

NEW JERSEY V. ENVIRONMENTAL PROTECTION AGENCY

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I. INTRODUCTION

Coal-fired electric generating utility plants are the most significant industrial contributors to the nation's mercury pollution, which causes serious health effects in humans and wildlife. The U.S. Environmental Protection Agency's ("EPA") regulation of power plant emissions of mercury and other hazardous air pollutants ("HAPs") has been an overly delayed, frequently litigated, and highly politicized process. EPA attracted a record number of rulemaking comments when it proposed to declassify power plants as a source of toxic mercury emissions, a decision that came just five years after it had determined that regulation of toxic emissions from power plants under section 112 of the Clean Air Act ("CAA") was appropriate and necessary.¹ Despite widespread opposition to this reversal from states as well as environmental and public health groups, EPA followed through with its proposal to remove power plants from the section of the CAA that regulates hazardous air pollutants. EPA then promulgated the Clean Air Mercury Rule ("CAMR"), which set emission standards under section 111 of the CAA and established a cap-and-trade system for mercury emissions. In *New Jersey v. EPA*,² the D.C. Circuit rejected EPA's bold maneuver and vacated CAMR because EPA had failed to follow the section 112 procedure for removing power plants from the list of source categories to be regulated under that section.

Although *New Jersey v. EPA* seemingly left mercury emissions without any formal federal regulation, environmentalists will likely demand provisional pollution control under two relatively untested provisions of section 112 called the "MACT hammers."³ Those provisions may mandate stringent reductions in mercury emissions until formal MACT emission standards can be developed. Major new power plants currently in development fall under the straightforward section 112(g) requirement to comply with case-by-case MACT standards, but the uncertainty over the extent of section 112(j)'s application to power plants will likely frustrate any interim regulation of existing plants.

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¹ Environmental Protection Agency, Controlling Power Plant Emissions: Overview (Oct. 24, 2008), http://www.epa.gov/mercury/control_emissions/index.htm (on file with the Harvard Environmental Law Review).

² 517 F.3d 574 (D.C. Cir. 2008).

³ MACT stands for "Maximum Achievable Control Technology."

II. BACKGROUND

Electric utility steam generating units (“EGUs” or “power plants”) fueled by coal produce over half of the United States’s electricity.⁴ However, they also emit over 150,000 tons of hazardous air pollutants annually,⁵ and, in contributing over forty percent of U.S. anthropogenic mercury emissions, they constitute the single largest source of such emissions.⁶ Mercury is an extremely dangerous neurotoxin that can cause neurological damage in developing fetuses and infants, cardiac abnormalities in children, and cardiovascular problems in adults.⁷ Mercury emitted into the air as a byproduct of electricity generation eventually settles on land and in water, where it bioaccumulates in the fatty tissue of fish.⁸ Humans and wildlife become exposed to mercury when they consume fish in which mercury has accumulated.⁹

EPA has long recognized the need to regulate mercury, making it the first air pollutant listed as hazardous under section 112 of the CAA, the section that deals with highly toxic emissions.¹⁰ However, EPA only managed to formulate standards for a small subset of mercury sources¹¹ and failed to address mercury emissions from power plants.¹² Two decades after section 112’s passage, many legislators recognized that section 112 had not succeeded in protecting public health from HAPs, in part due to critical

⁴ Regulating Greenhouse Gas Emissions Under the Clean Air Act: Advance Notice of Proposed Rulemaking, 73 Fed. Reg. 44,354, 44,403 (July 30, 2008).

⁵ EPA, STUDY OF HAZARDOUS AIR POLLUTANT EMISSIONS FROM ELECTRIC UTILITY STEAM GENERATING UNITS – FINAL REPORT TO CONGRESS ES-5 (1998) [hereinafter 1998 STUDY], available at <http://www.epa.gov/ttn/caaa/t3/reports/eurtc1.pdf>. In addition to mercury, HAPs emitted by power plants include arsenic, cadmium, chromium, dioxins, lead, nickel, radionuclides, and others. *Id.* at ES-5, ES-6.

⁶ JAMES E. MCCARTHY, CONG. RESEARCH SERV., MERCURY EMISSIONS FROM ELECTRIC POWER PLANTS: AN ANALYSIS OF EPA’S CAP-AND-TRADE REGULATIONS 4 (2005) [hereinafter MCCARTHY, ANALYSIS], available at https://www.policyarchive.org/bitstream/handle/10207/2403/RL32868_20050415.pdf?sequence=1; JAMES E. MCCARTHY, MERCURY EMISSIONS FROM ELECTRIC POWER PLANTS: STATES ARE SETTING STRICTER LIMITS 1 (2006) [hereinafter MCCARTHY, STATES], available at http://members.4cleanair.org/frc_files/3494/crsmercury.pdf.

⁷ Catherine A. O’Neill, *Environmental Justice in the Tribal Context: A Madness to EPA’s Method*, 38 ENVTL. L. 495, 499-500 (2008) (citing numerous scientific studies). Mercury also causes serious health effects in birds and mammals that feed on fish, and it may even lead to their death. *Id.* at 500.

⁸ Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000). When mercury enters water bodies, microorganisms living in the aquatic environment convert the substance into methylmercury. *Id.* This case comment uses the terms “mercury” and “methylmercury” interchangeably.

⁹ *Id.*

¹⁰ Opening Brief of Government Petitioners at 4, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097). Mercury was listed simultaneously with asbestos and beryllium. *Id.*

¹¹ See *Nat’l Mining Ass’n v. EPA*, 59 F.3d 1351, 1353 n.1 (D.C. Cir. 1995).

¹² S. REP. NO. 101-228 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3516 (“[M]ercury emissions from powerplant boilers (exempt from standards) are contributing to high mercury levels in the flesh of fish . . .”).

faults in its design and EPA's inertia in its administration.¹³ To cure inherent defects in the law and force EPA into action, Congress completely overhauled section 112 in the 1990 Amendments to the CAA,¹⁴ taking the initiative to list 189 HAPs itself and to establish tight deadlines by which EPA is required to issue technology-based standards for specific categories of sources.¹⁵ Congress placed mercury on the initial list of HAPs.¹⁶

Section 112(c) requires EPA to list "all categories and subcategories" of sources of HAPs listed in section 112(b)(1). Once listed, a category or subcategory emitting non-cancerous pollutants like mercury cannot be removed unless EPA determines that no single unit's emissions in the category or subcategory exceed a level adequate to protect public health with an ample margin of safety, and that no adverse environmental effect will result from removal.¹⁷

For each listed source category, EPA must promulgate emission standards applicable to new and existing sources that require "the maximum degree of reduction in emissions of the hazardous air pollutants" that EPA, considering the cost of achieving those reductions, determines is achievable.¹⁸ To meet this demanding standard, all new sources in the category or subcategory must match the emissions control performance of the "best controlled similar source," and all existing sources must match the "average emission limitation achieved by the best performing 12 percent of the existing sources," as determined by EPA.¹⁹ This approach is known as "Maximum Achievable Control Technology," or MACT.

