

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

Even if EPA were justified in setting new source performance standards under section 111 for the HAPs listed in section 112(b) – and EPA is not – Section 111 does not permit a nationwide cap-and-trade program. Nor can authority for such a program be found anywhere in section 112.

A. A Cap-and-Trade Program is Impermissible Under Section 111.

EPA argues that a section 111 “standard of performance” can embrace nationwide, unrestricted, emission trading, under which plants that prefer not to install pollution controls will be able to purchase credits from companies that do clean up. Reading EPA’s proposal, one would hardly know that the notion of pollution trading under CAA programs has been the subject of extensive litigation, administrative action, and legislative debate, as the agency acts as though it is writing on a virtually clean slate. However, when one considers the history of trading under the CAA, it becomes abundantly clear that EPA cannot authorize it as part of a “standard of performance” applicable to stationary sources.

1. Judicial decisions limit pollution trading under the CAA, and do not authorize the approach proposed by EPA.

EPA once tried to permit emission trading under section 111, and was rebuffed by the U.S. Court of Appeals for the D.C. Circuit. In *ASARCO, Inc. v. EPA*,¹ the court held that even the limited emission trading conceived of by the agency – which would allow existing plants to avoid section 111 standards when they made changes that increased emissions, so long as offsetting emission reductions were identified elsewhere *at the*

¹ 578 F.2d 319 (D.C. Cir. 1978).

same plant site – was inconsistent with the purpose of section 111. As the court described the statute:

Section 111’s provisions mandating New Source Performance Standards were passed because Congress feared that the system of state plans designed to keep air pollution below nationally determined levels was insufficient by itself to achieve the goal of protecting and improving air quality. The New Source Performance Standards are designed to enhance air quality *by forcing all newly constructed or modified buildings, structures, facilities, or installations* to employ [best demonstrated controls].²

Thus, section 111 standards of performance are supposed to apply uniformly to all pollution-generating equipment, and the notion of intra-source trading runs counter to that overall purpose. As the court noted,

The bubble concept in the challenged regulations would undercut Section 111 by allowing operators to avoid installing the best pollution control technology on an altered facility as long as the emissions from the entire plant do not increase. For example, under the bubble concept an operator who alters one of its facilities so that its emission of some pollutant increases might avoid application of the NSPS by simultaneously equipping other plant facilities with additional, but inferior, pollution control technology or merely reducing their production. Applying the bubble concept thus postpones the time when the best technology must be employed and at best maintains the present level of emissions.³

Accordingly, the court struck down EPA’s attempt to authorize section 111 pollution trading.

Subsequently, courts have interpreted the language in section 111 to allow or even demand limited pollution trading under the permitting programs for new and modified pollution sources. In *Alabama Power Co. v. Costle*,⁴ the D.C. Circuit concluded that EPA was obliged to allow some form of *intra-source* trading to avoid the application of the Prevention of Significant Deterioration (PSD) permit requirements, in part because

² *Id.* at 327 (footnote omitted) (emphasis added).

³ *Id.* at 327-28.

⁴ 636 F.2d 323 (D.C. Cir. 1980).

“the PSD provisions express a purpose of ensuring that economic growth occurs in a manner consistent with preservation of clean air. The bubble concept is precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement.”⁵ In so doing, however, the court stressed that “the offsetting changes must be within the same source, as defined by EPA.”⁶ The Supreme Court similarly found that the language of the CAA was open to the interpretation that trading between units at the same physical “source,” but the Court defined that concept in a way that would not permit the kind of trading that EPA proposes; the Court understood “source” to be “any discrete, but integrated, operation which pollutes.”⁷

Admittedly, these cases revolved around the question of the proper interpretation of the statutory term “source,” and the agency’s proposal focuses on the statutory term “standard of performance,” but this distinction is not one that makes a difference legally. First, and most obviously, “standards of performance” apply to “sources,”⁸ and interpreting “standard of performance” to allow the trading that the courts have prevented EPA from interpreting “source” to allow would render superfluous the requirement that “sources” be regulated. Second, when it amended the CAA in 1990, Congress legislated against the backdrop of these judicial decisions and while it made specific provision for trading in several parts of the statute, it did not include trading in section 111. Title IV of the 1990 amendments, for instance, has elaborate requirements mandating a program for,

⁵ *Id.* at 402 (footnote omitted).

