V. The Rule Properly Establishes MACT Emission Limits for Area Source EGUs

A. There is No Significant Difference Between Major and Area Sources That Would Warrant Exercise of EPA's Discretion to Establish Different Standards for Area Sources

EPA's proposed Utility Air Toxics Rule properly sets MACT emission standards for all coal- and oil-fired EGUs greater than 25 megawatts ("MW"), without further distinguishing between "major" sources and "area" sources. Rather than relying on the Agency's discretion under Clean Air Act section 112(d)(5) to set alternative generally available control technology ("GACT") standards for area source EGUs, EPA's "proposed rule treats all EGUs the same and proposes MACT standards for all units." 76 Fed. Reg. at 25,021. EPA based this decision, in part, on "data show[ing] that similar HAP emissions and control technologies are found on both major and area sources greater than 25 MWe."[1] *Id.* Additionally, EPA found that there is "no essential difference between area and major source EGUs with respect to emissions of HAP." *Id.* EPA's decision to establish MACT emission limits for both major and area source EGUs is well-grounded in fact and is necessary to implement the Act's HAP control requirements for EGUs.

The Clean Air Act does not require, or even promote, different emission control standards for major and area source EGUs that have an electric generation capacity of greater than 25 MW. For purposes of HAP regulation under section 112, the Act defines "electric utility steam generating unit" as "any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale." 42 U.S.C. § 7412(a)(8). EPA has, thus, appropriately limited

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[1] Indeed, many of the air toxics emitted by EGUs are very harmful even in small quantities. *See* supra Chapter I of these comments. Total EGU industry emissions of mercury, for example, are on the order of 45 tons per year, but are centrally responsible for the mercury contamination and damage to public health and the environment, as this industry is the largest source of such emissions without final NESHAPs at present.

the scope of the Utility Air Toxics Rule to EGUs as defined by section 112. The Act separately defines "major source" as "any stationary source . . . that emits or has the potential to emit considering controls . . . 10 tons per year or more of any hazardous air pollutants or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1). And the Act defines "area source" simply as "any stationary source that is not a major source." 42 U.S.C. § 7412(a)(2).

Unlike the case-by-case provisions of Clean Air Act section 112(g), which apply only to major sources, Clean Air Act section 112(d)(1) imposes on EPA a non-discretionary duty to promulgate HAP emission standards that apply to both major sources and area sources. 42 U.S.C. § 7412(d)(1). The MACT emission standards required and defined in Clean Air Act section 112(d)(2) and (3), respectively, likewise are not limited to "major sources," and apply presumptively to new and existing major and area sources alike. 42 U.S.C. § 7412(d)(2), (3). As an alternative to this presumption, Clean Air Act section 112(d)(5) provides EPA discretion to promulgate generally available control technology ("GACT") standards in lieu of MACT standards for area sources. After reviewing the substantial record in this rulemaking, EPA has correctly determined that major and area source EGUs greater than 25 MW have similar HAP emissions and use the same control technologies and techniques to reduce HAP emissions. Thus, the record demonstrates that there is no technical basis for distinguishing between major and area source EGUs for purposes of establishing HAP emission control standards under Clean Air Act section 112(d).

Moreover, experience in recent permit proceedings for large new EGUs under the case-by-case MACT regime of Clean Air Act section 112(g) confirms the basis and emphasizes the importance of EPA's decision to hold both major and area source EGUs to MACT standards pursuant to Clean Air Act section 112(d)(2) and (3). These permit proceedings further demonstrate that: (1) major and area sources are not appreciably different with respect to boiler size, HAP emissions and pollution controls; and (2) setting different standards based on such a distinction would further encourage recent attempts by large, highly polluting HAP sources to

evade MACT emission standards for the HAPs of greatest concern by claiming minor (or area) source status. In fact, distinguishing between major and area sources, and holding the latter to less rigorous GACT standards, would undermine the HAP program for EGUs.

