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COMPREHENSIVE COMMENTS OF:
CLEAN AIR TASK FORCE, CLEAN WATER ACTION, CLEAR THE AIR,
ENVIRONMENTAL INTEGRITY PROJECT, NATIONAL ENVIRONMENTAL
TRUST, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES
DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, SOUTHERN
ALLIANCE FOR CLEAN ENERGY, SOUTHERN ENVIRONMENTAL LAW
CENTER, AND U.S. PUBLIC INTEREST RESEARCH GROUP

**“Proposed Emission Standards for Hazardous Air Pollutants; and in the
Alternative, Proposed Standards of Performance for New and Existing Sources:
Electric Utility Steam generating Units,” 69 Fed. Reg. 4652 (January 30, 2004) and
Supplemental Notice, 69 Fed. Reg 12398 (March 16, 2004),
Docket No. OAR-2002-0056**

COVER LETTER AND EXECUTIVE SUMMARY

I. INTRODUCTION

- A. The Coal- and Oil-Fired Electric Utility Industry is a Major Emitter of Hazardous Air Pollutants, Including Mercury, that Adversely Affect Public Health.
 - 1. Mercury Emitted by Utility Units Causes Adverse Health Effects.
 - 2. Adverse Public Health Effects of Exposure to the 66 non-Mercury HAPs Emitted by Utility Units.
- B. The Hazardous Air Pollutants Emitted by Utility Units are Associated with Adverse Environmental and Economic Effects.
- C. Statutory and Regulatory Background.
- D. Despite the Statutory Mandate to Promulgate a MACT Standard, EPA has Proposed Two Alternative Regulatory Schemes.

II. EPA’S ILLEGAL MACT PROPOSAL CAN AND MUST BE REJECTED IN FAVOR OF A MORE STRINGENT STANDARD FOR MERCURY AND OTHER HAPs EMITTED BY POWER PLANTS

- A. Our Proposed MACT Floors for Mercury Reflect the Clean Air Act’s Requirements.
- B. EPA’s MACT Proposal is Contrary to Law.
 - 1. Section 112(n) Contains No Authority to Regulate Utility Units Less Stringently Than Other Listed Source Categories.

2. EPA's Proposed Subcategories are Contrary to Law.
 - a. EPA's proposed subcategorization by coal rank is without rational basis, arbitrary and capricious.
 - b. EPA's proposed subcategorization scheme is an abuse of discretion.
3. EPA's Emission Floors for Existing and New Utility Units are Contrary to Law, Arbitrary, Capricious, and an Abuse of Discretion.
 - a. EPA's Variability Analysis Does Not Reflect the Actual Emissions of the Best Performing Units.
 - (1) EPA did not select the best performing units for the MACT floor calculation.
 - (2) EPA's statistical method for accounting for emissions variability is arbitrary and capricious, contrary to long-standing agency policy, and yields results that bear no resemblance to the best sources' actual performance.
 - (3) EPA's use of an annual averaging time in combination with the variability methodology is unsupportable.
 - (4) The Department of Energy's Suggested Treatment of Variability Also Must Be Rejected.
 - b. EPA's Method for Converting the MACT Floors to an Output Based Standard Is Unlawful.
 - c. Our Calculation of Alternative Emission Rates Using EPA's Own Basic Methodology Demonstrates How Badly EPA Has Distorted the MACT Floor Results.
 - d. EPA Also Has Unlawfully Distorted The New Source MACT Floor Results.
4. EPA Has Failed to Consider or Improperly Rejected Numerous Technologies that Could Serve as the Basis for Above the Floor MACT for Mercury.
 - a. Techniques and Technologies Are Available Now to Further Reduce Utility Unit Mercury Emissions "Beyond the Floor."
 - (1) Coal Cleaning and Fuel Switching Can Enable Sources to Minimize Their Mercury Emissions Without Add-on Controls.
 - (2) Conventional Controls Can Be Added to Existing Units for Mercury Capture.
 - (3) Activated Carbon Technology is Available Now.
 - b. EPA's Arguments for Ignoring Mercury-Specific Controls are not Supported by the Facts or by the Agency's Prior Practice.
 - c. Mercury Controls are Cost-Effective.
 - d. EPA's Refusal to Consider Certain Technologies Which are Not in Widespread Commercial Use Ignores the Agency's Past Interpretation of the Clean Air Act.
 - e. EPA Has Utterly Failed to Adequately Consider Sources' Ability to Achieve Above-the-Floor Levels of Pollution Reductions.
5. State Regulatory Efforts Demonstrate that Stringent MACT Standards for Mercury are Achievable.