⁶ *Id.*

⁷ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 860-61 (1984).

⁸ See 42 U.S.C. §§ 7411(b)(1)(B) (EPA must develop “standards of performance for new sources”); (d)(1)(A) (state plans are to “establish[] standards of performance for any existing source”). EPA’s regulations likewise reflect the coextensive scope of the standard and the regulated equipment, defining “affected facility” for the NSPS program to mean “any apparatus to which a standard is applicable.” 40 C.F.R. § 60.2.

and regulating the conduct of, trading for the purposes of reducing pollution which contributes to acid rain.⁹ In addition, Congress spelled out the circumstances in which intra-source trading would be allowed in certain kinds of ozone nonattainment areas¹⁰ and for certain sources of HAPs¹¹ as a means by which such facilities could make changes without making “modifications” that would subject them to stringent controls.

2. The legislative history of section 111 indicates a Congressional desire for uniform national standards, not a tradeable system of allowances.

The legislative history provides significant evidence that Congress never intended for section 111(d) to be used to promulgate a cap-and-trade pollution program. Rather, the legislative history suggests that Congress intended that *every* plant meet the same *national* emissions standard.

Regulation of existing sources under section 111(d) is based on the promulgation of “standards of performance” which the states must include in a SIP-like plan.¹²

“Standard of performance” is defined in section 111(a)(1) as:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.¹³

This definition applies to both new sources and existing sources.

Section 111 and the term “standard of performance” first appeared in the CAA in the 1970 Amendments.¹⁴ The definition of “standard of performance” was amended in

⁹ 42 U.S.C. §§ 7651-7651o.

¹⁰ 42 U.S.C. §§ 7511a(c)(6)-(8).

¹¹ 42 U.S.C. § 7412(g)(1).

¹² 42 U.S.C. § 7411(d).

¹³ 42 U.S.C. § 7411(a).

¹⁴ Clean Air Amendments of 1970, Pub. Law. No. 91-604, 91st Cong., 84 Stat. 1680, sec. 4, § 111 (1970).

1977 to include a “percentage reduction requirement” for electric utility units, but in the 1990 Amendments, Congress removed this addition in order to “return to the definition in the 1970 CAA requirements.”¹⁵ Thus, the legislative history of the CAA amendments of both 1970 and 1990 can be used to try to understand the legislative intent behind section 111(d). Moreover, even though there is no legislative history about section 111(d) in particular, the same definition of “standard of performance” applies to existing sources and new sources. The legislative history about how a “standard of performance” was to be understood for new sources, therefore also illuminates what types of regulation Congress intended for existing sources.

The Conference Committee for the 1970 CAA Amendments explained that section 111 “require[s] that new major industry plants such as power plants, steel mills, and cement plants achieve a standard of emission performance based on the latest available control technology, processes, operating methods and other alternatives.”¹⁶ The Conference Committee report explains that the provision “provides for *national* standards of performance on emission from new stationary sources.”¹⁷ Furthermore, it notes that “[t]hese sources, important in themselves and involved in industries of national scope, must be controlled to the maximum practicable degree regardless of their location.”¹⁸ Senator Cooper elaborated during Senate debate that “the concept is that wherever we can afford or require new construction, we should expect to pay the cost of using the best available technology to prevent pollution.”¹⁹ Similarly, the House Report explains that

¹⁵ *1990 Legislative History*, at 832 (comments by William G. Rosenberg, Assistant Administrator for Air and Radiation).

¹⁶ *Summary of Provisions of the Conference Agreement on the Clean Air Amendments of 1970*, reprinted in *1970 Legislative History* at 130.

¹⁷ *Id.* at 133 (emphasis added).

¹⁸ *Id.*

¹⁹ *1970 Legislative History* at 260.

“the emission standards shall provide that sources of such emissions shall be designed and equipped to prevent and control such emissions to the fullest extent compatible with the available technology and economic feasibility as determined by the Secretary.”²⁰ Congress’s manifested intent that every individual source meet the same standard is fundamentally inconsistent with a cap-and-trade program in which some plants would be able to operate at pollution levels higher than the technology based emissions standard because they have traded with other plants.

