

**Clean Air Task Force * Earthjustice * Environmental Defense Fund
Natural Resources Defense Council * Sierra Club * WildEarth Guardians**

January 30, 2012

Administrator Lisa Jackson
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC, 20460

Re: New Source Performance Standards for the Oil and Natural Gas Sector,
Docket EPA-HW-Oar-2010-0505

Dear Administrator Jackson:

The oil and gas sector is a significant source of dangerous air pollution, and that pollution is getting worse due to booming unconventional natural gas production. EPA's proposed New Source Performance Standards (NSPS) for the industry are, therefore, urgently needed, and are long overdue. As the Department of Energy's Shale Gas Production Subcommittee recently recognized in its Second 90-Day Report (Nov. 18, 2011),¹ finalizing these rules is a "critical step" towards properly regulating the industry. Although the rules are not perfect – and we have identified numerous areas which require improvement – they are far better than the status quo and the Clean Air Act requires that EPA timely complete them.

The oil and gas industry continues to resist EPA's proposed emissions regulations, even though, in many regards, they reflect the application of demonstrated control technology, and are highly cost-effective. We urge you to decline these calls for further delay. The agency is legally obligated to issue a final rule comprehensively controlling emissions in this sector by April 3, 2012.

To aid your review of industry comments, this brief letter responds to comments by the American Petroleum Institute (API), and the Air Permitting Forum (APF), among others, which assert arguments for further delay. Those comments argue, generally, that EPA is (1) not required to complete its rulemaking, even though a court order mandates that it do so; and (2) that EPA may not regulate many sources in the industry without undertaking a range of additional procedural steps. Both claims are wrong, as we explain below.

Separately, some industry groups argue against EPA's proposal on technical grounds. We believe many of these arguments are also in error and intend to address them in a separate filing.

¹ Available at: http://www.shalegas.energy.gov/resources/111811_final_report.pdf.

Thank you for considering this letter, sent on behalf of the Sierra Club, the Clean Air Task Force, Earthjustice, the Environmental Defense Fund, the Natural Resources Defense Council, and WildEarth Guardians. Please include it in the docket for this rulemaking.

I. EPA is Required by Court Order to Promulgate Comprehensive Final Rules by April 3, 2012

Section 111 of the Clean Air Act, 42 U.S.C. § 7411, requires EPA to “at least every 8 years, review, and if appropriate, revise” its NSPS for each “category of sources” which “in [its] judgment [] causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A) & (B). EPA last issued standards for the “Crude Oil and Natural Gas Production” source category in 1985, but these standards are limited, and apply only to gas processing plants. See 50 Fed. Reg. 26,122 (June 24, 1985) (existing NSPS for gas processing plant VOC leaks, Subpart KKK) & 50 Fed. Reg. 40,158 (Oct. 1, 1985) (existing NSPS for gas plant SO₂ emissions, Subpart LLL). EPA was required to review these standards, and to expand them appropriately, no later than 1993. Thus, when EPA finally completes its review and revision, this April, it will already be 19 years late.

EPA must complete its work by April 3, 2012, as ordered by the District Court for the District of Columbia. Order, *WildEarth Guardians, et. al. v. Jackson*, D.D.C. No. 1:09-CV-0089-CKK (Feb. 4, 2010)(entering Consent Decree); Order (Oct. 28, 2011) (setting final deadlines). API and APF, however, maintain that these orders requires EPA only to review and revise the narrow existing NSPS at Subparts KKK and LLL covering gas processing plants. See, e.g., APF Comments at 3. They therefore urge that the agency may continue to illegally delay comprehensively regulating emissions from the source category as a whole. This hyper-technical objection has no merit.