To avoid delay in the standard-setting process, Congress set strict deadlines for EPA to promulgate standards for listed sources. Emission standards for every category and subcategory initially placed on the section 112(c) list were to be promulgated within ten years of the 1990 Amendments.²⁰ New plants constructed after promulgation of an applicable standard must comply immediately with that standard, and existing sources must comply within three years of the standard's promulgation.²¹ The structure of section 112 operates to accelerate regulation of HAPs, often by restricting EPA's discretion to delay action.

¹³ See, e.g., H.R. REP. NO. 101-490 (1990), reprinted in LEXIS 1990 CAA Leg Hist 3021, 3175 (stating that only a small fraction of harmful substances had been regulated and faulting the basic legislation and its implementation); S. REP. NO. 101-228, at 3513, 3541 (stating that "[t]he law has worked poorly" and that "the bill forces regulatory action to overcome the inertia that has plagued the . . . standard-setting process").

¹⁴ S. REP. NO. 101-228, at 3513 ("The legislation reported by the [Senate] Committee [on Environment and Public Works] would entirely restructure the existing law . . .").

¹⁵ 42 U.S.C. § 7412(b)(1), (e) (2000); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 576 (7th ed. 2006).

¹⁶ 42 U.S.C. § 7412(b)(1).

¹⁷ *Id.* § 7412(c)(9)(B)(ii).

¹⁸ *Id.* § 7412(d)(1)-(3).

¹⁹ *Id.* § 7412(d)(3).

²⁰ *Id.* § 7412(e)(1).

²¹ *Id.* § 7412(i)(1), (3).

Despite these safeguards, Congress wrote a broad exemption into section 112 prohibiting EPA from initially listing EGUs as a source category to be regulated.²² Instead, Congress directed EPA to further study the need to regulate power plants, stipulating in section 112(n)(1)(A):

[EPA] shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs] of pollutants listed under [section 112(b)] after imposition of the requirements of this chapter. [EPA] shall report the results of this study to the Congress within 3 years after November 15, 1990. . . . [EPA] shall regulate [EGUs] under this section, if [EPA] finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.²³

Even though Congress understood at the time of the 1990 Amendments that EGUs constituted a major source of mercury and other HAPs, it gave EPA the broad discretion to decide whether to regulate EGUs based on the results of its scientific study.

EPA released the study on public health effects from EGUs (“1998 Study”) in 1998, five years after the deadline set by Congress.²⁴ The 1998 Study found “a plausible link between anthropogenic releases of mercury from industrial and combustion sources in the United States and methylmercury in fish” and found that “mercury emissions from utility units may add to the existing environmental burden.”²⁵ On December 20, 2000, in the final days of the Clinton Administration, EPA issued a regulatory finding (“2000 Finding”) in which it declared that it was “appropriate and necessary” to regulate HAPs from coal-fired and oil-fired EGUs based on the results of the 1998 Study and on additional data EPA had subsequently gathered on HAP emissions.²⁶ In the 2000 Finding, EPA confirmed the high toxicity of mercury, noted that EGUs were the largest source of mercury emissions in the United States, and concluded that mercury emissions from EGUs posed a threat to public health and the environment.²⁷

The 2000 Finding placed power plants on the section 112(c) list of HAP sources,²⁸ triggering the requirement that EPA issue MACT standards for

²² *Id.* § 7412(c)(6).

²³ *Id.* § 7412(n)(1).

²⁴ After EPA missed the three-year deadline for reporting the results of the study, Natural Resources Defense Council sued EPA and forced a settlement that set new deadlines. DAVID WOOLEY & ELIZABETH MORSS, CLEAN AIR ACT HANDBOOK § 3:32 (2008).

²⁵ 1998 STUDY, *supra* note 5, at 7-1, 7-45.

²⁶ Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,825-26 (Dec. 20, 2000). EPA did not make an “appropriate and necessary” finding for gas-fired plants because it determined that the effect of their emissions was negligible. *Id.*

²⁷ *Id.* at 79,829-30.

²⁸ See National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act, 67 Fed. Reg. 6,521 (Feb. 12, 2002).

each HAP emitted by power plants.²⁹ On January 30, 2004, EPA proposed MACT standards for EGUs, but it also proposed a regulatory alternative: remove EGUs from the section 112(c) list, set New Source Performance Standards (“NSPS”) for them under section 111, and implement a voluntary cap-and-trade program to allow power plants to trade the rights to emit mercury.³⁰ After notice and comment, EPA adopted the section 111 regulatory option through the issuance of two rules, the Revision of December 2000 Regulatory Finding (“Delisting Rule”)³¹ and the Clean Air Mercury Rule (“CAMR”).³²

In the Delisting Rule, EPA justified removal of coal-fired and oil-fired EGUs from the section 112(c) source category list through a new, exceptionally narrow interpretation of what section 112(n)(1)(A) requires for an affirmative “appropriate and necessary” finding. First, EPA read section 112(n)(1)(A) as requiring EPA to make its finding based solely on public health effects, given that the study upon which EPA must base its finding only examines hazards to public health.³³ EPA then limited its consideration of health hazards exclusively to effects on women of childbearing age from consumption of freshwater fish caught recreationally.³⁴ Moreover, EPA concluded that it could only take into account effects from mercury bioaccumulation that are directly attributable to EGUs; cumulative harm and harm not directly tied to power plant emissions fell outside this inquiry.³⁵

EPA also stated that in the 2000 Finding it had not fully considered the mercury emission reductions that would result from “imposition of the requirements” of the CAA, such as implementation of revised National Ambient Air Quality Standards for ozone per section 109, development of NSPS for nitrogen oxides (NO_x) per section 111, and regulation of the interstate transport of NO_x under the “NO_x SIP Call” per section 110.³⁶ In addition to factoring in emission reductions achieved by other implemented programs,

²⁹ Although section 112(c)(5) requires EPA to issue MACT standards within two years of adding a source category to the list, EPA had until December 2003 per its settlement with the Natural Resources Defense Council. WOOLEY & MORSS, *supra* note 24, at § 3:32.

³⁰ Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4,652 (Jan. 30, 2004). EPA supplemented this proposal in Supplemental Notice for the Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 12,398 (Mar. 16, 2004).

³¹ Revision of December 2000 Regulatory Finding, 70 Fed. Reg. 15,994 (Mar. 29, 2005).

³² Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005). The Delisting Rule and CAMR were revised based on public comments. Revision of December 2000 Clean Air Act Section 112(n) Finding Regarding Electric Utility Steam Generating Units; and Standards of Performance for New and Existing Electric Utility Steam Generating Units: Reconsideration, 71 Fed. Reg. 33,388 (June 9, 2006).

³³ Revision of December 2000 Regulatory Finding, 70 Fed. Reg. at 16,003.

³⁴ *Id.* at 16,021.

³⁵ *Id.* at 16,028-29.

³⁶ *Id.* at 16,003-04.