Moreover, although the EPA relies, here, on the term “best system” for the authority to instigate a novel regulatory scheme under section 111,²¹ nothing in the legislative history suggests that Congress intended “best system” to be interpreted so broadly. To the contrary, the “best system” is consistently understood to be the best system that an individual plant could implement. For example, the Senate explained:

“Standards of performance” . . . refers to the degree of emissions control which can be achieved through process changes, operation changes, direct emission control, or other methods. The Secretary should not make a technical judgment as to how the standard should be implemented. He should determine the achievable limits and let the owner or operator determine the most economic, acceptable technique to apply.²²

Likewise, the legislative history of the 1990 Amendments reaffirms that Congress intended “best system” to apply to the methods of individual plants not to a novel regulatory system. For example, although Senator Simpson explained that Congress had reverted to the 1970 definition of “standards of performance” in order to give sources

²⁰ H.R. Rep. No. 91-1146, *reprinted in 1970 Legislative History* at 900; *see also id.* at 1190 (statement of Dr. John Middleton Commissioner, National Air Pollution Control Administration, HEW) (“[T]he purpose is to assure that *everybody must met the same performance requirements* for new plants wherever they are built, that requirement being the best possible control so that we being to do more than just talk about protection and enhancement of air quality.”) (emphasis added).

²¹ 69 Fed. Reg. at 4,686.

²² S. Rep. No. 91-1196, at 17, *reprinted in 1970 Legislative History* at 417.

significant flexibility, he made clear that this flexibility is understood in the context of a plant meeting a specific standard:

[Congress has] directed EPA to come up with an alternative standard that would allow utilities to meet it in the most flexible manner possible. The new standard could be met by fuel switching, the use of technology and fuel switching, by technology alone, and by intermittent controls or intermittent operation. . . . For the first time Congress has made it clear that not only technology can be considered, but the use of low-sulfur fuels may be considered as a best available control technology under the law.²³

Thus, while it is true that there was a desire for the “best system” to be interpreted broadly, the legislative history suggests that this flexible mandate was intended to apply within the constraint of a command and control system.

B. EPA’S PROPOSED SECTION 112 CAP-AND-TRADE PROGRAMS ARE CONTRARY TO LAW.

Although EPA solicits comment on whether section 112(d) permits EPA to create a cap-and-trade program encompassing multiple sources,²⁴ the agency commits only a paragraph to the notion and thus seems barely to believe it is legally possible. It is not; section 112 emission standards must be as stringent as the “floor” level of control achieved in the industry, and must be met by each “source” in the category.²⁵ Even while interpreting the CAA to permit MACT standards to contain a limited form of emissions averaging in the Hazardous Organic NESHAP in 1994, EPA specifically concluded that the Act barred it from allowing inter-source trading, saying:

In setting the standard for a category or subcategory, the Administrator is required to determine a floor for the entire category or subcategory, and then set a standard

²³1990 LH at 1149.

²⁴ 69 Fed. Reg. at 4,662.

²⁵ See 42 U.S.C. § 7412(d)(2) (“Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section. . . .”)

applicable to each source within that category that is at least as stringent as the floor and requires the maximum achievable emission reductions considering certain factors. In determining whether the standard should be more stringent than the floor and by how much, the Administrator is to consider, among other factors, the cost of achieving the additional emission reductions. The statute does not limit how the standard is to be set beyond requiring that it be applicable to all sources in a category, be written as a numerical limit wherever feasible, and be at least as stringent as the floor. Therefore, the relevant statutory language is broad enough to permit the Administrator to exercise discretion to allow sources to meet MACT through the use of emissions averaging provided the standard applies to every source in the category, *averaging does not cross source boundaries*, and the standard is no less stringent than the floor.²⁶

Similarly, when EPA interpreted the CAA to permit averaging between affected sources in the Primary Aluminum NESHAP, the agency concluded that it was constrained to allow such averaging:

only if it can be demonstrated that the total quantity of any particular HAP that may be emitted by that portion of a contiguous major source that is subject to the NESHAP will not be greater under the averaging mechanism than it would be if each individual affected source complied separately with the applicable standard. Under this rigorous test, the practical outcome of averaging is equivalent in every respect to compliance by the discrete sources, and the statutory policy embodied in the MACT floor provisions is therefore fully effectuated. A construction of the Act which permits EPA to establish a unified compliance regimen in these limited circumstances promotes economic efficiency and has no adverse environmental consequences. In a NESHAP incorporating such a unified compliance regimen, EPA would construe compliance with the overall regimen to constitute compliance for each of the affected sources.