Following the D.C. Circuit Court of Appeals vacatur of the EGU Delisting Rule and Clean Air Mercury Rule in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), several proposed new EGUs have attempted to circumvent the case-by-case MACT requirements that apply to new and expanded major HAP sources under Clean Air Act section 112(g) by claiming that the units are minor sources of HAPs and, as such, are exempt from the case-by-case MACT requirements of section 112(g). Table V-1 below summarizes pertinent design details for five EGU projects that have claimed minor HAP source status in the wake of *New Jersey v. EPA*. As this table illustrates, each of these sources is a large EGU and, individually and as a class, they include the full array of pollution control technologies found on major source EGUs. Thus, recent experience supports EPA's determination that "similar . . . control technologies are found on both major and area sources greater than 25 MWe." 76 Fed. Reg. at 25,021.

Table V-1

Source	**Boiler Type**	**Boiler Size**	**Controls**
Duke Energy, LLC: Cliffside Steam Station Unit 6[2]	Super-critical Pulverized Coal	800 MW	Low NOx Burners, Selective Catalytic Reduction ("SCR"), Spray Dry Absorber ("SDA") with Lime Injection, Fabric Filter ("FF") Baghouse, and Wet Flue Gas Desulfurization ("Wet FGD")
LS Power:	Super-	Two 600	Low-NOx Burners, SCR, SDA, and FF

[2] *See* Air Quality Permit No. 04044T29, Issued for Duke Energy Cliffside Steam Station Unit 6 (March 13, 2009), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Cliffside_Permit_T29.pdf.

Longleaf[3]	critical Pulverized Coal	MW Boilers	Baghouse
LG&E: Trimble County Generating Station Unit 2[4]	Super-critical Pulverized Coal	750 MW	Low-NOx Burners with closed-coupled Overfire Air, SCR, Dry Electrostatic Precipitator ("ESP"), Pulse Jet Fabric Filter ("PJFF") with Activated Carbon and Lime Injection, Wet FGD, and Wet ESP
Otter Tail Power Company: Big Stone II[5]	Super-critical Pulverized Coal	580 MW	Low-NOx Burners, SCR, FF Baghouse, and Wet FGD
East Kentucky Power: Spurlock Unit 17[6]	Circulating Fluidized Bed	300 MW	Selective Non-Catalytic Reduction ("SNCR"), FF Baghouse, and a Dry-Lime Scrubber (*See* p. 29 of 103 for case-by-case MACT avoidance limits)

The case-by-case permit proceedings subsequent to *New Jersey v. EPA* also highlight a more insidious problem that, if not resolved by the Utility Air Toxics Rule, would undermine the fundamental purpose of the HAP control provisions with respect to EGUs: any rule that establishes separate and less rigorous HAP control standards for area sources would spur dubious minor source claims by large new and modified EGU sources attempting to skirt highly protective MACT emission

[3] *See* Longleaf Application for Notice of MACT Approval (Oct. 6, 2008), *available at* http://www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/psd18499/mactapp.pdf.
[4] *See* Attachment V-1, Revised Air Permit for Trimble County Generating Station (Apr. 21, 2009); *see also* Attachment V-2, Section 112(g) Evaluation for Trimble County Generating Station Unit 31 (July 10, 2009).
[5] *See* Attachment V-3, Big Stone II Air Permit (June 9, 2009).
[6] *See* Attachment V-4, Hugh L. Spurlock Generating Station Air Quality Permit (Dec. 22, 2009).

standards for the HAPs of greatest concern to public health and the environment. Several cases following *New Jersey v. EPA* underscore this danger and mandate EPA's decision to hold major and area source EGUs alike to MACT standards.

B. Case Study: Duke Energy's 800 Megawatt Cliffside Unit 6

1. Permit Proceedings Prior to *New Jersey v. EPA*

In December 2005, Duke Energy Carolinas, LLC ("Duke") applied for a permit to construct a new, 800 MW, super-critical pulverized-coal EGU, designated as Unit 6, at its existing Cliffside Steam Station. In its initial application, Duke asserted that Unit 6 would emit 171.9 tons per year of hydrogen chloride ("HCl") and more than 217 tons per year of all HAPs combined, far above the 10-ton individual and 25-ton aggregate thresholds for application of section 112(g) of the Clean Air Act.[7] In March, 2007, Duke filed a substantially new application to construct Unit 6, in which it again stated that Unit 6 would emit over 171 tons per year of HCl and more than 217 tons per year of combined HAPs.[8]