EPA explained that it must discount mercury emissions that *could* be eliminated by other provisions of the CAA, *if* those provisions were implemented.³⁷ Under this limited inquiry, EPA concluded that the 2000 Finding “lacked foundation” and that the effects on public health resulting from mercury exposure did not meet the “appropriate and necessary” burden set by section 112(n)(1)(A).³⁸

EPA provided an additional rationale for the Delisting Rule: that “recent information demonstrate[d] that it [was] not appropriate or necessary” to regulate EGUs under section 112.³⁹ The newly developed Clean Air Interstate Rule (“CAIR”), which established a cap-and-trade program for several eastern states to trade rights to emit sulfur dioxide (SO₂) and NO_x, rendered regulation of mercury under section 112 inappropriate and unnecessary.⁴⁰ EPA explained that the scrubber technology that power plants would likely adopt to comply with CAIR would yield concurrent reductions in mercury emissions.⁴¹

Once EPA established that EGUs were no longer a listed source of HAPs under section 112, EPA set up a nationwide mercury emissions trading system under the authority of section 111(d). EPA designed the trading system to regulate new and existing coal-fired power plants in the most cost-effective manner.⁴² The system capped mercury emissions at thirty-eight tons per year beginning in 2010 (Phase One) and fifteen tons per year beginning in 2018 (Phase Two).⁴³ States electing to participate in the program were to be assigned a total emissions budget, which they would allocate in the form of emissions allowances among power plants within the state.⁴⁴ All power plants participating in the emissions trading scheme could trade allowances amongst themselves.⁴⁵ In addition to the trading system, EPA promulgated NSPS for mercury emissions from new coal-fired plants under the authority of section 111(b).⁴⁶ Section 111(b) specifies national, uniform

³⁷ See *id.* at 16,001.

³⁸ *Id.* at 15,994.

³⁹ *Id.*

⁴⁰ *Id.* at 16,004; Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,606 (May 18, 2005). CAIR was vacated then remanded to EPA by the D.C. Circuit in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (*per curiam*), *modified and reh'g denied* No. 05-1244, — F.3d — (D.C. Cir. Dec. 23, 2008) (*per curiam*).

⁴¹ Revision of December 2000 Regulatory Finding, 70 Fed. Reg. at 16,004.

⁴² Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. at 28,606. CAMR did not apply to oil-fired power plants.

⁴³ *Id.* Assuming no federal regulation, mercury emissions from EGUs are estimated at forty-eight tons per year. Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4652, 4691 (Jan. 30, 2004).

⁴⁴ Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. at 28,606, 28,621. One allowance equalled the right to emit one ounce of mercury. *Id.* at 28,606.

⁴⁵ *Id.* at 28,606.

⁴⁶ *Id.*

standards that function as a minimum requirement to be met by all new EGUs.⁴⁷

CAMR would have resulted in a twenty-one percent reduction in mercury emissions in 2010 and a sixty-nine percent reduction when actual plant emissions equaled the level of the Phase Two cap, which, because power plants could “bank” unspent allowances for future use, might not have been realized until 2025 or later.⁴⁸ In contrast, the section 112 MACT standards proposed in 2004 would have yielded an estimated fifty-five percent reduction in mercury emissions within three years,⁴⁹ and others argue that a properly formed MACT standard would yield a ninety percent reduction.⁵⁰ Moreover, CAMR did not regulate any HAPs emitted from power plants other than mercury, whereas regulation under section 112(d) would require stringent controls for all HAPs emitted from power plants.

Mercury emissions from power plants are also regulated at the state level. Many states have exercised the option to impose requirements more stringent than CAMR, with several states requiring ninety percent reductions in mercury emissions from power plants by 2012 or earlier.⁵¹ Moreover, at least sixteen states opted not to participate in the CAMR cap-and-trade plan.⁵²

III. *NEW JERSEY v. EPA*

EPA’s sudden reversal of its own finding, that mercury from power plants posed a sufficiently significant risk to public health to require regulation, and its controversial plan to allow plants to trade the right to pollute a highly toxic substance drew sharp criticism from many sides, including Congress, the Government Accountability Office, and EPA’s own Inspector Gen-

⁴⁷ FARBER ET AL., *supra* note 15, at 536-37.

⁴⁸ See MCCARTHY, Analysis, *supra* note 6, at 7 n.24 (concluding from conversations with EPA employees that the full Phase Two reduction may be achieved as early as 2025 or may not occur until after 2030); see also Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. at 28,619 (estimating that mercury emissions will be 24.3 tons in 2020); Lisa Heinzerling & Rena Steinzor, *Mercury and the Bush Administration*, 30 ADMIN. & REG. L. NEWS 8, 8 (2005) (citing 2026 as the year significant reductions in mercury will occur).

⁴⁹ O’Neill, *supra* note 7, at 503 (describing the proposed MACT standard as “watered down”).

⁵⁰ See Final Opening Brief of Environmental Petitioners at 5 n.15, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097) (citing Praveen Amar, Ph.D & P.E., et al., NES-CAUM, State and Local Air Pollution Control Officials’ Recommendations for Utility MACT Standards, at 14-24 (Oct. 2002), OAR-2002-0056); Opening Brief of Government Petitioners, *supra* note 10, at 22 n.6 (citing EPA Memoranda by Bill Maxwell (Nov. 26, 2003), OAR-2002-0056-0006 and (Oct. 21, 2005), OAR-2002-0056-6305).

⁵¹ See NAT’L ASS’N OF CLEAN AIR AGENCIES, STATE MERCURY PROGRAMS FOR UTILITIES (2007), available at <http://www.4cleanair.org/Documents/StateTable.pdf>. For example, Illinois requires a ninety percent reduction in mercury emissions from power plants by 2012, and Connecticut and New Jersey have adopted similar requirements. *Id.*

⁵² James Ruhl, *Quicksilver Alchemy: New England’s Mercury Control Programs and the Clean Air Mercury Rule*, 32 VT. L. REV. 525, 541 n.129 (2008).

eral.⁵³ Fifteen states, two state agencies, and one city (“State Petitioners”), several environmental and public health organizations (“Environmental Petitioners”), and the National Congress of American Indians and Treaty Tribes (collectively “Petitioners”) petitioned the D.C. Circuit for review of the Delisting Rule and CAMR.⁵⁴ Respondent EPA was not without support – the Utility Air Regulatory Group (“UARG”) intervened on its side, and seven states intervened or filed *amici curiae* briefs defending CAMR.⁵⁵ The D.C. Circuit consolidated the petitions for relief, designated New Jersey as the lead petitioner, and decided *New Jersey v. EPA* on February 8, 2008 in favor of Petitioners.

