

LEGAL STANDARDS APPLICABLE TO MACT FLOORS AND SUBCATEGORIES
Industry Perspective
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MACT Floors

- *Statutory Standard.* The MACT floor for existing units is defined as: “the average emission limitation achieved by the best performing twelve percent of existing sources.” CAA § 112(d)(3)(A). “Emission limitation” is a term of art under the CAA, defined as “a requirement established by the State or the Administrator which limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis” – in other words, a permit limit. CAA § 302(k).
 - ✓ Few, if any, power plants currently have permit limits for mercury. Accordingly, the MACT floor for mercury should be no control. EPA therefore should evaluate the available data on power plant mercury removal to determine the appropriate “above the floor” level of control, considering the factors set forth in CAA § 112(d)(2).
 - ✓ In contrast, the MACT floor for new sources is defined as the level of “emission control that is *achieved in practice* by the best-controlled similar source.” CAA § 112(d)(3) (emphasis added).
- *Worst Case Operating Conditions.* The D.C. Circuit has found that “if an emissions standard is as stringent as ‘the emissions control that is achieved in practice’ by a particular unit, then that particular unit *will not violate the standard. This only results if ‘achieved in practice’ is interpreted to mean ‘achieved under the worst foreseeable circumstances.’* *Sierra Club v. EPA*, 167 F.3d 658, 665 (D.C. Cir. 1999) (emphasis added). *See also National Lime Association v. EPA*, 233 F.3d 625, 632 (D.C. Cir. 2000) (EPA must ensure that emission standards are achievable “under the most adverse circumstances which can reasonably be expected to recur.”); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 863 (D.C. Cir. 2001) (same).¹

Subcategorization

- *Statutory Standard.* CAA § 112(c)(1) grants EPA broad discretion to establish “categories and subcategories” of sources to be regulated under § 112. Section 112(d)(3)(A) provides that the MACT floor for existing sources shall be based on “the average emission limitation achieved by the best performing 12 percent of the existing sources . . . in the category or subcategory.” The CAA further provides that EPA “may distinguish among *classes, types and sizes of sources* within a category or subcategory” when establishing MACT standards. CAA § 112(d)(1) (emphasis added).
 - ✓ *Webster’s’ Third New International Dictionary Unabridged* (1993) defines “class” to mean “a group, set or kind marked by common attributes or a common attribute.” It defines “type” as “qualities common to a number of individuals that serve to distinguish them as an identifiable class or kind,” further clarifying that “‘Type’, ‘kind’ and ‘sort’ are usually

¹ Thus, in *Cement Kiln Recycling Coalition*, the Court expressly upheld EPA’s use of incinerator trial test burns – which reflect abnormally bad performance because, for example, metals and chlorine are spiked into the waste feed and the emissions control equipment is “detuned” – for purposes of setting the MACT floor. *Id.* at 867.

interchangeable” and that “‘kind’ in most uses is likely to be very indefinite and involve any criterion of classification whatsoever.”

- ✓ Congress’s use of the broad terms “type,” “kind,” and “size” shows that EPA is intended to have broad discretion in the appropriate factors that warrant distinguishing among sources for purposes of setting MACT floors and MACT standards.
- *Factors That Congress Intended EPA To Consider.* The legislative history makes clear that Congress intended EPA to distinguish among classes, types and sizes of sources under three core circumstances: when differences among sources affect (1) the feasibility of air pollution control technology; (2) the effectiveness of air pollution control technology; and (3) the cost of control.
 - ✓ The Senate Report clarifies that the Administrator should “take into account factors such as industrial or commercial category, facility size, type of process and other characteristics of sources which are likely to *affect the feasibility and effectiveness of air pollution control technology*. *Cost and feasibility are factors* which may be considered by the Administrator when establishing an emission limitation for a category under section 112. The proper definition of categories, in light of available pollution control technologies, will assure maximum protection of public health and the environment while minimizing costs imposed on the regulated community.” S. Rep. No. 228, 101st Cong., 1st Sess 166 (emphasis added).
 - ✓ The House Report similarly provides: “In the determination of MACT for new and existing sources, consideration of cost should be based on an evaluation of the cost of various control options. The Committee expects MACT to be meaningful, so that MACT will require substantial reductions in emissions from uncontrolled levels. However, *MACT is not intended to require unsafe control measure , or to drive sources to the brink of shutdown.*” House Report at 328 (emphasis added).
- *Need For Subcategorization.* Both the text of CAA § 112 and the legislative history make it clear that EPA is obligated to tailor MACT standards to take into account pertinent differences among sources. Subcategorization is the primary mechanism for tailoring standards since it allows the grouping of facilities according to the factors that Congress enunciated in both the statute and the legislative history, including cost and feasibility and effectiveness of control technology. The statute uses the broad terms “class,” “type” and “size” when identifying the bases on which EPA may distinguish among sources, evidencing an intent to allow EPA to look broadly at the many factors that may affect the cost, feasibility and effectiveness of pollution control for different sources.
- *EPA’s Regulatory Finding on the Emissions of HAPs from Power Plants.* In its “Notice of Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units,” 65 Fed. Reg. 79825, 79830 (Dec. 20, 2000), EPA stated:

“[T]he EPA intends to develop a record to facilitate consideration of subcategorization of the source category in setting the ‘floor.’ Based on the information that EPA has to date, the EPA anticipates that a factual record will allow EPA to propose appropriate subcategories for this source category. In developing standards under section 112(d) to date, the EPA has based subcategorization on considerations such as: the size of the facility; the type of fuel used at the facility; and the plant type. The EPA may also consider other relevant factors such as geographic conditions in establishing subcategories.”