IV. Statutory Compliance Deadlines And Electric System Reliability

The Clean Air Act compels the Agency to establish a compliance deadline for existing sources that requires such sources to meet the MACT standards "as expeditiously as practicable, but in no event later than three years after the effective date" of the standards' effective date.[1] 42 U.S.C. § 7412(i)(3). The Agency acknowledges that the controls required by the mercury and particulate standards can uniformly be installed in "significantly less than 3 years," and that many owners and operators already have installed controls needed to meet those standards, or are in the process of installing them. *See* 76 Fed. Reg. at 25,054-56. Units that already have installed scrubbers, for example (more than half of the existing fleet, with additional installations planned or ongoing), need only optimize those controls to meet the new acid gas standards. Even where additional equipment is needed to meet some standards, technology vendors agree that the required controls can be installed in one or two years. *Id.* at 25,054 n.172. The vast majority of sources should consequently be able to reduce emissions to the meet the standards within three years, without need for the one-time case-by-case extension of "up to one year" available by permit from the Administrator or a State if "necessary for the installation of controls." 42 U.S.C. §7412(i)(3)(B).

A. EPA May Not Alter the Statutory Deadlines Provided in Section 112(i)

EPA has no authority to provide a deadline for any category or subcategory that exceeds the statutory three-year maximum. *Natural Resources Defense Council v. E.P.A.,* 489 F.3d 1364, 1373-74 (D.C. Cir. 2007). Nor may EPA extend any particular source's compliance deadline beyond three years, unless the standards set forth in the statute for such an extension are met, *e.g.,* 42 U.S.C. §§7412(i)(3)(B) (authorizing the Administrator or a State to grant up to one year

[1] New and reconstructed units must be in compliance immediately upon start-up, or on the effective date of the final rule, whichever is later. 42 U.S.C. § 7412(i)(1); *accord,* 76 Fed. Reg. at 25,054.

extensions on a case-by-case basis "if necessary for the installation of controls"), (5) (allowing longer compliance period for sources that achieved certain reductions prior to first proposal of standards), & (6) (5-year compliance period where BACT or LAER controls have been installed on "the same …stream of pollutants" prior to the effective date of the MACT standards).[2]

Congress provided, in section 112, an explicit and comprehensive scheme defining the deadlines by which existing sources must comply. The Agency has no discretion to add to that scheme, as Congress emphasized: "*in no event*" may EPA provide more than "3 years after the effective date of [the] standard" for an existing source to comply. 42 U.S.C. § 7412(i)(3)(A) (emphasis added).[3] *See Natural*

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[2] There should be no need for the Presidential exemption authorized by 42 U.S.C. § 7412(i)(4). Such an exemption is available only where the required control technology is "not available," *id.,* and EPA has confirmed that the technologies required here have long been available, *see* 76 Fed. Reg. at 25,054-56. And neither EPA nor any other party has made a particularized showing that such exceptions are likely to advance the "national security interests of the United States." 42 U.S.C. § 7412(i)(4).

[3] To our knowledge, EPA has attempted to alter those deadlines only once: by making the 8-year compliance schedule provided in Section 112(j)(6) available to plants that obtain a case-by-case MACT limit under Section 112(g). 40 C.F.R. § 63.44(b)(1). When it proposed that alteration, EPA asserted that it was filling "gaps left by Congress in Section 112(g)." 59 Fed. Reg. 15,504, 15547-48 (April 1, 1994). The statutory language belies the existence of any such gap; on the contrary, its detail and specificity suggest completeness. *See also Natural Resources Defense Council,* 489 F.3d at 1374. Congress declined, in Section 112, to provide an exception for sources obtaining case-by-case limits under Section 112(g). The existence of such an exception for sources subject to section 112(j) does not permit EPA to add that exception; rather, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez Machain,* 542 U.S. 692, 712 n.9 (2004) (citation omitted). At any rate – whether or not EPA's past alteration of the statutory deadlines is permissible – there is no gap in Section 112(i) (or anywhere else in Section 112) that would allow the Agency to extend the compliance schedule in this rule beyond the three to four years specified in Section 112(i)(3). Finally, because the proposed rule failed to include or suggest extensions beyond the clear and complete schedules reflected in Section 112(i), any such extensions in the final rule would be impermissible procedurally as well as invalid substantively.