A. Litigants’ Legal Arguments

Petitioners raised three primary challenges to the Delisting Rule and CAMR, seeking vacatur of both rules. First, Petitioners attacked EPA’s authority to remove a listed category of polluting sources without first finding that no source in the category exceeds an emissions level adequate to protect public health, as required by section 112(c)(9).⁵⁶ The plain text of section 112(c)(9), Petitioners argued, does not authorize EPA to “delist *any* source category” without first making the section 112(c)(9) finding, and EGUs are not exempt from this provision.⁵⁷ Petitioners also questioned EPA’s authority to reverse its “appropriate and necessary” finding, pointing out that section 112(n)(1)(A) only gives EPA authority to make a single regulatory determination but no authority to revisit it.⁵⁸

EPA countered that the delisting requirements of section 112(c)(9) do not cover EGUs in light of Congress’ special treatment of EGUs within section 112. The authority to list EGUs per section 112(n)(1)(A), according to EPA, necessarily encompasses the authority to remove them when EPA determines the listing was in error.⁵⁹ The fact that Congress did not provide a deadline for EPA to decide whether regulating EGUs is “appropriate and necessary” provided further evidence that EPA may revisit and revise its original finding.⁶⁰ In any case, EPA argued, because section 112(n)(1)(A)

⁵³ See Shankar Vedantam, *EPA Distorted Mercury Analysis*, GAO Says, WASH. POST, Mar. 8, 2005, at A9, available at <http://www.washingtonpost.com/wp-dyn/articles/A15244-2005Mar7.html>. Other commentators have decried the environmental justice implications of CAMR. See Rachel Kalman, Note, *EPA’s Mercury Cap and Trade Rule: An Environmental Injustice for Women*, 13 CARDOZO J.L. & GENDER 111 (2006) (discussing CAMR’s impact on women); O’Neill, *supra* note 7, at 505 (discussing CAMR’s impact on Native Americans).

⁵⁴ *New Jersey v. EPA*, 517 F.3d at 575-76.

⁵⁵ *Id.* at 577.

⁵⁶ Opening Brief of Government Petitioners, *supra* note 10, at 12, 14-17; Final Opening Brief of Environmental Petitioners, *supra* note 50, at 14-15.

⁵⁷ Final Opening Brief of Environmental Petitioners, *supra* note 50, at 15.

⁵⁸ Opening Brief of Government Petitioners, *supra* note 10, at 12-13.

⁵⁹ Revision of December 2000 Regulatory Finding, 70 Fed. Reg. 15,994, 16,032 (Mar. 29, 2005); Final Brief of Respondent United States Environmental Protection Agency at 24, *New Jersey v. EPA*, 517 F.3d 574 (No. 05-1097).

⁶⁰ Revision of December 2000 Regulatory Finding, 70 Fed. Reg. at 16,001-02.

focuses specifically on EGUs and section 112(c)(9) does not mention EGUs, it is ambiguous whether section 112(c)(9)'s delisting requirement applies to EGUs.⁶¹ Therefore, EPA concluded that its interpretation deserved *Chevron* deference.⁶²

In addition, EPA invoked the “fundamental principle of administrative law” that an agency has inherent authority to reverse an earlier finding where it has a principled basis to do so.⁶³ Otherwise, EPA argued, an agency would not have the flexibility to respond to new information or unforeseen developments.⁶⁴ Moreover, an agency must be able to reconsider the wisdom of its policy on a continuing basis, perhaps in response to a “change in administrations.”⁶⁵ Finally, EPA argued that because it had removed categories from the section 112(c) list previously without making the section 112(c)(9) finding, it should be allowed to remove EGUs in the same manner.⁶⁶

In their second primary challenge, Petitioners argued that EPA's Delisting Rule interpretation on what hazards it could consider in an “appropriate and necessary” finding was contrary to the language and purpose of the CAA.⁶⁷ In its brief, EPA defended as reasonable its Delisting Rule interpretation of section 112(n)(1)(A) and the conclusions it drew from it.⁶⁸

In their third challenge, Petitioners contested whether the cap-and-trade program qualified as a “best system of emission reduction which . . . has been adequately demonstrated” as required per section 111(a)(1).⁶⁹ Petitioners also argued that because the emissions trading system did not require “continuous” reduction from “particular” sources, it did not meet the requirements of section 111(d).⁷⁰ EPA countered that the emissions trading system met the definition of “standard of performance” provided in section 111.⁷¹

B. *The Court's Opinion*

The D.C. Circuit three-judge panel held that EPA violated the procedure prescribed by Congress in section 112(c)(9) by delisting a category of pol-

⁶¹ Final Brief of Respondent United States Environmental Protection Agency, *supra* note 59, at 26.

⁶² *Id.* at 26-27.

⁶³ *New Jersey v. EPA*, 517 F.3d at 582; Final Brief of Respondent United States Environmental Protection Agency, *supra* note 59, at 22.

⁶⁴ Final Brief of Respondent United States Environmental Protection Agency, *supra* note 59, at 22.

⁶⁵ *Id.*

⁶⁶ *New Jersey v. EPA*, 517 F.3d at 583.

⁶⁷ *Id.* at 581.

⁶⁸ Final Brief of Respondent United States Environmental Protection Agency, *supra* note 59, at 33-40.

⁶⁹ Opening Brief of Government Petitioners, *supra* note 10, at 29.

⁷⁰ Final Opening Brief of Environmental Petitioners, *supra* note 50, at 25-26.

⁷¹ Final Brief of Respondent United States Environmental Protection Agency, *supra* note 59, at 122.

luters from the section 112(c) source list without making the requisite finding that no plant in the category would pose a public health threat.⁷² The court grounded its decision in the plain text of section 112. The delisting provision of section 112(c)(9) governs the removal of “any” source category, and in previous cases the D.C. Circuit had found that the word “any” has an expansive meaning under the CAA.⁷³ Moreover, because nothing in the CAA explicitly exempts EGUs from the delisting requirement like section 112(c)(6) exempts them from the initial standard-setting process, the court concluded that Congress intended for EPA to comply with the section 112(c)(9) requirements in order to delist EGUs.⁷⁴ The court also explained that section 112(n)(1)(A) itself provided no authority for delisting EGUs, as its terms dealt only with the decision to list EGUs, not with the decision to delist them.⁷⁵

The court rejected EPA’s claim that EPA had the inherent authority as an executive agency to reverse its “appropriate and necessary” finding. Although the court agreed that EPA normally has the authority to change its position, “Congress . . . undoubtedly can limit an agency’s discretion to reverse itself.”⁷⁶ Here, the court pointed out, the delisting requirements of section 112(c)(9) restricted EPA’s discretion to remove sources, including EGUs, from the list once they had been added.⁷⁷ The court also refused to accept EPA’s argument that the removal of source categories on prior occasions without compliance with section 112(c)(9) lent credibility to the present delisting of EGUs. The court declared that “[p]revious statutory violations cannot excuse the one now before the court.”⁷⁸

The D.C. Circuit did not hesitate to vacate both rules.⁷⁹ The emissions trading program in CAMR merited vacatur because section 111(d)(1) prohibits EPA from regulating sources of air pollutants under section 111 that are listed under section 112, a point which EPA essentially conceded.⁸⁰ The court also struck down the NSPS for new power plants that EPA had promulgated under section 111(b) because the standards rested on the assumptions that there would be no section 112 regulation of power plants and that the NSPS would be accompanied by an emissions trading program, both of which were no longer true.⁸¹

⁷² *New Jersey v. EPA*, 517 F.3d at 578, 581.

⁷³ *Id.* at 582 (citing *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 582-83.

⁷⁷ *Id.* at 583.

⁷⁸ *Id.*

⁷⁹ *Id.* at 578.

⁸⁰ *Id.* at 583.