On January 29, 2008, just ten days before the D.C. Circuit issued its decision in *New Jersey v. EPA*, the North Carolina Department of Environment and Natural Resources, through its Division of Air Quality ("NCDAQ") issued a construction and operation permit for Cliffside Unit 6.[9] Duke claimed that it began constructing Unit 6 the next day. Throughout the T28 Permit process, Duke consistently represented

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[7] *See* Duke's PSD Application for Cliffside Units 6 & 7 (Dec. 16, 2005), *available at* *http://daq.state.nc.us/permits/psd/docs/cliffside/Original_Unit_6and7_Application.pdf; see also* 42 U.S.C. § 7412(a)(1).

[8] *See* Duke's PSD Application for Cliffside Unit 6, Forms B and D1 (March 31, 2007), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Application_Additional_Info_3-31-07.pdf.

[9] *See* Cliffside Unit 6 Final Air Quality Permit No. 04044T28 (Jan. 29, 2008) ("Permit T28"), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Final_Permit-Final_Determ_App_A.pdf.

that Cliffside Unit 6 would emit more than 217 tons of HAPs annually. Nevertheless, the T28 Permit did not require Duke to perform a case-by-case MACT analysis or obtain MACT emission limits for Unit 6.

2. After *New Jersey v. EPA*: A Citizen Enforcement Suit and the "MACT-like" Process

Subsequent to the D.C. Circuit ruling in *New Jersey v. EPA*, Duke continued to construct Cliffside Unit 6 without complying with the case-by-case MACT requirements of undergoing a MACT determination or obtaining MACT emission limits pursuant to Clean Air Act section 112(g). On May 6, 2008, several environmental organizations sent a 60-day notice letter detailing their intent to institute a citizen enforcement action against Duke for constructing Cliffside Unit 6 in violation of section 112(g).[10] Less than a month later, NCDAQ wrote to Duke, stating that while it was unsure whether the Act's case-by-case MACT requirements applied to Unit 6 in light of the *New Jersey v. EPA* decision, the public interest would best be served if Unit 6 "has the maximum degree of reduction of emissions achievable."[11] NCDAQ requested that Duke agree voluntarily to undertake an assessment of its HAP emissions, "consistent with the analyses that would apply under [CAA] § 112."[12]

Duke responded that, because Cliffside Unit 6 was permitted prior to the D.C. Circuit's decision invalidating the Clean Air Mercury Rule, it was not subject to the case-by-case MACT requirements of Clean Air Act section 112(g).[13] Nevertheless, Duke agreed to participate in a strictly voluntary "MACT-like"

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[10] *See* Attachment V-5, Letter from National Parks Conservation Assoc., *et al.* to B. Keith Overcash, *et al.* (May 6, 2008).
[11] *See* Letter from Overcash to Roper Re: "MACT-like" process (June 2, 2008), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Letter_Regarding_Cliffside_MACTs.pdf.
[12] *Id.*
[13] *See* Attachment V-6, Letter from Turner to Overcash (June 13, 2008).

process without agreeing to submit to the requirements of Clean Air Act section 112(g).[14]

On July 3, 2008, Duke submitted its so-called "MACT-like" assessment to NCDAQ, but reiterated its position that, because Unit 6 was permitted under the Clean Air Mercury Rule, it was not subject to the requirements of Clean Air Act section 112(g).[15] In its MACT-like assessment, Duke argued that, for purposes of establishing case-by-case MACT emission limits, it would be inappropriate to rely on limited stack test data from specific sources because such data did not account for differences in the characteristics of the coal that different units might burn; differences in unit-specific equipment and pollution control performance, even among units employing the same or similar equipment; and variations in boiler and pollution control performance that an individual unit would experience under a range of actual operating conditions during the course of a year.[16]

Duke continued to construct Unit 6 during the voluntary "MACT-like" process. Thus, on July 16, 2008, the environmental organizations filed a Clean Air Act citizen enforcement suit in the U.S. District Court for the Western District of North Carolina based on Duke's construction of Cliffside Unit 6 without the case-by-case MACT determination and emission limits required by Clean Air Act section 112(g).[17] On August, 8, 2008, environmental plaintiffs filed a motion for summary judgment asserting Cliffside Unit 6 was a major source of HAPs and that Duke's

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[14] *Id.*; *see also* Duke's "MACT-like" Assessment (July 3, 2008) at 2 fn 1, *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Case-by-Case_MACT_Assessment-Final_07-03-08.pdf.