Resources Defense Council, 489 F.3d at 1374 (noting that Congress "set an outer limit of three years" for compliance). "Congress has spoken on the question and not provided EPA with authority . . . to extend the compliance date" in the statute. *Id.* (citation omitted).[4]

We note that for purposes of calculating the compliance deadlines for the standards, their "effective date" should be no later than the date on which they are published in the Federal Register. Section 112(d)(10), and EPA's implementing regulations, specify that "emissions standards promulgated under this subsection shall be effective upon promulgation." 42 U.S.C. § 7412(d)(10); 40 C.F.R. § 63.2 (defining "effective date" as "the date of promulgation in the Federal Register of such standard"). *See also Horsehead Res. Dev. Co. v. E.P.A.,* 130 F.3d 1090, 1095 (D.C. Cir. 1997) (regulations are promulgated no later than when published in Federal Register). While the Congressional Review Act requires a sixty-day delay before the standards become operative, it does not alter the standards' effective date. *Liesegang v. Secretary of Veterans' Affairs,* 312 F.3d 1368, 1375-76 (Fed. Cir. 2002).

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[4] If a specific facility fails to comply within the statutory time-frame, EPA may require compliance on a schedule which will, by definition, exceed the statutory timeframe. 42 U.S.C. §7413(a)(3) &(4) (allowing such orders to "specify a time for compliance which the Administrator determines is reasonable," and requiring that "any order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable but in no event longer than one year after the date the order was issued, and shall be nonrenewable."). That general enforcement authority does not, however, allow EPA to broadly exempt a source (or sources) from the statutorily defined time-lines, whether through its rulemaking authority or otherwise. Parties may not "agree to take action that conflicts with or violates the statute" from which the consent decree emerges. *Local No. 93, Intern. Ass'n of Firefighters, ALF-CIO C.L.C. v. City of Cleveland,* 478 U.S. 501, 526 (1986). *Cf. Conservation Law Foundation v. Franklin,* 989 F.2d 54, 60-61 (1st Cir. 1993) (approving consent decree delaying compliance only where statute provides agency "discretion to set a timetable").

B. Existing Source Compliance Is Practicable In Three Years, or Less

EPA proposes to offer the maximum three year compliance period for existing sources, characterizing that timeframe as being "as expeditious[] as practicable," given that the standards will "require the control technology industry to ramp up quickly." *Id.* at 25,055. The Agency's supporting analysis is based largely on controls produced to comply with the Clean Air Interstate Rule (CAIR). EPA's analysis indicates, however, that those controls were installed at a rate that would allow compliance in well under three years. *An Assessment of the Feasibility of Retrofits* 12 (U.S.E.PA. Office of Air & Radiation March 9, 2011). And CAIR required a smaller group of significantly more resource-intensive controls than will be required by this rule.

The record indicates that at present over 50 percent of EGUs have already installed technologies EPA asserts can be used to meet the standards, and that many more scrubber installations are pending. 76 Fed. Reg. 25,054. *See also* U.S. EPA, Coal-fired Characteristics and Controls: 2010: Table of Coal Unit Characteristics: 2010 & Summary of Coal Unit Controls: 2010, available at http://www.epa.gov/airmarkets/quarterlytracking.html (last checked July 31, 2011). According to a 2009 study prepared by the U.S. General Accounting Office, many existing coal-fired power plants achieved substantial mercury controls given then-installed control technologies – up to 98 percent from inlet mercury levels.[5] Given plants' ability to meet the standards with existing controls, the diversity of available control options that can meet the standards, and the relatively short timeframe necessary to install the necessary controls, 76 Fed. Reg. 25,054-56, EPA's

[5] U.S. Government Accountability Office, "Clean Air Act Mercury Control Technologies at Coal-Fired Power Plants Have Achieved Substantial Emissions Reductions," Report to the Chairman, Subcommittee on Clean Air and Nuclear Safety, Committee on Environment and Public Works, U.S. Senate (GAO-10-47 Oct. 2009), available at http://www.gao.gov/new.items/d1047.pdf.

proposed three year compliance period is entirely reasonable, despite the protestations of various industry spokespersons during the public comment period.[6]

C. Compliance Within the Statutory Deadlines Will Not Adversely Affect Electric System Reliability

EPA also asserts the maintenance of reliable electricity supplies supports its proposed industry-wide three-year compliance schedule. 76 Fed. Reg. at 25,055. But information in current studies shows that shorter compliance periods are in most instances achievable – particularly given that EPA's proposed standards can be met by a variety of control options beyond retrofits with wet scrubbers. See BPC Report at 26-27 & nn.63 & 66 (citing studies). The analysis underlying EPA's

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[6] *See, e.g.* Oral Statement of Chris Hobson, The Southern Company, MACT Public Hearing Atlanta Georgia (May 26, 2011). Mr. Hobson's broad statements about the need for installation of pollution controls to meet the standards and concern about the three year compliance period are belied by his recognition that the industry has had many years to get ready for the clear requirements of the Act, prior to the proposal and finalization of this rule, and indeed that his company has been able to respond by "install[ing] more pollution controls than any other." These, and other similar claims, are not accompanied by any specific evidence – while other, well-supported reports confirm the opposite is true. See, *e.g.*, Bipartisan Policy Center, Environmental Regulation and Electric System Reliability 27 & nn. 66-67 (June 13, 2011), available at http://www.bipartisanpolicy.org/library/report/environmental-regulation-and-electric-system-reliability (hereinafter "BPC Report") (noting "most pollution control projects can be implemented in less than two years from design to start-up without the need for outage or with the final step occurring during a regularly scheduled maintenance period so as to avoid additional outage time") (citing URS Corp., Lipinski, G., *et al.*, "Assessment of Technology Options Available to Achieve Reductions of Hazardous Air Pollutants" (April 2011), available at http://www.supportcleanair.com/resources/studies/file/4-8-11-URSTechnologyReport.pdf (last visited July 31, 2011)).