⁸¹ *Id.* at 583-84 (“[S]everance and affirmance of a portion of an administrative regulation is improper if there is ‘substantial doubt’ that the agency would have adopted the severed portion on its own.” (quoting *Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997))).

EPA and intervenor UARG petitioned the D.C. Circuit for a rehearing en banc, which the D.C. Circuit denied on May 20, 2008.⁸² Both UARG and EPA filed petitions for writ of certiorari with the Supreme Court, on September 17, 2008 and October 17, 2008, respectively.⁸³ EPA's petition presented the same question it had pressed with the D.C. Circuit: whether EPA has the authority to remove EGUs from the list of source categories when it has found that regulation is neither appropriate nor necessary.⁸⁴ To support its contention that section 112(c)(9) does not mandate a finding of no harm in order to delist EGUs, EPA emphasized that the use of "may" in the phrase "the Administrator may delete any source category" indicates that section 112(c)(9) is a grant of power to be applied at the EPA's discretion, not a limit on EPA's power to remove source categories.⁸⁵

UARG's petition presented two distinct questions. First, UARG contended that the D.C. Circuit misapplied *Chevron* because its finding of unambiguous congressional intent rested on a singular focus on section 112(c)(9) while ignoring the overall meaning of section 112.⁸⁶ UARG also argued that the 2000 Finding was not binding on EPA because it was not issued through notice-and-comment rulemaking.⁸⁷ At the time this comment went to publication, the Supreme Court had not decided whether to grant the petitions.

IV. ANALYSIS

A. *The Decision*

New Jersey v. EPA was a sensible, legally sound, and environmentally protective decision. The unambiguous statutory text of section 112 amply supported a decision under *Chevron* Step One on the impropriety of the delisting. Moreover, the court was wise to avoid delving into the legislative history. Though numerous sources clearly illustrate that Congress designed section 112 to ensure the sweeping and speedy regulation of toxic sources of air pollution, Congress specifically exempted power plants from this treatment, instead entreating EPA to further study the hazards they pose. The exemption of power plants was a product of a legislative compromise between the Senate, which desired mandatory regulation of power plants, and the House of Representatives, which opposed such regulation in the face of

⁸² Order, *New Jersey v. EPA*, No. 05-1097 (D.C. Cir. May 20, 2008), available at <http://turtletalk.files.wordpress.com/2008/05/order-denying-rehearing-en-banc-petitions-05-1097.pdf>.

⁸³ Petition for a Writ of Certiorari of United States Environmental Protection Agency, *New Jersey v. EPA*, 517 F.3d 574 (No. 08-512); Petition for a Writ of Certiorari of Utility Air Regulatory Group, *New Jersey v. EPA*, 517 F.3d 574 (No. 08-352).

⁸⁴ Petition for a Writ of Certiorari of United States Environmental Protection Agency, *supra* note 83, at I.

⁸⁵ *Id.* at 14.

⁸⁶ Petition for a Writ of Certiorari of Utility Air Regulatory Group, *supra* note 83, at i.

⁸⁷ *Id.*

persistent industry lobbying.⁸⁸ It would have been very difficult for the court to discern a unified intent from this compromise. Basing the decision on the delisting provision also relieved the court of the necessity of deciding whether section 111(d) authorizes EPA to establish a cap-and-trade program, a complex legal question that remains unresolved.

The court's attitude toward EPA's creative attempts to justify its reading of section 112 went beyond skepticism to incredulity. The court described EPA's argument for finding ambiguity in the delisting requirement as "de-plot[ing] the logic of the Queen of Hearts, substituting EPA's desires for the plain text of section 112(c)(9)."⁸⁹ A comparison to the Queen of Hearts should be insulting to anyone familiar with the Queen's impetuous disregard for the rule of law in Lewis Carroll's *Alice's Adventures in Wonderland*.⁹⁰

Perhaps the court's hostility was rooted in frustration with the decidedly political nature of EPA's maneuvering. In less than five years, EPA had performed a complete about-face from its 2000 Finding. Its drastic change in approach reflected the policy of the George W. Bush Administration to favor market-based regulatory systems that limit costs to industry, sometimes at the substantial price of greater risk of harm to the population. While courts typically treat such policy decisions as falling within the province of an agency's inherent authority, in this instance EPA exercised its discretion to retract its listing of power plants contrary to specific instructions from the legislative branch. In other words, the court reminded agencies that they lack the discretion to choose not to follow the law. As Congress will likely soon write a bill to regulate greenhouse gas emissions, it should take note that it can reduce some variability in agency implementation of statutes between administrations through provisions like section 112(c)(9), which restrict an agency's ability to reverse a past determination.

In light of the solid legal foundation upon which the D.C. Circuit's narrow holding rests, it seems unlikely that the Supreme Court will find that the decision merits rehearing. EPA essentially recycled the same argument for the petition for writ of certiorari that had gained so little traction in front of the D.C. Circuit. After the remand of CAIR to EPA, even if EPA were to win before the Supreme Court, the appropriate remedy would be to remand to EPA to reconstruct CAMR so that it remains consistent with CAIR or operates independent of CAIR.⁹¹ Given the remote chance of ultimate victory, EPA's motive for petitioning the Court may simply be to further delay the process of implementing legal, meaningful regulation, while preserving

⁸⁸ See Barry J. Goehler, *Control of Mercury Emissions from Coal-Fired Electric Power Plants*, 9 ENVTL. LAW. 119, 151-52 (2002).

⁸⁹ *New Jersey v. EPA*, 517 F.3d at 582.

⁹⁰ Lewis Carroll described the Queen of Hearts as "a sort of embodiment of ungovernable passion – a blind and aimless Fury." Lewis Carroll, *Alice on the Stage*, Appendix C to LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 232, 235 (Richard Kelly ed., 2000).

⁹¹ See Petition for a Writ of Certiorari of United States Environmental Protection Agency, *supra* note 83, at 19 n.4 ("EPA may need to seek a remand to reconsider the CAMR and its Section 7412(n)(1)(A) determination.").

the Bush Administration's legacy of pro-industry air pollution policy.⁹² President-elect Barack Obama's opposition to CAMR provides further reason for the Court to decline to hear the case.⁹³

B. *The Aftermath*

New Jersey v. EPA leaves mercury regulation in a state of uncertainty. Unless EPA makes the highly improbable finding that delisting power plants would not endanger public health,⁹⁴ EPA will have to begin developing MACT regulations. Although the statute stipulates that this process should take no more than two years,⁹⁵ EPA will most likely take longer, given the significance of such regulation for the economy and energy supply and the likelihood that the final rules will be challenged.⁹⁶ Two legislative proposals seek to speed up this lengthy process, while several other "multi-pollutant" bills propose regulation of power plant mercury emissions outside the CAA.⁹⁷ Several states opted out of CAMR and have implemented their own rigorous mercury control programs, some of which provide for mandatory

⁹² A report of the Majority Staff of the House Select Committee on Energy Independence and Global Warming found that EPA employed similar delay tactics to avoid regulating greenhouse gases under the CAA in part to preserve the Bush Administration's legacy of siding with the oil industry. SELECT COMM. ON ENERGY INDEPENDENCE & GLOBAL WARMING MAJORITY STAFF, INVESTIGATION OF THE BUSH ADMINISTRATION'S RESPONSE TO *MASSACHUSETTS V. EPA: HOW BIG OIL PERSUADED THE BUSH ADMINISTRATION TO ABANDON PROPOSED REGULATIONS FOR GLOBAL WARMING POLLUTION 27* (2008), available at <http://globalwarming.house.gov/tools/2q08materials/files/01110.pdf>.