Strict limits on the scope and nature of averaging across sources are necessary to ensure that no HAP is emitted by that portion of a major source subject to a NESHAP in quantities that are greater than those that would result from compliance by each discrete affected source within the facility. These limits include: (1) No averaging can be permitted between differing pollutants, (2) *no averaging can be permitted between sources that are not part of the same major source*, (3) no averaging can be permitted between sources within the same major source that are not subject to the same NESHAP, (4) statistical discounts must be derived and applied to account for the variability in emissions by the sources to be averaged, and (5) no averaging can be permitted between existing sources and new sources.²⁷

²⁶ 59 Fed. Reg. 19,402, 19,426 (Apr. 22, 1994) (emphasis added).

²⁷ 62 Fed. Reg. 52,384, 52,388 (Oct. 7, 1997) (emphases added).

Accordingly, EPA's proposed trading program under the authority of section 112(d) is completely inconsistent with the statute's single-source focus and with the agency's own interpretations of the law.

Nor is there any legal basis in section 112(n) for EPA to authorize pollution trading. EPA, drawing on arguments directly from utility industry talking points, argues that section 112(n)(1)(A) provides EPA with affirmative authority to establish emission standards that are less stringent than the traditional MACT approach. Specifically, EPA's proposal claims:

Congress's intent to authorize EPA to regulate Utility Unit HAP emissions in ways other than with the prescriptive requirements of section 112(d) is indicated by the section 112(n) requirement that EPA develop alternative control strategies for HAP emissions from these units. These alternative control strategies must address the hazards to public health that EPA reasonably anticipates will occur as a result of Utility Unit HAP emissions. Congress authorized EPA to consider a wider range of control alternatives for the utility sector than the source-by-source approach EPA has prescribed in standards for other source categories under the traditional section 112(d) MACT approach. Because Congress directed EPA to develop control strategies that would be alternatives to the usual section 112(d) MACT standard, it is reasonable to conclude that Congress authorized EPA to implement such alternatives.

As a result, EPA believes that section 112(n) confers on the Agency the authority to develop a system-wide or pooled performance standard for HAP emissions from Utility Units.²⁸

Thus, the agency seems to believe that the mere directive to examine, during a proceeding that culminated in 2000 with the issuance of the Regulatory Finding, various ways to reduce utility HAPs, also grants EPA the power, in *this* rulemaking, to prescribe something weaker than the statutory standard.

²⁸ 69 Fed. Reg. at 4,661-62. *Compare id.* (EPA's proposed position) with Latham & Watkins, "A System-wide Compliance Alternative for Mercury Emissions from Electric Utility Steam Generating Units, Legal and Policy Basis" (September 4, 2003) at 1-5 (presenting precisely the same argument on behalf of Latham & Watkins's clients, a consortium of electric utility interests).

But the Agency’s Congressionally-authorized opportunity to “develop and describe . . . alternative control strategies,” actually has come and gone. The statute explicitly states that this analysis and development of alternative control strategies “shall” occur in the Administrator’s Utility Air Toxics Study and Report to Congress – that Study and Report was completed in 1998.

To be sure, there is no language in the Act suggesting that EPA is barred from considering alternative control strategies in developing a MACT standard, but the CAA's directive to the Agency to consider “alternative control strategies” is unexceptional and certainly is not a license to walk away from the MACT regulatory scheme of section 112(d) altogether. It makes sense to study a range of control methods because the MACT program does not dictate specific technology; it directs EPA to set an emission standard reflecting the best performers in the industry, but regulated sources can meet that standard in any way they choose. That is why section 112(d)(2) specifies that MACT must be:

achievable . . . through application of measures, processes, methods, systems or techniques including, but not limited to, measures which--(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications, (B) enclose systems or processes to eliminate emissions, (C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point, (D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification). . . , or (E) are a combination of the above.²⁹

Accordingly, it is not surprising that EPA followed this obvious understanding when it surveyed “alternative control strategies” in the agency’s Report to Congress; the agency examined precombustion controls (such as coal cleaning, gasification, and fuel switching), combustion controls (including NOx controls and boiler type),

²⁹ 42 U.S.C. § 7412(d)(2).

postcombustion controls (both particulate phase controls and vapor phase controls), and non-technology based options.³⁰ EPA did not consider, much less review the effectiveness of, a cap-and-trade scheme for HAP emissions, a fact that demonstrates that the agency did not believe that the directive to review “alternative control strategies” provided it with authority to ignore the requirement that MACT must be required on all sources.