Initially, EPA’s duties are clear on the face of the statute. EPA is required to promulgate standards for each “category of sources,” and to regularly review and, if appropriate, to revise those standards. 42 U.S.C. § 7411(b)(1)(A)&(B). The review, and the revision, in other words, must be undertaken with reference to the “category of sources” listed. See *National Asphalt Pavement Ass’n v. Train*, 539 F.2d 775, 778 (D.C. Cir. 1976) (explaining that NSPS apply to the “sources within that category”). This broad review and revision obligation is consistent with Congress’s intent in Section 111 “to induce, to stimulate, and to augment the innovative character of *industry* in reaching for more effective, less costly systems to control air pollution,” see *Sierra Club v. Costle*, 657 F.2d 298, 347 n.174 (D.C. Cir. 1981) (quoting legislative history, emphasis added), a purpose which requires EPA to take a view of the industry as a whole.

Here, the source category is “Crude Oil and Natural Gas Production,” 40 C.F.R. § 60.16, *not* merely the gas processing plants currently covered by Subparts KKK and LLL. EPA

has long recognized as much, acknowledging, in its proposal for the Subpart KKK rulemaking, for instance, that the source category is broader than the processing plants it regulated, but stating that it then was unable to identify demonstrated control technology for other sources within the category. See 49 Fed. Reg. 2,636, 2,637 (Jan. 20, 1984) (proposed VOC rule). Since that time, as EPA amply demonstrated in its proposed rule and supporting materials, the agency has identified numerous control technologies for these sectors (including, for instance, green completion technologies for wells). In this proposal, EPA has also determined, once again, that the source category embraces the industry as a whole.

As such, the existing standards no longer reflect “the degree of emission limitation achievable through the application of the best system of emission reduction [which is] adequate demonstrated” for the entire source category, see 42 U.S.C. § 7411(a)(1), as they are required to do, because they do not require *any* controls for significant numbers of “new sources within [the] category,” as the statute mandates, see *id.* § 7411(b)(1)(B). Thus, it was manifestly “appropriate,” see *id.*, for EPA, during its required review, to revise the existing standards by expanding them to include controls for additional sources, as EPA did here.

In fact, it would be contrary to the statute for EPA to do otherwise, and limit its review as API and APF suggest. As we have explained, each NSPS must address the “new sources within such categor[ies]” as EPA has listed under Section 111. *Id.* Because EPA has not taken action to revise its rules since 1985, there is a significant mismatch between the existing rules’ coverage and sector sources emitting pollution which “may reasonably be anticipated to endanger public health and welfare.” See *id.* § 7411(b)(1)(A). Upon reviewing the existing NSPS, EPA can only rationally conclude that the standards do not adequately regulate the “crude oil and natural gas production” industry, and so must be revised to do so.

Thus, the *Wildearth Guardians, et. al. v. Jackson* Order arises directly from EPA’s clear statutory duties. The Order makes this point entirely clear, requiring EPA to sign final rules completing its review and revision of the existing NSPS by April 3, 2012. See Case No. 1:09-CV-00089-CKK, Docket # 25 (original Order); Docket #28 (modified Order setting deadline). As we have just explained, the only conclusion EPA can legally come to upon such review is that the NSPS for the sector must be revised in order to cover all “new sources within the category” which cause or contribute to dangerous air pollution.² Thus, by requiring EPA to review and revise its existing rules consistent with the statute, the Order requires EPA to undertake a *complete* revision, including

² As we explained in our comments, EPA has long determined that it is “appropriate” to regulate pollutants emitted by a source category whenever such a pollutant is emitted in significant quantities, and can be controlled by available measures. See, e.g., *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 426 n. 27 (D.C. Cir. 1980) (discussing these factors). The same factors must direct EPA’s decision to cover *sources* of regulated pollutants as well: If those sources emit significant amounts of pollution, and can be controlled, Section 111 directs that it is “appropriate” for EPA to revise an NSPS to do so.

proposing new rules covering sources in the source category which, on review, it determines the existing rules do not adequately address. Any other course would render the statute, and the Order, nugatory.