⁹³ As a senator, Obama voted for a joint resolution that would have invalidated CAMR; the resolution failed. Project Vote Smart – President-elect Obama on S J Res 20 – EPA's Clean Air Mercury Rule, http://www.votesmart.org/issue_keyvote_detail.php?cs_id=7766&can_id=9490 (last accessed Nov. 15, 2008). This comment went to press before Obama's inauguration.

⁹⁴ Since section 112(c)(9) does not ask EPA to consider the effect of emissions after imposition of other requirements of the CAA, EPA will have to show that even without any regulation, EGUs do not pose a threat. Given the pernicious effects of mercury emissions from EGUs documented in the 1998 Study, the determination of states and environmental groups to see the fruition of section 112 MACT regulations, and the unfriendly reception the D.C. Circuit gave EPA in its first attempt to circumvent its 2000 Finding, EPA is not likely to succeed if it pursues delisting.

⁹⁵ 42 U.S.C. § 7412(c)(5) (2000).

⁹⁶ EPA has stated that development of the formal MACT standards will require "considerable resources." Petition for a Writ of Certiorari of United States Environmental Protection Agency, *supra* note 83, at 11. The D.C. Circuit's recent, repeated rejection of methodologies used by EPA to formulate MACT standards for other source categories will provide an additional reason for EPA to proceed cautiously. See *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1371-74 (D.C. Cir. 2007); *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1259-60 (D.C. Cir. 2007); *Sierra Club v. EPA*, 479 F.3d 875, 880-84 (D.C. Cir. 2007). On the other hand, EPA may be able to save time by building off the MACT standards it proposed in 2004.

⁹⁷ See ROBERT MELTZ & JAMES É. MCCARTHY, CONG. RESEARCH SERV., THE D.C. CIRCUIT REJECTS EPA'S MERCURY RULES: *NEW JERSEY V. EPA 5* (2008), available at <http://www.dnr.state.wi.us/air/pdf/CRS22817report20080228.pdf>; see also Mercury Emissions Control Act, S. 2643, 110th Cong. (2008); Mercury Emissions Reduction Act, H.R. 1087, 110th Cong. (2007).

reductions by 2010 or sooner.⁹⁸ Nonetheless, this group includes only a fraction of the states, and they are concentrated mostly on the eastern seaboard.⁹⁹

This Case Comment focuses on the extent to which the so-called “MACT hammer” provisions in section 112(g)(2) and section 112(j) will fill the federal regulatory void by requiring EPA and state permitting agencies to impose MACT restrictions for major sources on a case-by-case basis. Congress had the foresight to recognize that MACT standards would take significant time to develop and that EPA would miss some deadlines for promulgation.¹⁰⁰ To ensure that sources of toxic air pollution did not go unregulated in the interim, Congress included both MACT hammers in section 112.¹⁰¹ The MACT hammer provisions are essentially untested in court,¹⁰² and debate exists among legal commentators whether and to what extent these provisions apply to EGUs. The MACT hammer in section 112(g) will provide stringent interim regulation of newly constructed plants because its plain and unambiguous language encompasses all listed source categories. Parties trying to enforce section 112(j) against existing plants, however, will likely encounter difficulty because section 112(j)’s language suggests that the provision does not regulate source categories subsequently placed on the section 112(c) list, such as EGUs.

Case-by-case standards are not perfect — the level of protection afforded will vary among state agencies, development of the standards will impose a substantial burden on state agency resources that may limit the number of sources the agency can regulate, and each permit will be vulnerable to litigation over its faithfulness to section 112(d). However, case-by-case standards play an important role in the section 112 statutory scheme as a backstop to protect public health from unrestricted exposure to dangerous substances where no other regulation has been passed. Inconveniences posed by administering case-by-case standards only increase the pressure on EPA to promulgate permanent national standards. While one may debate whether case-by-case standards are efficient, Congress selected this method to provisionally regulate HAPs. This Comment focuses on the extent to which case-by-case standards apply to EGUs.

⁹⁸ See NAT’L ASS’N OF CLEAN AIR AGENCIES, *supra* note 51.

⁹⁹ *Id.*

¹⁰⁰ Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources, 61 Fed. Reg. 68,384, 68,384-85 (Dec. 27, 1996) (to be codified at 40 C.F.R. pt. 63); Hazardous Air Pollutants: Regulations Governing Equivalent Emission Limitations by Permit, 59 Fed. Reg. 26,429, 26,430 (May 20, 1994) (to be codified at 40 C.F.R. pts. 9, 63); *see also* Natural Res. Def. Council v. Reilly, 983 F.2d 259, 272 n.22 (D.C. Cir. 1993).

¹⁰¹ Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources, 61 Fed. Reg. at 68,386; Hazardous Air Pollutants: Regulations Governing Equivalent Emission Limitations by Permit, 59 Fed. Reg. at 26,430.

¹⁰² Only an unpublished decision challenging construction of a dairy farm for noncompliance with section 112(g)(2)(A) addresses the MACT hammers. *See* Ass’n of Irrigated Residents v. Fred Schakel Dairy, No. 1:05-CV-00707 OWW SMS, 2008 WL 850136 (E.D. Cal. Mar. 28, 2008).

i. *Section 112(g)(2)*

Section 112(g)(2)(B) mandates that all major power plants that are constructed or reconstructed before EPA promulgates MACT standards must obtain a case-by-case determination from EPA or the state permitting authority that the plants control emissions at a level estimated to be equivalent to the emission reduction that a MACT standard for new sources would require.¹⁰³ This provision applies to all HAP emissions from power plants, not just mercury. There should be no doubt that section 112(g) became effective upon the vacatur of CAMR and that it applies to the construction or reconstruction of major power plants; EPA stated as much in its petition to the Supreme Court.¹⁰⁴

Although limited to newly constructed or substantially reconstructed power plants, section 112(g)(2)(B) will play a critical role in protecting public health and the environment over the next few years. Over one hundred new coal-fired power plants are currently planned, a trend that environmentalists have deemed the “coal rush.”¹⁰⁵ The preconstruction review process detailed in the section 112(g)(2)(B) implementing regulations will engage plant developers before designs have been finalized, when adding air pollution controls is most cost-effective.¹⁰⁶ Environmental groups have already leveled legal challenges against several coal-fired power plants that are

¹⁰³ Section 112(g)(2)(B) states in part: “[N]o person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.”