Certainly there is no support for industry’s suggestion that the language requiring EPA to “develop and describe in the Administrator’s report to Congress alternative control strategies,” serves as an independent and affirmative grant of authority to regulate outside of section 112(d). Most obviously, this directive is limited to what EPA does in the study – develop and describe strategies; this falls far short of a Congressional grant of jurisdiction to regulate at all, much less regulate outside of section 112(d). Moreover, this mere descriptive gloss on EPA’s study obligations lacks sufficient content and legal standards to serve as a grant of jurisdiction.

It is especially absurd to contend, as some industry commenters do, that the “alternative control strategies” language provides EPA with freewheeling authority to create a Rube Goldberg regulatory cap-and-trade program with extended compliance deadlines that directly conflict with section 112(d). The detailed and intricate design of the acid rain program shows that Congress knows how to structure a cap-and-trade program when that is its intent. And for reasons discussed elsewhere in these comments, this language does not and cannot supplant mandatory section 112(d) regulation.

Even more far-fetched is industry’s contention that because section “112(n) does not expressly prohibit the implementation of a national trading program as an alternative

³⁰ Report to Congress, at 13-33, table 13-13.

control strategy,”³¹ EPA may adopt such a program. This is an unfounded view of statutory construction and the jurisdictional limits of agency authority. There are countless legal measures that section 112(n) does not prohibit or even address, but that silence hardly amounts to an independent and affirmative grant of authority to do as EPA wishes. Industry of course identifies no support or precedent for these propositions.

We cannot help but comment on the *unprecedented* irony of industry seeking to grant EPA essentially unfettered and standardless authority to create whatever regulatory program it wishes in order to address the risks of harm from electric utility HAP emissions. Industry pretends that in doing so EPA may adopt more cost-effective and effective controls, but there is nothing in the language that industry itself relies upon that would require EPA to do so; and the approaches that industry and EPA both support, of course, are not more effective and timely from the perspective of protecting the public against utility HAP emissions. The thinly veiled reality, of course, is that industry seeks to grant EPA such wide latitude and unfettered discretion because industry believes EPA to be receptive to adopting a weaker and unlawful program that will circumvent the more protective requirements of section 112(d).

Furthermore, the notion that section 112 might permit inter-source emission trading is fundamentally at odds with a clear statutory provision – section 112(g). That section generally provides that major HAP a source which makes a change that increases emissions must apply MACT, but it provides for an exception when “such increase in the quantity of actual emissions of any hazardous air pollutant from such source will be

³¹ Robert Wyman, Claudia O’Brien & Jeffrey Hamlin, Latham & Watkins, “A National Cap-and Trade Program for the Regulation of Mercury Emissions from Electric Utility Steam Generating Units—Legal and Policy Basis,” (April 21, 2004) at 6, Docket No. OAR-2002-0056-1955.

offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant (or pollutants) *from such source* which is deemed more hazardous. . . .”³² In other words, intra-source trading is a way for a source to avoid MACT under certain prescribed circumstances. If Congress intended for section 112 emission standards to permit inter-source trading as a way of avoiding the source-specific application of MACT, it could have done so.

In recognition of the foregoing limits on trading under sections 112(d) and (n), EPA officials repeatedly acknowledged, during the development of the present proposal, that inter-source pooled compliance schemes could not be incorporated into the standards for Utility Units. In connection with the Utility MACT Working Group, William Maxwell of the Office of Air Quality Planning and Standards made a presentation titled “MACT process,” which noted, “[t]rading [is] not allowed in any consideration of the level(s) of control at the floor.”³³ Similarly, Mr. Maxwell, in answering an email question fewer than three months before the proposal was signed, stated, “the MACT does not provide for a ‘cap-and-trade’ approach.”³⁴ The next month, an EPA staffer participated in a presentation which noted, “[s]ection 112 does not allow trading between facilities to meet the standard. . . .”³⁵

C. EPA’s Trading Schemes are Contrary to Law and Arbitrary and Capricious Because they May Permit the Creation of Localized “Hotspots,” and EPA adopts only a “wait-and-see” approach to this problem.

