs under the New Source Performance Standards program.

On March 15, 2005, EPA published notices of final rulemaking withdrawing the proposed MACT standard, de-listing Utility Units under Section 112, and regulating Utility Units under New Source Performance Standards and a cap and trade program.

Question: You asked whether EPA's March 15, 2005, rulemaking impacts the obligation for owners or operators of proposed new Utility Units in Montana to obtain a case-by-case MACT determination.

Department's Response: As discussed above, the State's air quality rules adopt and incorporate the federal case-by-case MACT requirements. The federal MACT regulations require a case-by-case MACT determination for new "affected sources." Upon EPA de-listing Utility Units as being subject to regulation pursuant to Section 112, Utility Units were no longer "affected sources" subject to regulation pursuant to Section 112 and were again exempted under Section 112(n).

Because the State's air quality rules do not contain MACT standards and case-by-case MACT requirements that are independent of the requirements of federal regulations,

Letter to Anne Hedges  
May 27, 2005  
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there is no authority under the State's air quality rules to require a case-by-case MACT determination for a proposed new Utility Unit in Montana unless a stay of the effect of EPA's recent rulemaking is ordered in court or the rulemaking is found by the courts to be invalid. If a court orders a stay of EPA's recent rulemaking, the de-listing of Utility Units under Section 112 will be stayed and, because EPA has not promulgated a MACT standard, a case-by-case MACT determination again will be required until the court dissolves the stay or EPA promulgates a MACT standard.

Question: You asked whether the MACT emission limit for mercury in the air quality permit for the Roundup Power Project would be rescinded if the permit applicant, Bull Mountain Development Company No. 1, LLC, requested that it be rescinded.

Department's Response: There is no provision of the Clean Air Act of Montana or rules implementing that Act that expressly addresses the Department's authority to rescind a permit condition when the condition was legally required or allowed at the time the Department made its decision and the permit became final. If Bull Mountain requests rescission of the MACT emission limit for mercury, the Department will make a decision at that time, considering any authority on the issue presented by Bull Mountain, any authority presented by any other interested persons or agencies, and any authority otherwise determined by the Department to be relevant to the matter. The Department also would consider the status of the court case challenging EPA's recent rulemaking.

Question: You asked whether, if the Department rescinded the MACT emission limit for mercury in the air quality permit for the Roundup Power Project, the Department would require the permittee to obtain a PSD permit for mercury or whether the Department would regulate mercury emissions from the Project through another regulatory scheme.

Department's Response: The Department does not have authority to require Bull Mountain to submit an application for a Prevention of Significant Deterioration of Air Quality (PSD) permit for mercury emissions. Bull Mountain has applied for, and obtained from the Department, a PSD permit. However, HAPs are expressly excluded from regulation under both the federal and State PSD programs. ARM 17.8.818(2) states that the requirements of the PSD program do not include HAPs, except to the extent that they are regulated as constituents of general pollutants or must be considered in the BACT analysis, and ARM 17.8.819(2) excludes HAPs from best available control technology (BACT) analysis under the PSD rules.

However, the State's general permitting rules in ARM 17.8.740, et seq., require BACT for all new or modified facilities and emitting units for which a Montana Air Quality Permit is required. See, ARM 17.8.752(1)(a). Unlike the definition of BACT in the PSD rules, the definition of BACT in the general permitting rules of Subchapter 7 states that it is an emission limit that is based on the maximum degree of reduction "for each pollutant

Letter to Anne Hedges

May 27, 2005

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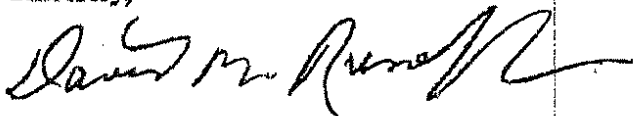
subject to regulation under 42 U.S.C. 7410, et seq. or 75-2-101, et seq, MCA, that would be emitted from any proposed emitting unit or modification . . . ." Section 75-2-103, MCA, of the Clean Air Act of Montana, defines "air pollutants" as including "those pollutants regulated pursuant to section 7412 and Subchapter V of the federal Clean Air Act, 42 U.S.C. 7401, et seq." Section 7412 of the federal Clean Air Act (42 U.S.C. § 7412, otherwise referred to as Section 112 of the FCAA) specifies requirements for HAPs.

So, the Department's BACT authority under its general permitting rules is broader than its BACT authority under its PSD rules, and the more stringent requirements of the two sets of rules would apply. Therefore, the Department will continue to regulate HAPs from the Project, and any other new or modified emitting units, through the BACT requirement of ARM 17.8.752(1)(a), of the State's Subchapter 7 general preconstruction permit rules.

In the recent contested case concerning modification of the air quality permit for the Rocky Mountain Power Hardin Generation Project, by a motion for summary judgment, the permit applicant challenged the Department's authority to require BACT for HAPs. The Board of Environmental Review did not address that challenge because the case was settled prior to a determination on the motion for summary judgment. Bull Mountain, or another permit applicant, may raise a similar challenge. However, unless the Board or a court determines that the Department does not have authority to regulate HAPs under the Subchapter 7 BACT requirement, the Department will regulate HAPs under BACT and also under MACT, if applicable.

Please let me know if you have any questions.

Sincerely,



David M. Rusoff  
Staff Attorney

cc: Dave Klemp

DR