[15] *See* Duke's "MACT-like" Assessment at 2 fn 1, *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Case-by-Case_MACT_Assessment-Final_07-03-08.pdf.

[16] *Id.* at 9-10.

[17] *See Southern Alliance for Clean Energy, et al. v. Duke Energy Carolinas, LLC*, No. 1:08-CV-00318 (W.D.N.C. filed July 16, 2008).

construction of Cliffside Unit 6 without a MACT determination and emission limits violated Clean Air Act section 112(g).[18]

Throughout both the "MACT-like" process initiated by NCDAQ and in its briefing in response to environmental plaintiffs' motion for summary judgment in the federal citizen suit, Duke did not revise its estimates of Unit 6's potential HAP emissions or challenge the fact that Unit 6 would exceed the statutory thresholds for a major source. But on October 14, 2008, just two days before the federal court hearing on environmental plaintiffs' motion for summary judgment, and three days before NCDAQ was due to publish draft "MACT-like" HAP emission limits for Unit 6, Duke suddenly declared that Unit 6 would emit less than the 10- and 25-ton thresholds for major sources of HAPs and was, therefore, exempt from the case-by-case MACT requirements in Clean Air Act section 112(g).[19] Duke based its eleventh-hour minor HAP source claim on stack test data from one of its other units, Marshall Unit 5, which were acquired approximately a year-and-a-half earlier.[20] Remarkably, Duke asserted the minor source claim for Cliffside Unit 6 based on precisely the type of data that it rejected as too unreliable for developing case-by-case emission limits in its "MACT-like" assessment – *i.e.*, results of short-term stack tests conducted at another unit operating under a narrow range of controlled conditions and burning a limited range of coal types.

3. Federal Court Rules Unit 6 is Subject to Clean Air Act Section 112

On December 2, 2008, the federal district court issued an Order granting the environmental plaintiffs' motion for summary judgment. In its ruling, the court

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[18] *See* Attachment V-7, Mem. in Supp. of Mot. for Summary Judgment, *Southern Alliance for Clean Energy, et al. v. Duke Energy Carolinas, LLC,* No. 1:08-CV-00318 (W.D.N.C. filed Aug. 8, 2008).
[19] *See* Duke Minor Source Letter to NCDAQ, with attachments (Oct. 14, 2008), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/OvercashLetter.pdf; http://daq.state.nc.us/permits/psd/docs/cliffside/Attachment1.pdf; *and* http://daq.state.nc.us/permits/psd/docs/cliffside/Attachments2-4.pdf. .
[20] *Id.*

held that, by commencing and "continuing with the construction of Unit 6 without the required § 112 MACT determination," Duke "[was] simply refusing to comply with controlling law."[21] The court rejected Duke's claim that Unit 6 is a minor source of HAPs, stating that it "has the potential to emit in excess of" the applicable statutory thresholds.[22] Based on these findings, the court ordered Duke to engage in a formal Clean Air Act section 112 process for Unit 6.[23]

4. Minor Source Permit

Rather than complete a case-by-case MACT determination and obtain MACT emission limits, however, Duke sought and obtained from NCDAQ a minor source permit on March 13, 2009.[24] NCDAQ contemporaneously issued an "Air Permit Review" explaining why it decided to issue the minor source permit. In its Air Permit Review, NCDAQ accepted Duke's claims and presented a fatally flawed "potential to emit" ("PTE") calculation for HCl and HF – the two HAPs that Cliffside Unit 6 and other coal-fired EGUs emit in the greatest quantities – which purported to demonstrate that Unit 6's potential HAP emissions would fall below major source thresholds.[25] Because Clean Air Act section 112(g) requires case-by-case MACT emission limits for major sources only, NCDAQ's minor source determination ended the process.