³² 42 U.S.C. § 7412(g)(1)(A) (emphasis added).

³³ Bill Maxwell, U.S. EPA, “Utility MACT background: MACT process,” (Aug. 2001), available online at <http://www.epa.gov/ttn/atw/combust/utiltox/81pres1.pdf> (visited June 3, 2004).

³⁴ Email from William Maxwell, U.S. EPA, to Stephen Becker, Wholesale Energy Markets Group (Sept. 26, 2003) (attached as Appendix 8).

³⁵ Ravi K. Srivastava, U.S. EPA, et. al, “Current and Emerging Mercury and Multipollutant Control Technologies,” at 4 (Oct. 14-15, 2003), available online at http://www.icac.com/controlhg/ICAC03_Srivastava.pdf (visited June 3, 2004).

Section 112 does not authorize EPA to adopt the “wait-and-see” approach it proposes in this rulemaking to the potential problem of localized heightened risk of mercury contamination (“hot spots”) due to the cap-and-trade alternatives proposed. To the contrary, as described elsewhere in these comments, section 112(d) mandates the promulgation of a MACT standard which must be met by all sources in the regulated industry. It is *after* the MACT standard is in place that EPA *must* investigate and review the “risk to public health remaining or likely to remain from sources subject to regulation under [section 112] after the application of standards under [section 112(d)].”³⁶ At that point, the Administrator is mandated (in the absence of Congressional action) to issue *additional* standards if necessary to “provide and ample margin of safety to protect public health.”³⁷

Furthermore, EPA’s proposed “wait-and-see” approach to the problem of hotspots is based on the premise that mercury will behave like sulfur dioxide.³⁸ Even if one were to assume that EPA’s assertions that its Acid Rain program has not resulted in hot spot creation (an incorrect assumption we address in Chapter III), it is completely contrary to the science on the uptake and bioaccumulation of methylmercury to compare the public health risks of sulfur dioxide and mercury deposition. Specifically, as part of its approach to the hotspots problem, EPA proposes to look at human blood levels rather than levels of methylmercury in fish to discern whether local deposition is high.³⁹ But that approach would not address the issue of environmental loading of this persistent pollutant over time, provides only a snapshot of human exposure and does not mean that

³⁶ 42 U.S.C. §7412(f)(1).

³⁷ *Id.* at 7412(f)(2).

³⁸ 69 Fed. Reg. 4701-4702.

³⁹ *Id.* at 4702.

the long-term risk for human health is any less. Moreover, the agency is not proposing to monitor actual deposition of mercury through monitors located near utility units – which would be the appropriate way to assess actual hot spot creation. While EPA correctly asserts that “the relevant question is what is the contribution of [utility units] to hot spots [will be] under a cap-and-trade approach, relative to their current contribution and their projected contribution under a traditional section 112 approach,”⁴⁰ the agency simply dismisses the problem without making the assessment or even proposing a monitoring approach that would allow it to make the assessment. EPA’s dismissal of the hot spots problem therefore reflects its apparent fundamental misunderstanding of the problem – and demonstrates that the agency’s approach is unsupported technically, and arbitrary and capricious.

- D. If EPA Goes Forward with its Unlawful Trading Program, it Must Reject Several Program Elements That Permit Increased Pollution.**
- 1. Utility Units emitting less than 25 pounds of mercury should not be exempted from the 2018 cap.**

EPA has requested comment on whether utility units emitting less than 25 pounds of mercury should be exempted from the 2018 cap. Our response is “no”. The record documents the origin of this provision and illustrates that EPA has done no analysis of this issue, either with respect to costs or impacts. The language adopted comes directly from staff at the Small Business Administration (SBA). Apparently, the SBA is concerned that small units may have difficulty reducing their mercury emissions,

⁴⁰ *Id.*

although EPA has presented no evidence that suggests this is true. Hoping to apparently bury this giveaway in the preamble, the SBA staff person writes:⁴¹

[W]e are not making a formal proposal here – fuzzing up the original version will give the commenters even less of a target to focus on.

* * *

One solution – we could provide a memorandum in the record which addresses the releases of utilities that are 50 pounds/year and under, by individual unit, so that the commenters can draw their own conclusions.