II. Industry's Empty Assertions of Procedural Impediments Cannot Prevent EPA From Carrying Out Its Duties

Although EPA's duties are clear, API and APF, among others, assert various procedural claims as to why EPA should not comprehensively regulate the industry's dangerous emissions. They claim that: (1) EPA has not taken required steps to "expand" the source category; (2) EPA has not properly defined facilities in this source category; (3) EPA may not properly regulate modified sources in this sector; (4) EPA may not regulate well completions because they are "construction"-related emissions, and; (5) EPA may not regulate emissions from "temporary" compressors. These assertions are groundless.

A. EPA Can, and Must Regulate the Full "Crude Oil and Natural Gas Production" Source Category

Industry argues that EPA is "vastly expand[ing]" the listed oil and gas source category, *see* APF Comments at 3-4, and that it may do so, if at all, only by first jumping through a series of procedural hoops, including making additional endangerment findings for each "additionally-regulated" source in the category, *see* API Comments at 5. In API's view, in particular, the fact that EPA initially listed the "Crude Oil and Natural Gas Production" sector in response to section 111(f)'s directive that it list "categories of major stationary sources," mean that it may only regulate "major" sources (i.e., ones emitting 100 tons per year or more of an air pollutant) within the category, in the absence of further endangerment findings. API Comments at 3-4.

These arguments are simply wrong: EPA is free to include sources within the listed category as needed, and has done so here. Moreover, the source category is not limited in the way that industry claims.

First, the statute grants EPA broad authority to list, and revise, source categories. EPA has properly used that authority here.

Section 111(b)(1)(A), again, provides that EPA shall list a "categor[y] of stationary sources" for regulation whenever, in its judgment, that source category "causes, or contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411. This means that *all* EPA need do to define a source category for regulation is to determine that the category, *as a whole*, causes or contributes to dangerous air pollution.³ Having so defined a source category,

³ For this reason, API's suggestion that EPA must, instead, make endangerment findings with regard to each individual facility in the "expanded" source category – such that EPA would be required, for instance,

EPA is to devise standards of performance for “the industry as a whole,” *Nat’l Lim Ass’n v. EPA*, F. 2d 416, 431 (D.C. Cir. 1980), based upon the “best system of emission reduction” which can act upon each “stationary source” – broadly defined as “any building, structure, facility, or installation which emits or may emit any air pollutant,” 42 U.S.C. § 7411(a)(3)⁴ - within the category to reduce industry-wide emissions. *See* 42 U.S.C. § 7411(b)(1)(B). This broad mandate not only allows, but requires, EPA to consider stationary sources throughout the source category each time it “revise[s] such standards,” as we have demonstrated above. *See id.*

Industry nonetheless maintains that EPA’s original understanding of the source category – which, again, these commenters contend, embraced only natural gas processing plants – should still control, meaning that EPA may not promulgate controls for other stationary sources in the source category. API Comments at 4. Even if API were correct about EPA’s original understanding of the category and its authority (which it is not, as we demonstrate below), this argument would be irrelevant, because EPA has the discretion now to define the scope of stationary sources in the source category appropriately, and has done so.

EPA has already made endangerment findings for each pollutant at issue in the NSPS – VOC, NO_x and SO₂⁵ – which means that to define and regulate the oil and gas source category as it proposes to do, it must only have determined that the category, as a whole, causes or contributes significantly to this pollution. 42 U.S.C. § 7411(b)(1)(B). It has done so, at least three times. Thus, despite its protestations to the contrary, *see* APF Comments at 4, the industry manifestly has “adequate notice” that it is subject to regulation across a wide range of sources.

EPA first recognized the source category, as a whole, as a significant pollution source, subject to NSPS regulation, when it listed the category in 1979. *See* 44 Fed. Reg. 49,222, 49,223 (Aug. 21, 1979).