¹⁰⁴ Petition for a Writ of Certiorari of United States Environmental Protection Agency, *supra* note 83, at 22-23. Guidance issued by EPA before EGUs were delisted, specifying that section 112(g) would be in effect “until the EPA promulgates a nationally applicable MACT standard to address hazardous air pollutants” for EGUs, provides further evidence that section 112(g) presently applies. Memorandum from John Seitz, Dir., Office of Air Quality Planning & Standards, EPA, to Regional Office Air Dirs., EPA, 1 (Aug. 1, 2001), *available at* <http://www.epa.gov/ttn/atw/combust/utltox/casebycase.pdf>. In addition, several states issued permits under section 112(g)(2)(B). *See* Comment submitted by Chuck Layman, Central States Air Resource Agencies Association (Apr. 29, 2004), Docket No. EPA-HQ-OAR-2002-0056 (“States are unable to evaluate the cost associated with implementation of the proposed rule without clearly stated commitments on these types of issues.”). The Congressional Research Service has advised that section 112(g)(2)(B) applies to new sources. MELTZ & MCCARTHY, *supra* note 97, at 5.

¹⁰⁵ *See* NAT'L ENERGY TECH. LAB., DEP'T OF ENERGY, TRACKING NEW COAL-FIRED PLANTS 6 (2008), *available at* <http://www.netl.doe.gov/coal/refshelf/ncp.pdf> (fifty-two plants permitted or under construction and fifty-eight additional plants planned, although not all of these plants may qualify as “major”); Sierra Club, Stopping the Coal Rush, <http://www.sierraclub.org/environmentallaw/coal> (last visited Sept. 28, 2008) (stating that over one hundred coal-fired plants have been proposed).

¹⁰⁶ 40 C.F.R. § 63.43 (2008). Congress appears to have been cognizant of this fact when writing the provision. *See* Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources, 61 Fed. Reg. at 68,384-85.

planned or already in construction, alleging noncompliance with section 112(g)(2)(B).¹⁰⁷

It would seem sensible that power plants regulated under a provisional case-by-case standard based on the same criteria used for developing a MACT standard for new sources would have to meet the actual MACT standard for new sources once it is promulgated. However, the law is not so clear. For a power plant to qualify as a “new source” regulated by the new source MACT standards, construction or reconstruction of the facility must commence “after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.”¹⁰⁸ Regulation under section 112(g)(2)(B) probably would not fall under this language for two reasons. First, in most cases, state permitting authorities impose the section 112(g)(2)(B) regulations, not the EPA Administrator. Second, the permitting authority in section 112(g)(2)(B) makes a case-by-case determination, rather than “proposes” a regulation — the verb “to propose” more accurately describes EPA’s proposal of regulations in notice-and-comment rulemaking. Neither section 112 nor its implementing regulations specify which MACT standards, those for new or existing sources, plants initially regulated under section 112(g)(2)(B) would have to meet.

The definition of “new source” *could* encompass plants that begin construction before the promulgation of final MACT standards because the EPA Administrator *has already proposed* MACT regulations for EGUs establishing an emission standard, in 2004 — it just did not adopt them.¹⁰⁹ This literal reading of the meaning of “new source” would require any power plant constructed after the 2004 proposal to meet the MACT standard for new sources once it is developed, even if the plant has already been built.

A court charged with interpreting the interplay of section 112(g)(2)(B) with the definition of “new source” would be presented with a catch-22. If a court finds that all plants commencing construction after the 2004 proposed MACT standards are “new sources,” then plants that commenced construction after the promulgation of the Delisting Rule but before its vacatur may require costly modifications to achieve the “new source” level of pollution reduction. On the other hand, if a court finds that the “new source” classification does not apply to any plants commencing construction

¹⁰⁷ Charlotte E. Tucker, *Citizen Suits: Sierra Club Notifies Coal-Fired Plants of Plans to Sue Over Mercury Pollution*, 23 Toxic L. Reps. (BNA) 433, 433 (2008); Peter Page, *Two Rulings Give Coal Plants Murky Future*, 30 NAT'L L.J. 4 (2008) (“Attorneys representing environmental organizations are challenging permits for 32 coal power plants in 13 states.”); Letter from David Frederick, Lowerre, Frederick, Perales, Allmon & Rockwell to Stephen L. Johnson, Adm’r, Env’tl. Prot. Agency et al. (May 6, 2008), available at http://lonestar.sierraclub.org/conservation/NOI_SandyCreekFNL.pdf (providing EPA notice of Sierra Club suit against a plant that commenced construction on January 7, 2008, before the *New Jersey v. EPA* decision).

¹⁰⁸ 42 U.S.C. § 7412(a)(4) (2000).

¹⁰⁹ See Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4652, 4652 (Jan. 30, 2004).

before formal MACT standards are proposed, then plants regulated under section 112(g)(2)(b) will have to initially adopt expensive pollution control equipment to meet the new source case-by-case standards, but will no longer need such advanced equipment to meet the “existing source” MACT standards once they are promulgated. A court should reject the latter result as an absurd consequence that Congress could not have possibly intended. Adopting the former interpretation would not unjustifiably burden newly constructed power plants because any reliance on the permanence of CAMR would be naïve given CAMR’s legal uncertainty and widespread opposition. Regardless of the interpretation of “new source,” regulations implementing section 112(g)(2)(B) allow a state, in its discretion, to continue regulating a facility under the provisional section 112(g)(2)(B) determination where the final standards promulgated by EPA are less stringent.¹¹⁰

Section 112(g)(2)(A) stipulates that modifications to major sources must meet case-by-case “existing source” MACT standards where no formal MACT standards are in place. However, EPA has arguably rendered this provision a “dead letter.” EPA chose not to write regulations implementing that provision because “the greatest benefits to be derived” from the section 112(g) hammer are from regulating the construction of sources.¹¹¹ EPA indicated that “[i]f there were substantial delays in issuance of MACT standards” it would reconsider that decision.¹¹² Given the resources that developing MACT standards will require, it is unlikely that EPA will develop regulations to implement section 112(g)(2)(A) in parallel.

ii. *Section 112(j)*

The overwhelming majority of power plants, which contribute the bulk of toxic emissions, are existing plants not subject to section 112(g)(2). Thus, environmentalists and plant owners will also contest the meaning of section 112(j), which addresses existing as well as new plants. Section 112(j) provides that eighteen months after “the Administrator fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to subsection (e)(1) and (3) . . . the owner or operator of any major source in such category or subcategory” shall apply for a permit.¹¹³ The state permitting authority must set the level of emissions reduction “on a case-by-case basis, to be equivalent to the limitation that would apply to

¹¹⁰ 40 C.F.R. § 63.44(c). The level of pollution reduction at which to continue regulating the plant is in the state permitting authority’s discretion. Thus, states favoring minimal pollution controls would likely not continue requiring stringent “new source” pollution reduction if plants are legally only required to meet “existing source” controls.

¹¹¹ Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources, 61 Fed. Reg. 68,384, 68,386 (Dec. 27, 1996) (to be codified at 40 C.F.R. pt. 63).