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[21] *See* Attachment V-8, *SACE, et al. v. Duke*, Dec. 2, 2008 Order at 22 (citing 42 U.S.C. § 7412(g)(2)(B)).
[22] *Id.* at 21-22; *see also* Attachment V-9, *SACE, et al. v. Duke*, Dec. 2, 2008 Judgment ¶ 3.
[23] *See* Judgment, *supra.* ¶ 5.
[24] *See* Cliffside Unit 6 Final Air Quality Permit No. 04044T29 (March.13, 2009) ("Permit T29"), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Cliffside_Permit_T29.pdf.
[25] *See* Cliffside Unit 6 Air Permit Review, Permit T29, *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Cliffside_Permit_Review_T29.pdf.

5. EPA's Response

On April 30, 2009, EPA wrote to NCDAQ to express its "concern[] about the Unit 6 HAP potential to emit (PTE) analysis" DAQ had performed.[26] EPA also criticized the monitoring conditions in the minor source permit, recommending a CEMS for HCl "sufficient to verify compliance with" minor source requirements "at all times."[27] EPA explained that Unit 6 must achieve very high removal efficiency (99.913%) . . . for the Unit to stay below major source thresholds. This removal efficiency is sufficiently tight that a small deviation of the annual removal efficiency, such as might occur during periods of start-up, shutdown, or malfunction, would cause the unit's emissions to exceed the major source threshold for HCl.[28] NCDAQ did not modify its PTE calculations or adjust any permit terms to address EPA's concerns

6. Consequences of Minor Source Status

By accepting Duke's minor source claims and designating Cliffside Unit 6 a minor HAP source, NCDAQ allowed Duke to avoid application of rigorous MACT standards for the more than 50 HAPs Unit 6 will emit, including those, like the potent neurotoxin mercury, that pose the greatest risk to public health. For the people of North Carolina, this consequence is material. Unit 6 is permitted to emit 133 pounds of mercury per year.[29] In contrast, Dominion Power's 668 megawatt coal-fired power plant in Wise County, Virginia, a somewhat smaller plant conceded

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[26] *See* EPA Letter to Sec'y Freeman (Apr. 30, 2009), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/EPAmemo_04302009.pdf.
[27] *Id.*
[28] *Id.*
[29] *See* Cliffside Permit T28 Final Determination (Jan. 28, 2008), at 23 Response to SELC Comment – 25, *available at* *http://daq.state.nc.us/permits/psd/docs/cliffside/Final_Determination.pdf*.

by its operator to be a major source of HAPs, received a MACT limit of 4.45 pounds of mercury per year.[30]

C. Other EGUs Make Similar Minor Source Claims Following *New Jersey v. EPA*

Faced with the prospect of completing case-by-case MACT determinations and obtaining stringent MACT emission limits following the D.C. Circuit's decision in *New Jersey v. EPA*, other utilities similarly reversed course. Companies which previously had acknowledged that their proposed new EGUs were major HAP sources now claimed that these large new units were minor sources to avoid MACT emission limits for all HAPs. And in each of these cases, state permitting authorities approved the EGUs' request for designation as minor HAP sources that are exempt from the case-by-case MACT requirements for major HAP sources under Clean Air Act section 112(g).

1. Longleaf

In 2004, LS Power Development, LLC ("LS ") submitted a case-by-case MACT analysis along with its PSD permit application to construct the Longleaf Power Plant, a proposed 1200 MW super-critical pulverized-coal plant to be located in Early County, Georgia.[31] Subsequent to EPA's promulgation of CAMR, in May

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[30] *See* Virginia City Hybrid Energy Center MACT Permit (June 30, 2008), *available at* http://www.deq.state.va.us/export/sites/default/info/pdf/vchec/D-11526-Permit-MACT-20080630.pdf.

[31] *See* Attachment V-10, Relevant Excerpts from LS Power Brief Supporting Minor Source Designation, ¶ 33; *see also* Longleaf Air Quality Permit (May 14, 2007), *available at* http://www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/permitdocs/0990030final.pdf.