Then, in 1984, in its Subpart KKK proposal to regulate natural gas processing plants within the source category, EPA made clear that pollution from the category arose from

to make separate endangerment findings for wells, for pneumatic controllers, for compressor seals, and so on, ad infinitum, *see* API Comments at 5 -- is wrong. All that matters is that the *category* is a significant source of dangerous pollution. In any event, as we discuss below, EPA has also shown that each class of sources regulated under its proposed rules is also a significant pollution source.

⁴ Notably, the definition of stationary source uses the broad language “emits or may emit,” which contains no requirement that the emissions be continuously or regularly emitted by the stationary source over long periods of time. Thus EPA is entirely within its authority to regulate temporary sources of emissions.

⁵ As we discuss in our comments on the proposal, EPA must also regulate methane. It has already found that methane, as a constituent of the well-mixed greenhouse gases causing climate change, endangers public health and welfare, and it is clear from the record for this rulemaking that the industry contributes substantially to methane pollution.

many different sources, not just the processing plants that API suggests were its sole focus. See API Comments at 3-4. EPA determined that:

The crude oil and natural gas production industry encompasses the operations of exploring for crude oil and natural gas products, drilling for these products, removing them from beneath the earth's surface, and processing these products from oil and gas fields for distribution to petroleum refineries and gas pipelines.

49 Fed Reg. at 2637. And, lest there was any doubt as to the breadth of this category, EPA went on to describe some of the many sources it contained, enumerating VOC pollutant sources in particular, as that NSPS focused on VOC regulation:

There are several VOC emissions points within this industry. These emission points can be divided into three main categories: process, storage, and equipment leaks. Process emission sources include well systems, field oil and gas separators, wash tanks, settling tanks, and other sources..... Storage emissions sources include field storage tanks, condensate tanks, and cleaned oil tanks.... Equipment leaks of VOC can occur from pumps, valves, compressors, open-ended lines or valves, and pressure relief devices used in onshore crude oil and natural gas production.

Id. Although EPA did not regulate all of these sources in 1985, explaining that “[b]est demonstrated control technology has not been identified for process emission points; therefore these sources have not been considered in developing the proposed standards,” *id.*, it certainly did not exclude any source from the broad source category itself. It just did not regulate them at the time. The source category, in other words, is broader than the processing plants regulated in 1985.

Finally, even if EPA had not already made appropriate significance findings confirming the breadth of the source category, it has done so now, in what is at least its third statement on the issue. The Technical Support Document for this rulemaking demonstrates at length that the category is a huge producer of harmful emissions. Moreover, EPA has also explained how each set of stationary sources in the category contributes to emissions. See, e.g., 76 Fed. Reg. at 52,757 (determining that “[w]ell completion activities are a significant source of VOC emissions”), 52,670 (describing VOC emissions from pneumatic controllers). Thus, while EPA must finalize the new set of stationary sources with the source category (if, indeed, EPA has added new sources to the category at all) in the final rule, there are no impediments to its doing so.

The D.C. Circuit affirmed, in *National Asphalt Pavement Association v. Train*, that EPA may follow exactly this course, proceeding with a substantive NSPS rulemaking at the same time at which it determines a source category is a significant contributor to air pollution. In that case, EPA determined that the asphalt industry contributed significantly to air pollution, and so issued a proposed NSPS at the same time that it listed the source category. 539 F.3d at 778-79. The court approved this approach

because industry was free to dispute EPA's significance determination in a challenge to the final rule. *See id.* at 780. It held that:

We agree... that the Administrator is not required to publish his "significant contributor" designation in proposed form and then hold a separate informal rulemaking on that specific issue. Neither the Clean Air Act nor the APA requires that an agency hold two separate rulemaking proceedings as to different parts of one rule. Thus the EPA can continue to have one informal rulemaking proceeding as long as the proceeding considers both the "significant contributor" designation and the proposed standards. Indeed, in rulemaking proceedings like this one, where the data underlying the "significant contributor" designation is likely to overlap substantially with that underlying the proposed standards, the most sensible course for an agency is to have one proceeding directed at both issues.

