

floor, and EPA is not fulfilling the requirements of the CAA by not performing such an analysis. The commenter stated that a majority of facilities identified in the analysis have adequate controls due to State regulations and these controls should be incorporated into the MACT floor evaluation. The commenter was particularly concerned that by not developing a MACT floor, no new-source MACT standards were created. The commenter requested that EPA perform a MACT floor analysis and develop a NESHAP for new sources.

Two of the commenters stated that EPA should support its decision not to regulate the chlorine production source category by citing the provisions of section 112(c)(9)(B)(ii) in addition to the provisions of section 112(d)(4). The commenters stated that the evaluation performed by EPA would also be sufficient for deleting sources under section 112(c)(9)(B)(ii) and that EPA's proposal to not regulate chlorine production is similar to deleting a subcategory of the Chlorine Production source category. Therefore, in addition to using the authority under section 112(d)(4), the commenters suggested that EPA delete the subcategory using the authority under section 112(c)(9)(B)(ii) to avoid any uncertainty over the use of its authority under section 112(d)(4).

Response: The EPA has the authority under CAA section 112(d)(4) to decide not to establish a NESHAP for chlorine and HCl emissions from certain chlorine production facilities. We have decided to limit our use of section 112(d)(4) to the emissions of chlorine and HCl from sources within the mercury cell chlor-alkali subcategory. While we have decided to establish no standards for the emissions of these two HAP from sources in the mercury cell chlor-alkali plant subcategory, we are establishing standards for the mercury emissions from the sources within that subcategory. As explained elsewhere in today's **Federal Register**, we have decided to delete the non-mercury cell chlorine production plants subcategory under CAA section 112(c)(9)(B)(ii). The only HAP emitted by the non-mercury cell chlorine production sources are chlorine and HCl.

Contrary to other commenters' claims that our use of section 112(d)(4) is inappropriate, both the statutory language and the legislative history of the provision support our decision not to set limitations for chlorine and HCl emissions from sources in the mercury cell chlor-alkali plant subcategory. The language of section 112(d)(4) provides the Agency with ample discretion to

utilize a risk-based approach in determining whether to establish emission standards for those HAP where we determine that the HAP are "threshold pollutants" and that the standard (or no standard) will achieve an "ample margin of safety."

The statutory language in section 112(d)(4) is ambiguous. Thus, under the Supreme Court's decision in *Chevron v. NRDC*, 467 U.S. 837 (1984), the Agency has the discretion to interpret the language to allow us to establish NESHAP that do set limitations on certain HAP emitted from sources ("when establishing standards") but to also decide not to set limitations on other HAP emitted from these same sources if the other HAP are threshold pollutants and the risk from the emissions are so low that no standard for that second set of HAP is necessary to protect the public and the environment with "an ample margin of safety."

This approach is consistent with prior decisions EPA has made in the context of two other NESHAP. First, in the NESHAP for combustion sources at pulp mills (40 CFR part 63, subpart MM), we chose not to set a standard for HCl emissions from recovery furnaces, while we did set standards for other HAP emitted from the same sources within the category. We explained this decision in the preamble to the proposed MACT standard and received no adverse comment on the approach (63 FR 18754, 18765–68, April 15, 1998). Second, we proposed to set no standard under section 112(d)(4) for HCl emitted from lime kilns, while we also proposed to set standards for other HAP emitted by these same sources (67 FR 78046 December 20, 2002). We also received no adverse comment on that proposed decision. While we originally proposed to utilize section 112(d)(4) to set no standard for chlorine and HCl from chlorine production sources in a separate notice of the **Federal Register** (67 FR 44713, July 3, 2002), we made it clear that the proposed use of section 112(d)(4) would apply to emissions of these two HAP from mercury cell chlor-alkali sources (as well as the emissions of chlorine and HCl from other chlorine production sources).

We do not agree that Congress' use of the phrase "in lieu of" in CAA section 112(d)(5) so clearly restricts any possible interpretation of CAA section 112(d)(4) such that some form of a MACT standard must always be set even when the criteria of section 112(d)(4) are met. Instead, we interpret that Congress enacted section 112(d)(4) to provide EPA with the discretion to take risk into account and decide that standards need

not be set when the HAP are threshold pollutants and levels being emitted are below the threshold value with an ample margin of safety. Moreover, in each case where we have exercised authority under section 112(d)(4), we have established standards in each category (or subcategory, as here) for those pollutants that do not satisfy the threshold pollutant and ample margin of safety statutory criteria.

We also disagree with the commenter who argued that the provision in section 112(c)(2), which requires the Administrator to establish emission standards for listed categories and subcategories, has much bearing on our use of section 112(d)(4) in this circumstance. By setting a standard for the emission of mercury from the mercury cell chlor-alkali plant subcategory, we are fulfilling our obligations under section 112(c)(2). As stated earlier, we have utilized the same approach in our other uses of section 112(d)(4), e.g., HCl emissions from combustion sources at pulp mills and lime production sources.

The statutory language in section 112(d)(1) and (3) does not prevent us from deciding that no emission standard is necessary for a particular threshold pollutant which is being emitted at levels well below the ample margin of safety when we are also establishing standards for HAP emitted from sources in that same category or subcategory. This approach to our use of section 112(d)(4) is consistent with the statutory language of section 112(d)(1) and (3). We are establishing emission standards for the listed category or subcategory, but are deciding that no MACT floor need be established and no emission standard set for those HAP that meet the criteria of "threshold pollutant" and "ample margin of safety."

With regard to the concerns the commenter raised about the failure to set a standard for new sources, our review of the mercury cell subcategory indicates that no new mercury cell chlor-alkali plants will be constructed. Given that our emission standard for new sources in the mercury cell chlor-alkali subcategory prohibits the emission of mercury, we do not believe any new sources using mercury cells for chlorine production will ever be constructed (or reconstructed). Therefore, this no-mercury emissions requirement in the final rule will, in effect, also ensure that there are no chlorine or HCl emissions from new mercury cell facilities.

In response to other commenters' suggestion that we utilize the authority of section 112(c)(9)(B)(ii) to delete the chlorine production category, we have