Other complaints have suggested that design defects in certain models of scrubbers may require unexpected repairs, and suggested that those defects warrant a delay in compliance. *E.g.,* Columbus Ohio Dispatch, July 11, 2011. To the extent that such defects exist, their manufacturers and owners should be able to remedy them within three years (indeed, the regulatory requirements that led to those scrubbers' installation and operation will presumably require them to do so). And difficulties with a handful of pollution-control devices could not justify an industry-wide delay in compliance.

proposal indicates that current reserve margins are projected at 25%; the Agency acknowledges that reserve margins will be sufficient to buffer any reliability related concerns associated with installation schedules. Resource Adequacy and Reliability in the IPM Projections for the Toxics Rule at 2-3.

Moreover, utilities have had many years to prepare for compliance with these rules, and EPA's record shows that many of them have already started installing the necessary controls. 76 Fed. Reg. 25,056. The D.C. Circuit vacated EPA's "delisting" of power plants in 2008, more than three years ago. *New Jersey v. EPA,* 517 F.3d 574 (D.C. Cir 2008). The record and various studies show that dry sorbent and activated carbon injection systems are relatively quickly installed, and can be put in place without unscheduled outages. 76 Fed. Reg. 25,055-56; BPC Report at 15, 27 (citing studies) (http://www.bipartisanpolicy.org/library/report/environmental-regulation-and-electric-system-reliability).

EPA therefore should be able to establish and stick to a prompt yet reasonable compliance schedule. In the unlikely event of site-specific difficulties with the installation of controls, creating particular reliability concerns, the statute authorizes the Administrator or a State with an approved program to grant a single extension of "up to 1 additional year to comply."[7] 42 U.S.C. §7412(i)(3)(B).

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[7] Some have suggested that the statutory one-year extension, or even further extra-statutory extensions or exemptions, might be granted for so-called "reliability-must-run" (RMR) sources, as defined by local system operator agreements or other unspecified legal authority. System operator agreements may not trump the plain text of the Clean Air Act, which requires expeditious compliance with MACT standards by listed source categories, to avoid the significant public health implications of prolonged exposure to air toxics. However, should EPA or an approved State entertain the idea of authorizing case-by-case one-year extensions beyond the basic three year compliance period for RMR sources or units, such extensions must be accompanied by limits on the operation of such sources or units to contain that operation to true "must run" situations, needed for real reliability reasons. Such extensions also must comply with the statutory conditions and requirements discussed in these comments.

D. Shut-down of Existing Units Is a "Pollution Control," and EPA May Consider the Construction of Replacement Power in Applying the Statutory Criteria Governing Compliance Deadlines

EPA notes that it, or approved state agencies, may receive requests for the one-year extension authorized by section 112(i)(3)(B), from facilities planning to permanently shut down and replace existing units with new, lower polluting generation. Because permanent shut-down of an existing unit is a form of "pollution control" – indeed in some cases, the best form of pollution control – shut-downs may be considered a form of meeting MACT standards as discussed in this section.[8] The Agency and approved states may consider, at the end of the three-year compliance period, applications for up to one-year extensions on a one-time, case-by-case basis – but only where such an extension is demonstrably necessary to shut down the existing units at issue in the applications. If the unit (or units) cannot be practicably shut down within the ordinary three-year compliance period without the construction of replacement facilities, the statute allows EPA (or state agencies) to take the time necessary to construct those facilities into account when assessing applications for permits allowing the one-year extension described by section 112(3)(B). See 42 U.S.C § 7412(i)(3)(A)&(B).

The Agency specifically seeks comment on whether the phrase "installation of controls" can be read not only to include changes made to an existing unit, but also the replacement of that unit with new, cleaner generation. 76 Fed. Reg. 25,055. Regardless of the answer, such an interpretation is not necessary to support the result EPA seeks: availability of the statutory one-year extension, where necessary to construct replacement power which is, in turn, required to accommodate the shut-down of an existing unit.