Id. EPA took precisely this sensible course here.⁶ It has thoroughly explained why regulation of the source category is appropriate, and why the source category should cover all the stationary sources it has proposed for regulation⁷

Second, the fact that EPA originally listed the crude oil and natural gas production sector in response to section 111(f) does absolutely nothing to alter this analysis.

That section required EPA to, within a year of the section's promulgation in the Clean Air Act Amendments of 1977, "promulgate regulations listing under subsection (b)(1)(A) the categories of major stationary sources" not yet listed, and to establish standards for these categories within four years. Pub. L. 95-95, Pub. L. 95-95, Section 109. Based upon this requirement, industry argues that EPA, when it listed the "Crude Oil and Natural Gas Production" category, was focused upon only "major" sources – which it reads to mean only "natural gas processing plants," rather than other types of sources, like wells or pneumatic devices. *See* API Comments at 3-4.

Even if this were true, it would not matter. Section 111(f) does not constrain the scope of EPA's authority to define and revise the stationary sources included in the source

⁶ Although *National Asphalt* flatly settles the matter, APF still argues that section 111(b)(1)(B) requires EPA to define a source category before it issues regulations, noting that that section provides that EPA shall issue standards "[w]ithin one year after the inclusion of a category of stationary sources" under 111, and arguing that this timing requirement supports its sequencing argument. APF Comments at 4. This argument is wrong on the face of the statute. Congress directed that EPA issue standards *no later* than one year after listing a source category, but set no minimum time EPA must wait to act – in other words, standard-setting is to be done as soon as possible. Thus, nothing prevents EPA from listing a source category and offering proposed regulations at the same time, as *National Asphalt* holds.

⁷ Indeed, EPA has long made alterations to the source category list in concert with proposed regulations. *See, e.g.*, 61 Fed. Reg. 9,905, 9,906 (Mar. 12, 1995) (finalizing both an NSPS for landfills and, in a single sentence, adding the source category to the section 111 list); 47 Fed. Reg. 31,875, 31,876 (July 23, 1982) (expanding asphalt processing source category simultaneously with promulgating standards of performance for that industry).

categories EPA identified under that section, and was not intended to do so. Instead, section 111(f) is a prioritization provision: It was intended to speed EPA's promulgation of performance standards covering the source categories containing some of the highest-emitting stationary sources, directing EPA to identify and list the source categories within a year, and then complete these standards within four years of the provision's enactment. *See* Pub. L. 95-95, Section 109; *see also* House Conference Report 95-564 for Pub. L. 95-95 at 1510 (explaining that amendments to section 111 are intended, among other purposes, to "provide a check on the Administrator's inaction or failure to control emissions adequately.").

But that is all that section 111(f) does. Once EPA had identified categories for listing per 111(f)'s directive, it listed them under section 111(b)(1)(A), as it does for all other source categories. Once it had promulgated standards for the listed categories on the statutory timeline contained in section 111(f) (as it did for oil and gas sources in 1985), EPA completed its section 111(f) obligation and the provision's relevance to the source category ended.⁸

Nor did EPA itself interpret its 111(f) listing decisions as constraining its future regulatory activities to major sources. Instead, in its final listing rule in 1979, it explained that its prioritized list of major sources was "essentially an advance notice of future standard development activity," and that EPA might later alter its NSPS plans to reflect "new information." 44 Fed. Reg. 49,222, 49,223 (Aug. 21, 1979). Likewise, in the underlying report in which EPA drew up priorities for NSPS promulgation, EPA emphasizes that the study was a "screening exercise to determine what areas should be looked at in more detail first," and so "took a fairly cursory view." EPA, *Priorities for New Source Performance Standards Under the Clean Air Act Amendments of 1977*, EPA-450/3-78-019 (Apr. 1978) at 42. In particular, consistent with its broad authority under

⁸ API also argues, in this regard, that EPA must consult with "appropriate representatives of the Governors" before finalizing the rule, pursuant to Section 111(f)(3). *See* API Comments at 5. If this requirement applies, EPA has fulfilled it.