- C. EPA’s Failure Even to Consider Regulating HAPs Other than Mercury in its MACT Setting Process is Contrary to Law.
 - 1. The Record Supports the Development of MACT Floors for Non-Mercury HAPs Emitted by Utility Units.
- D. Granting a Global Compliance Extension is Beyond EPA’s Authority Under the Act.
 - 1. Even if EPA had the legal authority to grant a blanket compliance extension, which it does *not*, the reasons set forth by industry and EPA simply do not provide a rational basis for such an extension.
- E. EPA’s Complete Disregard for the Recommendations of the Federal Advisory Committee Act Working Group it Convened for the Utility MACT rule Contravenes the Requirements of the Clean Air Act and is Arbitrary and Capricious.

III. EPA’s PROPOSAL TO REGULATE MERCURY AND NICKEL EMISSIONS FROM UTILITY UNITS UNDER SECTION 111 OF THE ACT IS UNLAWFUL.

- A. EPA Does Not Have the Authority to Regulate HAPs under Section 111 of the CAA.
 - 1. Congress intended listed HAPs to be regulated under section 112, and EPA’s interpretation of the 1990 amendments to section 111(d) does not suggest otherwise.
 - 2. Sections 112(c)(6) and 112(d)(7) do not support the assertion that HAP emissions can be regulated under provisions of the CAA other than section 112.
- B. EPA’s Attempt to Rescind Its December 2000 Regulatory Determination And Listing of the Utility Industry is Unlawful.
 - 1. EPA acts arbitrarily and capriciously in concluding that regulation under section 111 is “adequate” to deal with utility units’ mercury pollution.
 - 2. The record of this rulemaking disproves EPA’s belief that section 111 will control mercury pollution “adequately,” when compared to section 112 regulation.
 - 3. EPA acts arbitrarily and capriciously in implying that section 111 regulation, including a cap-and-trade approach, is adequate to address the harmful regional and local health and ecological impacts of HAP emissions from power plants.
 - 4. EPA misreads the Clean Air Act as providing authority to adequately regulate mercury emissions under section 111.

5. EPA’s regulatory determination was a singular event with legal consequences; it cannot simply rescind, or “un-make” that decision today, particularly where no new factual evidence supports such an action.
 6. EPA adopts an arbitrary reading of section 112(n)(1)(A) in order to avoid regulation under section 112.
 7. EPA cannot reverse its listing of Utility Units for MACT regulation because the plain language of the CAA requires that the list contain “all” major sources of HAPs.
- C. Even if EPA Finalizes Its Unlawful Section 111 Program, the “Best System of Emissions Reduction” Would Require Much Deeper and Faster Pollution Controls.

IV. EPA’S PROPOSED CAP AND TRADE PROGRAMS ARE CONTRARY TO LAW.

- A. A Cap-and-Trade Program is Impermissible under Section 111.
1. Judicial decisions limit pollution trading under the CAA, and do not authorize the approach proposed by EPA.
 2. The legislative history of section 111 indicates a Congressional desire for uniform national standards, not a tradeable system of allowances.
- B. EPA’s Proposed Section 112 Cap-and-Trade Programs Are Contrary to Law.
- C. EPA’s Trading Schemes are Contrary to Law and Arbitrary and Capricious Because they May Permit the Creation of Localized “Hot Spots,” and Because EPA adopts only a “wait-and-see” approach to this problem.
- D. If EPA Goes Forward With its Unlawful Trading Programs, it must Reject Several Program Elements That Permit Increased Pollution.
1. Utility Units emitting less than 25 pounds of mercury should not be exempt from the 2018 cap.
 2. The “safety valve” provision should be discarded because it permits pollution levels to remain artificially high and because EPA expects it to be used to avoid pollution controls.