¹¹² *Id.*

¹¹³ 42 U.S.C. § 7412(j)(2).

such source” under the section 112(d) MACT standards for existing sources.¹¹⁴

Commentators disagree over whether section 112(j) requires all existing power plants to apply for provisional MACT permits.¹¹⁵ The Congressional Research Service and others caution that section 112(j) applies only to categories and subcategories that were initially listed by EPA after the passage of the 1990 Amendments and thus excludes subsequently listed categories like power plants. This position relies on a plain meaning interpretation of the statement that section 112(j) applies where EPA fails to promulgate a standard “by the date established pursuant to subsection (e)(1) and (3).” Section 112(e)(1) only addresses the promulgation of regulations for “categories and subcategories of sources initially listed for regulation pursuant to subsection (c)(1).” Section 112(e)(3), on the other hand, directs EPA to publish a schedule of promulgation dates for categories “listed pursuant to subsection (c)(1),” but does not specify that the category must be “initially” listed. Even so, section 112(c)(1) is primarily concerned with the publication of an initial list of source categories and its periodic revision. Section 112(c)(5), not mentioned in any of the cross-references derived from section 112(j), is the provision that enables EPA to list subsequent categories of polluters, like power plants. From this textual inquiry, the Congressional Research Service and others have concluded that the omission of promulgation dates for subsequently added categories signifies that section 112(j) does not regulate power plants and other categories later added to the list. This position is certainly credible, especially given the D.C. Circuit’s reliance on the plain, literal meaning of section 112 in *New Jersey v. EPA*.

On the other hand, this outcome makes little sense in light of the purpose of section 112(j) and effects an almost absurd exception to its statutory reach. Congress intended section 112(j) to ensure that all major sources of toxic pollutants meet strict regulatory standards, even when EPA’s issuance of national MACT standards for the category are severely delayed.¹¹⁶ No basis beyond the text has been proffered for exempting newly added categories of polluters from this important safeguard, and Congress surely did not intend such a result. Moreover, EPA did not state anywhere in its extensive

¹¹⁴ 42 U.S.C. § 7412(j)(5).

¹¹⁵ See Ken Meade & Robert McKeehan, *What’s Next for Mercury? Uncertainty After New Jersey v. EPA*, ANDREWS ENVTL. LITIG. REP., May 14, 2008, at 2 (expressing doubt that existing power plants are regulated by section 112(j) because they were not initially listed); MELTZ & MCCARTHY, *supra* note 97, at 5 n.13 (finding that section 112(j) excludes power plants because it only applies to sources initially listed); David P. Novello, *Recent Development in the Regulation of Hazardous Air Pollutants*, 38 Env’tl. L. Rep. (Env’tl. Law Inst.) 10,480 (2008) (indicating that section 112(j) regulates power plants but expressing uncertainty about the date upon which power plants will need to apply for permits); WOOLEY & MORSS, *supra* note 24, at § 3:32 (suggesting that section 112(j) regulates power plants).

¹¹⁶ *Natural Res. Def. Council v. Reilly*, 983 F.2d 259, 272 n.22 (D.C. Cir. 1993) (quoting Henry Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1746 (1991)); Hazardous Air Pollutants: Regulations Governing Equivalent Emission Limitations by Permit, 59 Fed. Reg. 26,429, 26,430 (May 20, 1994) (to be codified at 40 C.F.R. pts. 9, 63).

regulations implementing section 112(j) that the hammer is limited to initially listed categories, which indicates that EPA did not interpret the statute to create such an exemption.¹¹⁷ EPA has tellingly listed EGUs as a category “potentially regulated” by section 112(j).¹¹⁸ Under *Chevron* review, a conflict between the plain language and an inquiry employing other tools of statutory construction can raise an ambiguity that would lead a reviewing court to defer to the agency’s construction.¹¹⁹ Consequently, whether the nation’s existing power plants can be brought under case-by-case MACT regulation while EPA develops permanent MACT standards may ultimately depend on the position EPA takes on the matter.

If section 112(j) does regulate existing power plants, significant uncertainty remains as to which date should serve as the missed deadline upon which the eighteen-month window for permit applications begins tolling. Possibilities include the promulgation date set when EPA added EGUs to the list of categories,¹²⁰ the promulgation date established by a prior settlement with the Natural Resources Defense Council,¹²¹ or a new promulgation date that EPA has yet to specify. Again, any guidance issued by EPA on the timing of the permit applications may merit deference by a reviewing court.

Interim regulation of existing plants under section 112(j) faces practical obstacles as well. Until more definite guidance is provided, permitting authorities in states that do not place a premium on public health protection will likely be reluctant to notify power plants of their need to apply for provisional permits. States have the discretion not to request such applications, and power plants are not required to apply of their own accord if they cannot “reasonably determine” that they belong in a category subject to section 112(j).¹²²

Finally, *New Jersey v. EPA* did not leave a federal regulatory void for mercury and other HAP emissions. The MACT hammer in section 112(g) should provide stringent interim regulation of newly constructed plants that will result in significant pollution reduction. Coupled with the possibility of regulation of carbon dioxide emissions from newly constructed plants, the section 112(g) control adds further disincentive to expand electricity production from coal and may contribute to a shift in investment towards alternative energy sources. Existing plants, however, will continue to emit toxic

¹¹⁷ See 40 C.F.R. §§ 63.50–56 (2008).

¹¹⁸ National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j), 67 Fed. Reg. 72,875, 72,875 (Dec. 9, 2002).

¹¹⁹ See *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 81 (2007) (deferring to agency under *Chevron* Step Two where the text clearly indicated one interpretation and the legislative history clearly indicated the opposite interpretation).

¹²⁰ EPA set that date as December 20, 2000. National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act, 67 Fed. Reg. 6521, 6524 (Feb. 12, 2002).

¹²¹ The settlement set this date as March 15, 2005. McCARTHY, ANALYSIS, *supra* note 6, at 5.

¹²² 40 C.F.R. § 63.52(a)(1).

mercury into the air while uncertainties over the applicability of the section 112(j) MACT hammer are litigated, except in the few states where pollution control requirements fill the gap.

V. CONCLUSION

New Jersey v. EPA marked a victory for Petitioners only in a narrow sense of the word. If not for EPA's stark reversal in course, rigorous MACT standards for power plants could have been in place years ago, with commensurate benefits in fewer premature deaths, less developmental damage among children, less government spending on health care, and increased productivity from fewer missed days at work. Instead, EPA set off on an extended detour from the path set out for it by Congress, a detour that industry did not mind taking. In retrospect, power plant owners might wonder whether the additional decade of pollution-based prosperity was worth passing up the weaker MACT standards proposed in 2004, now that they face the possibility of long-term compliance with significantly more stringent pollution controls developed by the next administration.

The vacatur of CAMR marks the abject failure of the Bush Administration to formulate an air policy on mercury fitting its desire for a market-based regulatory scheme into the command-and-control statutory directives fashioned by Congress in the CAA. *New Jersey v. EPA* signals that courts may not treat kindly attempts by agencies to creatively rationalize the substitution of their policy preferences for Congress's statutory mandates. After all, under the system of separation of powers and checks and balances set out in the Constitution, the executive branch's power over the kingdom does not reach as far as that of the Queen of Hearts.