Section 111(f)(3) provides that, "[b]efore promulgating any regulation under this subsection or listing any category of major stationary sources as required," EPA "shall consult" with appropriate representatives of state governors and state air pollution control agencies. 42 U.S.C. § 7411(f)(3). Initially, EPA already promulgated standards "under" 111(f)'s aegis in 1985. It is now revising and extending standards under section 111(b), so this requirement does not apply.

Even it mattered, though, this section is likely best read consistently with Section 111(g), which allows governors to argue that additional sources should be listed, or regulations made more stringent. *See* 42 U.S.C. § 7411(g). It does not present itself, in other words, as an impediment to EPA's air pollution control efforts, but as a means by which the states can argue for stronger regulations – so it is far from clear what interest API has in arguing for such consultation. And, in any event, EPA has offered its rules for public comment and has engaged in an extensive outreach effort; in response, the docket contains comments from numerous state governments and state air pollution control agencies. EPA may also consult these entities again before promulgating the final rule, rendering API's objection meaningless.

Section 111(b)(1)(A), EPA emphasized that it might ultimately regulate minor stationary sources as well, stating:

The Administrator may also concurrently develop standards for sources which are not on the priority list, especially certain “minor” sources which, in aggregate, represent a large quantity of emissions.

Id. This view on regulating minor sources under section 111 is entirely consistent with the broad definition of “stationary source” described above and EPA’s mandate under the section to protect health and welfare. EPA did not, in other words, view its section 111(f) mandate to prioritize major source categories for listing as a straightjacket: It understood that new information could affect its regulatory agenda and that all stationary sources in a given source category could be regulated under the mandate and authority granted in section 111(b)(1).

Moreover, the information available today to the Agency, and on which it has based its rule, documents that many stationary sources within the category are emitting significant uncontrolled pollution.⁹ Based on that record, EPA is obligated to regulate those stationary sources. Industry’s claims to the contrary, in short, are utterly without support.

B. EPA Can Properly Define Regulated Facilities to Maximize the Efficacy of its Proposal

Industry next argues that, even if EPA can regulate across the breadth of the oil and gas source category, it lacks discretion to define the facilities being regulated as it has done. *See* APF Comments at 3, API Comments at 6. Although the industry argument is not entirely clear, the gist appears to be that EPA may not define individual sources – such as individual pneumatic controllers or tanks – as regulated facilities, or, at least, may not do so without applying some unspecified “analytical framework.” *See* API Comments at 7. Industry is wrong.

NSPS apply to stationary sources, which, as explained above, are defined broadly as “any building, structure, facility, or installation which emits or may emit any air pollutant.” 42 U.S.C. § 7411(a)(3). EPA has defined a facility, in turn, as “any apparatus to which a standard is applicable” – that is, “any apparatus of the type for which a standard is promulgated... or any apparatus which could be altered in such a way as to be of this type.” 40 C.F.R. § 60.2; *see also ASARCO v. EPA*, 578 F.2d 319, 322 (D.C. Cir. 1978) (describing the breadth of the facility concept). This definition is, self-evidently,

⁹ EPA’s authority to regulate non-major sources is further evidenced by section 111(b)(2), under which EPA is free to “distinguish among classes, types, and sizes within categories of new sources” as it develops standards. 42 U.S.C. § 7411(b)(2). The statute emphatically does not limit EPA’s section 111 authority to major stationary sources, or otherwise allow EPA to ignore *any* sources altogether, or to defer regulating them, as industry urges; the authority to distinguish among sources by class, type, and/or size is only “for the purpose of establishing [] standards.” *Id.*

broad: EPA may define a facility simply by specifying the standard which is “applicable” to it. *But see ASARCO*, 578 F.2d at 327 (holding that EPA must regulate *individual* facilities). Although such a definition must, naturally, be reasonable, and consistent with the statutory focus on defining regulated facilities as narrowly as possible, as we discuss below, there is no other particular “analytical framework” required. *See also* 42 U.S.C. § 7411(b)(2) (allowing EPA to distinguish between types and sizes of sources to develop appropriate standards).