V. EPA HAS FAILED TO MEET THE REQUIREMENTS OF SEVERAL EXECUTIVE ORDERS.

- A. EPA Has Utterly Failed to Undertake a Rigorous Economic Analysis of Alternative MACT Regulatory Options Pursuant to Executive Order 12866 (Regulatory Planning and Review).
1. Undertaking a rigorous economic analysis using the E.O. 12866 approach demonstrates that more stringent emissions standards are achievable.
 - a. Alternate Mercury Control Scenario analysis methodology.
 - b. Alternate Mercury Control Scenario analysis results.

- i. Projected National Power Plant Emissions.
- ii. Alternate Mercury Control Scenario Benefits.
- iii. Alternate Mercury Control Scenario Costs.
- iv. Emissions Controls Installed.
- v. Coal Consumption by Rank for Alternate Mercury Control Scenario.
- vi. Coal Use by Electric Power Sector for Alternate Mercury Control Scenario.
- vii. Projected Retail Electricity Prices for Alternate Mercury Control Scenario.
- viii. Mine Mouth Coal Prices and Henry Hub Natural Gas Prices for Alternate Mercury Control Scenario.
- c. Summary: The Benefits of the Alternate Mercury Control Scenario Far Outweigh the Costs.

B. EPA Also Has Failed to Comply With Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks.”

APPENDICES TO THE COMPREHENSIVE COMMENTS

- APPENDIX 1:** Letter from 50 Signatories to Samuel W. Page, Ph.D., Acting WHO Secretary to JECFA, World Health Organization. RE: 61st JECFA meeting, 10 June 2003 (June 3, 2003), and Attachment: “Important Developments in Scientific Evidence on Methyl Mercury Toxicity and Exposure, and Policies on Permissible Exposure Levels, 2000-2003.
- APPENDIX 2:** Electronic mail from Bill Maxwell, U.S. EPA to all Utility Working Group members (April 3, 2003) (forwarding an April 1, 2003 electronic mail from Sally Shaver, U.S. EPA to members of a subgroup of the Utility Working Group concerned about modeling various MACT floor scenarios, announcing EPA’s inability to complete model runs in time for the April 15, 2003 meeting and announcing the cancellation of the meeting for that reason. Scanned copy.
- APPENDIX 3:** Electronic mail from Bill Maxwell, U.S. EPA to Michael Rossler, of EEI (April 3, 2003)(apologizing for late cancellation of meeting and room reservation, and noting that Mr. Maxwell had not “been told of the time frame during which [the meeting] would be rescheduled.” Scanned copy.
- APPENDIX 4:** Letter from John Paul, Regional Air Pollution Control Agency, Dayton Ohio (Utility Working Group Co-chair) to Jeffrey Holmstead, Assistant Administrator for Air and Radiation, U.S. EPA (November 3, 2003). Scanned copy.

- APPENDIX 5:** Mercury Control Technology Demonstration Projects.
- APPENDIX 6:** CATF’s Use of EPA’s Benefits Transfer Method in Evaluating the Benefits of the Alternate Mercury Control Scenario. Prepared by Clean Air Task Force.
- APPENDIX 7:** Summary of Integrated Planning Model Results for the Alternate Mercury Control Scenario (CATF 14b) and IAQR + EPA MACT Scenario (CATF 20). Clean Air Task Force.
- APPENDIX 8:** Electronic mail from Bill Maxwell, U.S. EPA to Stephen Becker, Wholesale Energy Markets Group, PA Consulting Group (September 26, 2003) (“MACT does not provide for a cap-and-trade approach”). Scanned copy.
- ATTACHMENT:** Memorandum: “A System-wide Compliance Alternative for Mercury Emissions from Electric Utility Steam Generating Units – Legal and Policy Basis” (September 4, 2003). Prepared by Latham & Watkins, and presented to the Agency on September 11, 2003, but not docketed in OAR-2002-0056, as of June 29, 2004.