Shut-down of an existing unit is within the definition of a pollution "control" under Section 112, as well as under the Act generally. Section 112 uses "emission

[8] If EPA allows compliance on an average basis within a specific facility, however, shut-down units should not and may not be allowed to combine their emissions with operating units. *See* Section XI.B.

control" broadly to refer to pollution reductions of any sort. *See, e.g.,* 42 U.S.C. § 7412(d)(3), (d)(5), (d)(6), & h(1) (all using "control" to refer to pollution-reduction and referring to "emission control" achieved by "best controlled similar source"). In keeping with that general synonymy, Section 112 defines "maximum achievable *control* technology" limit as a limit reflecting the "maximum degree of *reduction*" achievable. 42 U.S.C. § 7412(d)(2) & (g)(2) (emphasis added). And the statute confirms that any "measure[]," "method[]" or "technique[]" that reduces hazardous air pollution may be prescribed to accomplish the necessary limitation. 42 U.S.C. § 7412(d)(2). Elsewhere in the statute, as well, the term "control" is defined broadly enough to include the cessation of polluting operations. *See, e.g.,* 42 U.S.C. § 7479 (defining "best achievable control technology"). Closure of a high-polluting unit is a measure that reduces pollution, and is therefore a "control" under the Act. EPA has, accordingly, recognized in its consent decrees that shut-down is under some circumstances a method of pollution-reduction that is a "control technology" within the meaning of the Act. *See, e.g.,* Consent Decree*, United States v. Tampa Electric Co.,* Civ. No. 99-2524 (M.D. Fla. 204) at 7-8 (prescribing permanent shut-down amongst "emissions reductions and controls" required to comply with Clean Air Act).[9] Consequently, the word "control" in Section 112 encompasses the shut-down of a polluting unit, and "installation of controls" should be understood to include the on-site physical operations required to accomplish permanent shut-down.

The accompanying term "practicable," in section 112(i)(3)(A), allows EPA to consider the need to provide replacement power necessary to permit such a permanent shut-down. Section 112(i)(3) allows EPA (or state agencies) to provide up to one additional year to an existing source where "necessary for the installation of controls," 42 U.S.C. § 7412(i)(3)(B), while also establishing that controls are to be installed "as expeditiously as practicable," 42 U.S.C. §7412(i)(3)(A). Whether an extension is "necessary" for the installation of controls must be informed by whether those controls can "practicabl[y]" be put in place at an earlier date. Read together,

[9] http://www.epa.gov/compliance/resources/decrees/civil/caa/tecocd.pdf

sections 112(i)(3)(A) & (B) allow an extension of up to one year to be granted on a case-by-case basis for facilities at which controls cannot practicably be installed within three-years. EPA has, elsewhere in its proposed rulemaking, considered reliability to determine the pace at which controls can practicably be installed. *See* 76 Fed. Reg. at 25,054, 25,056 & nn. 177-178 (describing EPA's efforts and intention to work with FERC, NERC, the Department of Energy, and regional transmission organizations on issues related to compliance and reliability, particularly in the event unit shutdowns occur in load-constrained areas).

Consequently, if the absence of replacement power demonstrably renders shut-down of a unit or plant impracticable within three years, and that is the chosen compliance method by the plant operator, EPA or an approved state may, on a case-by-case basis, authorize a single extension of up to one year for the source to comply. Fidelity to the statute's commands that compliance occur "as expeditiously as practicable," and that extensions be allowed only where "necessary," requires that extensions under section 112(i)(3)(B) be issued only on a case-by-case basis, where the following minimum plant-specific conditions are met: (1) the agency confirms that permanent shut-down is prescribed, (and mandatory) in order to comply with section 112, and that this requirement is enforceable under federal law; (2) the plant demonstrates that replacement power is necessary to permit the unit or plant to shut down (in many cases, demand-side reductions or existing power supplies are likely to permit shut-down without the construction of new facilities); (3) the applicant has proceeded as expeditiously as possible, and (4) the required replacement power cannot practicably be put in place within three years.[10]

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[10] These basic pre-conditions must be met before any permit under 112(i)(3)(B) may be issued, whether the means of pollution control is shut-down, addition of new mechanical systems, or something else entirely. The plant-owner should be required to demonstrate the delayed controls will result in pollution reductions that exceed those that could practicably achieved by controls that could be installed more quickly – otherwise, the extension cannot be said to be necessary. The permit should, for the same reason, include federally enforceable conditions ensuring emissions reductions equivalent to (or greater than) those resulting from the delayed controls. And the plant-owner must demonstrate that the specified control

cannot be accomplished within three years, even with diligent and maximally expeditious effort (and that it has proceeded expeditiously to date); otherwise, either the extension is unnecessary, or the controls will not be installed as expeditiously as practicable. Given the prospect that EPA and the states may face large numbers of applications for permit extensions under section 112(i)(3)(B), we suggest the Agency promptly provide guidance regarding these and other conditions governing such permits.