We have reviewed EPA’s memorandum documenting the units emitting less than 25 pounds of mercury and have indeed drawn our own conclusions. We conclude that of all the 396 units listed, only about 60 are standalone units. All of the others are boilers that are part of a multi-boiler facility and it is entirely likely that at some facilities all of the boilers are tied into common ductwork for pollution control. Also, because EPA is proposing to allow facilities to bubble their emissions, units other than the one or two emitting less than 25 pounds of mercury per year can be controlled to a greater extent to compensate for the lower emitting units; this option would help mitigate any concerns that small units will be costly to control. Thus, the proposal to exempt units emitting less than 25 pounds of mercury a year is simply arbitrary and capricious.

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.

The proposal seeks comment on the use of a so-called “safety valve, which” would provide that, “[s]ources may purchase allowances from subsequent year budgets at the safety-valve price at any time.”⁴² Even though purchased safety valve allowances are

⁴¹ Email from Kevin Bromberg, Small Business Administration to Bill Wehrum, EPA; E. Stolpe, CEQ; A. Farrell, OMB. December 15, 2003.

⁴² 69 Fed. Reg. at 12,410.

deducted from the next year's allocation,⁴³ there does not seem to be any limit on using the safety valve to borrow yet again in the next year and the year after that, indefinitely putting off controls. Moreover, depending on how the cost of such an allowance (\$2,187.50 per ounce) compares to the cost of controls, this could be a significant disincentive to pollution reduction.

Indeed, the IPM modeling EPA did of its 111 scheme reveals that the “safety valve” proposal is bad environmental policy. It is our understanding, based on discussions with EPA staff, that this model run assumed the presence of the “safety valve,” and it predicts that emissions in the years 2023-2030 will be roughly 22 tons per year, rather than the cap level of 15 tons per year, and that the reason for this is “allowances purchased.”⁴⁴ Accordingly, it appears that the “safety valve” permits – indeed, is predicted to result in – elevated mercury levels into the distant future.⁴⁵

Moreover, the “safety valve” has the potential to cause delays in installing control equipment. If the price of “safety valve” allowances is significantly cheaper than pollution controls, the source may never install control equipment. Similarly, the “safety valve” provision could encourage the purchase of allowances that would worsen the problem posed by local hot spot deposition of mercury.⁴⁶ If a local power plant, unwilling

⁴³ See proposed 40 C.F.R. § 60.4143(c) (69 Fed. Reg. at 12,447).

⁴⁴ Again, as noted above, the model output says that 2026 is the end year and should not be used for analysis, so it is unclear to us whether the “safety valve” will be used as the model predicts in 2026 and beyond.

⁴⁵ See also Energy Information Administration, "Analysis of S.1844, the Clear Skies Act of 2003; S.843, the Clean Air Planning Act of 2003; and S.336, the Clean Power Act of 2003, at vii (May 2004) ("For Hg, power sector emissions are projected to remain above the 2018 target level in the Inhofe case [which is very similar to EPA's proposed mercury trading program] throughout the projection period. . . . The above-target-level emissions in the later years are caused by the mercury allowance price safety valve.")

⁴⁶ The best source of information on the issue of local vs. global deposition of mercury is contained in EPA's report to Congress for the instant rulemaking, U.S. EPA Mercury Study Report to Congress 1 & 2-5 (1997)(EPA 452-R-97-003) and the Florida Dep't of Env'tl Protection, Integrating Atmospheric Mercury Deposition With Aquatic Cycling in South Florida (2002, rev. 2003) available at <http://www.floridadep.org/labs/mercury/docs/flmercury.htm> (visited June 28, 2004).

to spend the money to control mercury emissions, is encouraged to purchase allowance by the “safety valve” price and thus continues to pollute, this dynamic could create an area around the plant of higher mercury emissions than those areas surrounding plants that control emissions. EPA does not even address the possibility of localized problems associated with the “safety valve” provision, but it is a very real concern. For example, a utility owner can decide that an old, large coal-fired (and very dirty) plant is ready for retirement, but rather than retire it right away, decide to buy allowances at “safety valve” prices for a several years.

In addition, another problem with this approach is that it creates a huge paradox associated with the continual borrowing of future allowances without ever reconciling the borrowed allowances from future compliance periods. As written, it appears as though EPA anticipates that a plant can comply by purchasing allowances into the future.