2007, Georgia's Environmental Protection Division ("GA EPD") issued the PSD permit for Longleaf without completing a case-by-case MACT determination.[32]

Following vacatur of CAMR in *New Jersey v. EPA*, LS Power submitted to GA EPD another case-by-case MACT application on October 6, 2008, which LS Power supplemented on October 8 and December 3, 2008.[33] GA EPD issued a draft Notice of MACT Approval ("NOMA") in June 2009.[34] Throughout the PSD permitting process and for most of the case-by-case MACT process through issuance of the draft NOMA, LS Power maintained that the Longleaf plant would be a major HAP source that is subject to the provisions of Clean Air Act section 112(g). After receiving comments on the NOMA, specifically including the comments of environmental organizations advocating for more stringent MACT floor limits, however, LS Power suddenly changed its approach.[35] On December 22, 2009, LS Power responded to public comments by filing a minor HAP source application in an attempt to avoid MACT limits for all of the HAPs the Longleaf facility would emit.[36]

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[32] *See* Attachment V-10, LS Power Brief*, supra,* ¶¶ 33, 34; *see also* Longleaf Air Quality Permit (May 14, 2007), *available at* http://www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/permitdocs/0990030final.pdf..

[33] *See* Attachment V-10, LS Power Brief, *supra,* ¶ 36; *see also* Longleaf's Application for MACT Approval (Oct. 6, 2008), *available at* http://www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/psd18499/mactapp.pdf; and http://www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/psd18499/120308leaepd0022.pdf.

[34] *See* Attachment V-10, LS Power Brief, *supra.* ¶ 37; *see also* Notice of MACT Approval (June 2009), *available at* http://www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/psd18499/0990030mactapproval.pdf. .

[35] *See* Attachment V-10, LS Power Brief, *supra.* ¶ 38; *see also* Longleaf Response to Comments (Dec. 22, 2009), *available at* http://www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/psd18499/12222009leaepd0031.pdf.

[36] *See* Attachment V-10, LS Power Brief, *supra.* ¶ 39; *see also* Longleaf Response to Comments (Dec. 22, 2009), *available at* http://www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/psd18499/12222009leaepd0031.pdf.

GA EPD approved Longleaf's minor HAP source application on November 8, 2010.[37] Nevertheless, LS Power has not yet commenced construction of the Longleaf plant.

2. Trimble County Unit 2

In December 2004, a consortium lead by Louisville Gas and Electric Company ("LG&E") applied for a Title V permit revision to include a PSD permit authorizing construction of a new 750 MW super-critical pulverized-coal unit at the existing Trimble County Generating Station. After a series of permit revisions and appeals, EPA Region 4 objected to the proposed permit on June 5, 2009. One of EPA's two objections was that the Kentucky Division for Air Quality ("KDAQ") "must undertake a Section 112(g) analysis for all hazardous air pollutants with respect to [the new unit] in order to comply with all applicable Clean Air Act requirements."[38] On August 12, 2009, EPA reaffirmed that Trimble Unit 2 was a major source of HAPs subject to the case-by-case MACT requirements of Clean Air Act section 112(g).[39]

In response to EPA's Objections, KDAQ re-issued the Trimble County permit on January 28, 2010.[40] But the re-issued permit did not include MACT emission limits for Unit 2.[41] Instead, the permit included blanket emissions limits restricting emissions of HCl to no more than 9 tons per year, and total HAP emissions to no more than 22.5 tons per year.[42] The permit further explained that:

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[37] *See* Georgia EPD website, Final Permit Issued 11/8/10, *available at* http://www.georgiaair.org/airpermit/html/permits/psd/dockets/longleaf/112docs.htm.
[38] *See* Attachment V-11, In the Matter of: Louisville Gas and Electric, Trimble County, Kentucky Title V/PSD Air Quality Permit # V-02-043 Revisions 2 and 3, EPA Order Responding to Issues Raised in April 28, 2008 and March 2, 2006 Petitions at 7 (Aug. 12, 2009).
[39] *Id.* at 60-61.
[40] *See* Attachment V-12, Trimble County Generating Station Air Quality Permit V-08-001R2 (Jan. 28, 2010).
[41] *See id.*, Attachment V-12.
[42] *Id.* at 30.