For instance, when EPA promulgated Subpart KKK, regarding VOC leaks at gas processing plants, it explained that it would define facilities “by examining the situation in light of the terms and purpose of Section 111.” 49 Fed. Reg. at 2,638. There, EPA considered defining the facility as either each individual piece of leaking equipment or as the entire plant, ultimately settling on a definition of the facility as a “process unit,” which was small enough to drive rapid adoption of the standard as units were replaced, but not so small as to cause record-keeping difficulties as multiple facilities were replaced. *Id.* In settling on this compromise, EPA emphasized that because section 111’s purpose is “to minimize emissions,” there is “a presumption that a narrower designation of the affected facility is proper” because “[t]his ensures that new emissions sources within plants will be brought under the coverage of the standards as they are installed.” *Id.* Facility definitions should only be broader where that will enable greater emissions control, or where a narrower definition is not feasible. *Id.*

EPA applied this presumption properly in this rulemaking, seeking to define facilities as narrowly as possible. In its technical support document, EPA demonstrates that it is reasonable to drive the replacement of individual pneumatic controllers with lower emission designs, for instance, because such replacements are highly cost-effective. *See* EPA, Oil and Natural Gas Sector: Standards of Performance for Crude Oil and Natural Gas Production, Transmission, and Distribution; Background technical Support Document (July 2011) at 5-22 -5-25. Separately, EPA has worked to streamline record-keeping obligations, addressing the concerns that motivated a slightly broader facility definition in the Subpart KKK context. *See, e.g.*, 76 Fed. Reg. at 52,790 (describing low total implementation costs, including recordkeeping costs, relative to rule’s benefits). So, while EPA could, perhaps, usefully clarify that its narrow facility definitions are consistent with the presumptions it has long-recognized, the record in any event supports such narrow definitions.

C. EPA Can Define “Modification” to Best Capture Emissions from This Source Category

API and APF argue that EPA should not define “modification” to include the refracturing of an existing well, or a workover or recompletions of such a well, or the replacement or repair of a pneumatic controller. *See* APF Comments at 9-11, API Comments at 143-44. In fact, such activities fall easily into the statutory definition of the term, as we discussed in our comments on the proposed rule.

Section 111 defines modification as:

[A]ny physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4).

Well recompletions and workovers manifestly fall under this definition, as they mark major increases in a well's air pollutant emissions: Before such activities, the well is likely not emitting much pollution, but during them it may emit thousands of cubic feet of VOCs and other pollutants. Although APF suggests that these marked shifts are not "changes" because the well operator may have planned for them, APF Comments at 9, this point is immaterial: Obviously, the shift from ordinary production to fracturing or workover is a "change in the method of operation" of the well that is accompanied by a marked increase in emissions. These changes are modifications and must regulated as such.

As for pneumatic controllers, the wholesale replacement of such a unit is not at issue here, because it is not a modification as API apparently supposes: It is simply the installation of a new stationary source, which naturally triggers new source standards. Conversely, repair or reconstruction of a controller, without replacement, will, as the statute provides, trigger the NSPS if it increases the amount of air pollution emitted, or allows new pollutants to be emitted. There is no room to vary this clear statutory language.

Nonetheless, API and APF point to various regulatory exceptions from the clear statutory definition, such as a capital expenditure test and an emission rate increase test, which EPA has used to limit the reach of the modification provision. *See, e.g.*, APF Comments at 7-8. These exceptions – even if legal, which we do not concede – are immaterial. The statute controls, first of all, and EPA's modification definitions are consistent with its terms. Second, the regulations themselves provide that EPA may define the term "modification" in any NSPS, "supersed[ing] any conflicting provisions" of the rules, including their exception provisions. 40 C.F.R. § 60.14(f). Because EPA has done so here, the exceptions are irrelevant.

