XI: THE RULE MUST DEFINE AS "NEW SOURCES" ALL SOURCES WHICH COMMENCED CONSTRUCTION AFTER JANUARY 30, 2004

The Act defines a "new source" to include any "stationary source the construction or reconstruction of which is commenced after the Administrator *first proposes* regulations under this section establishing an emission standard applicable to such source." 42 U.S.C § 7412(a)(4) (emphasis added). The Agency first proposed emission standards applicable to oil- and coal-fired electric generating units on January 30, 2004. 69 Fed. Reg. 4,652 (January 30, 2004). All coal- and oil-fired power plants that commenced construction or reconstruction after that date, consequently, are "new sources" under Section 112, and the rule should define them as such.

The clear text of the statute requires that result. The Agency's withdrawal of the standards proposed in 2004 is irrelevant; the statute specifies *proposal* of standards as sufficient to bring subsequently constructed sources within the ambit of the "new source" definition. And likewise, the Agency's subsequent proposal of different emissions standards is irrelevant; the statute expressly provides the *first* proposal as point dividing new from existing sources.[1] That command cannot be reasonably understood to allow the Agency to move that point to the second (or third, or fourth) proposal.

The statutory definition, especially in light of the strict deadlines by which the Act requires EPA to establish effective standards, reflects Congress' intent to ensure maximal reductions in air toxics. It further reflects Congress' desire to prevent industry from relying on administrative lobbying and judicial challenges to delay installation of pollution controls, or to secure weaker restrictions on their hazardous air pollution. And finally, the Act

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[1] Indeed, EPA's effort to replace its section 112 standards with standards under section 111 is a legal nullity that has no effect at all. "When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect. . . ." *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (citing *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Dir. 1987)).

discourages manipulation of construction schedules in a similar pursuit of lesser restrictions.

The sources encompassed by the statutory definition of new sources face no unfair burden. Section 112(i)(2) allows such sources to delay compliance with the new source standards for up to three years, if the source meets the standards as initially proposed. 42 U.S.C. § 7412(i)(2). Most such sources should already have MACT limits meeting the same substantive criteria by which EPA is devising these nation-wide standards, 42 U.S.C. § 7412(g)(2)(B); accordingly, the main pollution-control equipment required under the rule should be in place.[2] To the extent that plants with final and effective MACT limits procured to comply with section 112(g) require additional time to comply with the new-source standards, EPA's regulations allow EPA or other permitting authorities to delay compliance for up to 8 years from the promulgation of final standards. 40 C.F.R. § 63.44(b)(1). That delay should be more than adequate for such plants to undertake any necessary further modifications.

To our knowledge, only 37 coal-fired plants commenced construction after January 2004 (we have identified 3 oil-fired units built during the same period). *See* Ex. 11-1. If any of those plants emit significant quantities of hazardous air pollutants, they should have procured case-by-case MACT limits pursuant to Section 112(g)(2)(B), 42 U.S.C. § 7412(g)(2)(B), and should therefore be capable of meeting new-source standards. As a practical matter, none of the plants constructed since 2004 should have any significant difficulty meeting either the proposed or final new source standards. Seven coal-fired plants have not begun any physical, on-site construction (the American Falls plant in Idaho, the Decatur plant in Illinois, the Fuel

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[2] The only plants which commenced construction after January 2004, but nevertheless lack case-by-case MACT limits, are either: in violation of the Act, *Sierra Club v. Sandy Creek Energy Assocs.,* 627 F.3d 134 (5th Cir. 2010); or relying on exceedingly dubious claims to minor status, *see* Chapter V, above.

Frontiers plant in Kentucky, the Lake Charles Plant in Louisiana, the Kemper Plant in Mississippi, the Wellington Plant in Pennsylvania, and the Brazoria Plant in Texas). Another is less than three-quarters complete (the Turk plant, in Arkansas).

All of the plants scheduled to begin operation within the next year (or which have commenced operation) should already have the pollution-control equipment in place to meet the proposed or final new-source standards. All non-gasification units constructed since the Agency first proposed air-toxics standards for power plants are equipped with flue-gas desulfurization devices (scrubbers) and fabric filters, which are likely capable of meeting the proposed HCl and PM limits, and may well suffice to meet the proposed mercury limit. More than two thirds of new units have also installed activated carbon injection, ensuring their ability to meet the new-source mercury standard. All of the plants should be capable of meeting the new-source limits when they become effective, or (at a minimum) the proposed limits (allowing up to three additional years for those plants to install any necessary additional equipment).