

under Federal or State regulations. If not for the enforceable controls they have implemented, synthetic minor sources would be major sources under section 112 of the CAA.

We believe that the better interpretation of the CAA's plain language and legislative history requires that synthetic minor sources be included in MACT floor determinations. First, the plain language of the statute makes clear that our MACT floor determinations are to reflect the best sources in a category. For new sources in a category or subcategory, the MACT floor shall not be less stringent than the emission control that is achieved in practice by the *best-controlled* similar source, as determined by EPA. (See CAA section 112(d)(3), emphasis added.) For existing sources in a category or subcategory with 30 or more sources, the MACT floor may be less stringent than the floor for new sources in the same category or subcategory but shall not be less stringent than the average emission limitation achieved by the *best performing* 12 percent of the existing sources (for which the Administrator has emissions information). (See CAA section 112(d)(3)(A), emphasis added.¹) Thus, section 112(d)(3) of the CAA requires that MACT floors reflect what the best-controlled new sources and the best-performing existing sources achieve in practice. These phrases contain no exemptions and are not limited by references to sources with or without controls. Therefore, they suggest that all of the best-controlled or best-performing sources should be considered in MACT floor determinations, regardless of whether or not such sources rely upon controls.

Furthermore, section 112(d)(3) of the CAA expressly excludes certain sources that meet LAER requirements from MACT floor determinations for existing sources. (See CAA section 112(d)(3)(A).) The fact that Congress expressly excluded such LAER sources but did not also exclude synthetic minor sources suggests that no exclusion was intended for synthetic minor sources. Indeed, nothing in the statute suggests that EPA should exclude a control technology from its consideration of the MACT floor because the technology is so effective that it reduces source emissions such that the source is no longer a major source of HAP. (See 67

FR 36,460 and 36,464, May 23, 2002, stating this rationale for including synthetic minor sources in the floor determination for the proposed NESHAP for municipal solid waste landfills.)

Some commenters argue that because the BSCP source category only includes major sources and synthetic minor sources are non-major by definition, synthetic minor sources (like true area sources) fall outside the regulated source category and should not be considered in MACT floor determinations. EPA agrees that the BSCP source category includes only major sources. (See 67 FR 47,894 and 47,898, July 22, 2002.) However, EPA disagrees that the CAA contemplates that synthetic minor sources must be treated like true area sources and excluded from MACT floor determinations. Section 112(a) of the CAA defines a major source as:

any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants * * *.

(See CAA section 112(a)(1).) An area source is defined as any stationary source of hazardous air pollutants that is not a major source. (See CAA section 112(a)(1).) In the major source definition, the reference to a source's potential to emit considering controls allows the interpretation that a source's potential to emit before and after controls is relevant, such that synthetic minor sources may be considered within the meaning of this definition and included in MACT floor determinations for categories of major sources.² Some commenters appear to suggest that the reference to a source's potential to emit considering controls can only mean a source's potential to emit after controls have been implemented. While it is possible to read the phrase in this manner in isolation, this interpretation would have

the effect of excluding the best-performing sources in a category from MACT floor determinations and therefore would be contrary to the statutory mandate that EPA set MACT floors based on the levels the best-controlled new sources and the best-performing existing sources achieve in practice. We believe the statutory reference to potential to emit considering controls should be read in a manner consistent with the other requirements of section 112(d) of the CAA to allow for the consideration of synthetic minor sources in MACT floor determinations for categories of major sources.

In addition, the legislative history suggests that synthetic minor sources should be included in MACT floor determinations. In a floor statement, Senator Durenberger stated that in implementing section 112(d)(3) of the CAA, "the [Senate] managers intend the Administrator to take whatever steps are necessary to assure that [the Administrator] has collected data on *all of the better-performing sources within each category*. [The Administrator] must have a data-gathering program sufficient to assure that [EPA] does not miss any sources that have superior levels of emission control." (See Environment and Natural Resources Policy Division, Congressional Research Service, 103d Cong., S.Prt. 103-38 (prepared for the U.S. Senate Committee on Environment and Public Works), A Legislative History of the Clean Air Act Amendments of 1990 at 870, Nov. 1993, emphasis added.) This statement underscores that Congress intended for MACT floor determinations to reflect consideration of all of the sources in each category with the best emission controls. We believe it would be inconsistent with Congress's intent and the plain language of the CAA to exclude synthetic minor sources—those sources with superior controls which became synthetic minor sources by implementing such controls—from MACT floor determinations.

We believe that the inclusion of synthetic minor sources in MACT floor determinations is justified because of the reasons explained above. Even if the MACT floor determination had been "no emissions reductions" we believe that a departure from the MACT floor to a beyond-the-floor standard, based on DLA technology, is viable because the benefits associated with the emissions reductions will exceed the cost of installing and operating the technology.

2. MACT Floors for Existing Sources

Some commenters questioned how the MACT floor for existing sources was

¹ If a category or subcategory has fewer than 30 sources, the floor shall be "the average emission limitation achieved by the *best performing* 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory." (See CAA section 112(d)(3)(B), emphasis added.)

² We believe this approach is not inconsistent with our policy that existing sources that limit their potential to emit to below the major source threshold prior to the first compliance deadline under a MACT standard will not be subject to the standard, as one commenter suggests. (See Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA, to EPA Regions, "Potential to Emit for MACT Standards—Guidance on Timing Issues," May 16, 1995.) Including synthetic minor sources in MACT floor determinations ensures that MACT floors reflect the best-performing sources, as the CAA requires. At the same time, our policy recognizes that sources that already achieve or perform better than the MACT floors need not be subject to the MACT standards.