D. There is No "Construction" Exception to Section 111

API also attempts to avoid standards for new and recompleted wells by arguing that completions are well construction activities, and that there is an (uncodified) exception for "[p]eriods of source construction and maintenance" under the NSPS program. *See* API Comments at 7-8, 80-81. This argument is foreclosed by the statute.

An NSPS is, again, a “standard for emissions of air pollutants.” 42 U.S.C. § 7411(a)(1). An “emission standard,” in turn, is defined as a requirement which limits emissions “on a *continuous* basis.” 42 U.S.C. § 7602(k) (emphasis added). The courts have made clear that this requirement means what it says. See *Sierra Club v. EPA*, 551 F.3d 1019, 1026-27 (D.C. Cir. 2008) (holding that the requirement that limits be “continuous” means that EPA may not exempt sources during start-up, shut-down, and maintenance periods because emission standards must apply continuously). Well standards must, therefore, cover wells at all times, including their periods of highest emissions, i.e., during fracturing events.¹⁰

We note, too, that API’s evidence for its “exception” is based on compliance monitoring rules which, according to API, “typically” do not require monitoring until after a source is up and running. API Comments at 80. Such practices may or may not be legal, but they are, at least, understandable in the context of an industrial source, which might need to be constructed and calibrated before beginning normal operations. They have no relevance for a well, whose emissions and productive life are greatly influenced by the fracturing operation (though, of course, even unfractured wells may have significant emissions). The moment of fracturing is a key moment for emissions control, not a prelude to some ordinary emissions regime on which the standards focus. EPA must regulate fracturing emissions if it is to meaningfully regulate fractured well emissions at all.

E. There Is No Exemption for “Temporary” Compressors

APF, and the Gas Compressor Association (GCA), also argue that EPA should not apply its standards to “temporary” compressors which are installed on wellsites, and instead regulate those compressors only when they are initially fabricated. See APF Comments at 11; GCA Comments at 1-7. They contend that such installations are not covered by the statute. They are wrong.

The statute and its regulations define construction much more broadly than the position advanced by industry. A new source, again, is one whose “construction or modification ... commenced” after an NSPS has been proposed. 42 U.S.C. § 7411(2). “Construction,” in turn, is expansively defined as the “fabrication, erection, or installation of an affected facility.” 40 C.F.R. § 60.2. To “commence” construction, then, is to either enter into a “continuous program” of construction – that is, fabricating, erecting, or installing affected facilities – or to enter into a “contractual obligation” to do so. *Id.*

In this context, EPA proposes that operators will be considered “to have commenced construction on the date the compressor is installed at the facility.” See Proposed 40

¹⁰ Moreover, as a technical matter, well stimulation is not “construction” anyway. Well construction – the process of drilling and casing the well – occurs *before* a well is stimulated with hydraulic fracturing, which occurs as part of the well’s operation.

C.F.R. 60.5365(b)-(c). This definition is entirely consistent with the general regulatory definitions and the statute: A compressor is, plainly, an affected facility covered by the rules, and "installation" is explicitly defined as construction. When operators install a compressor, they have, therefore, commenced construction of the facility.

Although GCA offers two applicability determinations in which EPA officials determined that relocating a source was not, in itself, construction sufficient to trigger NSPS applicability, these determinations cannot trump a regulatory determination that is consistent with the statute. And, in any event, the installation of a compressor at a production site is not merely relocation: Substantial engineering work is needed to connect a compressor into a given well's production operations. EPA may, therefore, define the installation of a compressor as commencing construction, although it must justify its decision to do so on the record.

III. Conclusion

In sum, industry's objections to the rule are without merit, and provide no basis for EPA to avoid its obligation to issue these regulations by the court-mandated deadline.

Sincerely,

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