> To preclude the applicability of CAA, Section 112 (g), the operation of a WFGD and WESP shall begin upon start-up of the unit (i.e. initiation of coal combustion) and throughout the shutdown period. Continuous compliance with the HCl limit is demonstrated by continuous operation of the WFGD and WESP. Operation shall be consistent with manufacturer's specification and standard operating practices.[43]

As in each of the cases described in this section, the Trimble County Unit 2 minor source claim relied on the projected ability of the unit's sulfur dioxide controls (principally WFGDs) to achieve high levels of HCl and HF control, as these are the two HAPs that coal-fired EGUs emit in the greatest quantities. As a consequence of the minor source designation, however, each of these EGUs has evaded stringent MACT emission limits for the dozens of HAPs these sources will emit, including HAPs, like mercury, that present the greatest threats to public health and the environment.

3. Big Stone II

On February 25, 2008, Otter Tail Power Company submitted a case-by-case MACT application for its proposed Big Stone II coal-fired power plant (also identified as Unit 13). Less than a month later, on March 18, 2008, the company withdrew its application for a MACT determination, claiming that the 580 MW super-critical coal plant would, in fact, be a minor HAP source that is exempt from the case-by-case MACT provisions of Clean Air Act section 112(g).[44] On June 9, 2009, the South Dakota Department of Environment and Natural Resources issued a Title V Permit exempting Unit 13 from case-by-case MACT requirements based on its purported status as a minor HAP source.[45]

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[43] *Id.* at 38, § B(7)(c).
[44] *See* Attachment V-13, Letter from Terry Graumann to Kyrick Rombough, with attachments (March 18, 2008).
[45] *See* Attachment V-14, Title V Permit for Big Stone Power Plant (June 9, 2009).

4. Spurlock

On April 1, 2009, East Kentucky Power Cooperative ("EKPC") announced that it had completed and commenced operating a new 300 MW circulating fluidized bed EGU identified as Spurlock Power Station Unit 4.[46] Approximately three weeks later, the Sierra Club brought a challenge in the U.S. District Court for the Eastern District of Kentucky asserting EKPC's failure to obtain a case-by-case MACT determination and emission limits pursuant to Clean Air Act section 112(g). On December 22, 2009, KDAQ issued a permit revision designating the new unit as a minor HAP source. As with Trimble Unit 2, KDAQ approved the minor source permit provisions in order "[t]o preclude applicability of Section 112(g) of the Clean Air Act."[47]

D. Conclusion

Since the D.C. Circuit handed down its decision in *New Jersey v. EPA*, a pattern has emerged in which large EGUs previously designated as major HAP sources have claimed minor source status to avoid MACT emission limits for all of the 60 or more HAPs the sources will emit. In each of these cases, the EGUs asserted that the suite of pollution controls planned for the units would reduce HCl and HF emissions below the 10-ton per year major source threshold for individual HAPs, and that the combination of all HAP emissions would fall below the 25-ton per year threshold. These cases reaffirm EPA's conclusion that there is no material difference between major and area source EGUs insofar as HAP emissions and controls are concerned. The putative area sources discussed above have large

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[46] *See* EKPC Press Release (Apr. 1, 2009), *available at* http://www.ekpc.coop/pressreleases/2009%20press%20releases/2009-04-01_Spurlock4_commercial_start.pdf.

[47] *See* Attachment V-15, Hugh L. Spurlock Generating Station Air Quality Permit, at 27 (Dec. 22, 2009).

capacity boilers; they emit the same HAPs as major sources; and they include the full range of pollution controls available for major sources.

Additionally, these minor source case studies provide a compelling justification for EPA's proposal to establish MACT emission limits for both major and area source EGUs. To avoid MACT emission limits that apply to major HAP sources pursuant to Clean Air Act section 112(g), large, highly polluting EGUs have sought and obtained designation as minor HAP sources based on projected control of two pollutants – HCl and HF – and blanket limits for HAP emissions. In so doing, however, these sources have evaded stringent MACT emission control requirements for all the HAPs they will emit, including the HAPs of greatest concern to people and the environment. Distinguishing between major and area sources would perpetuate this loophole and threaten public health and welfare in the process.