

Congress of the United States

Washington, D.C. 20515

August 31, 2004

The Honorable Michael O. Leavitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Leavitt:

We are writing in response to the Environmental Protection Agency's (EPA) August 24, 2004, press release on the 2003 National Listing of Fish Advisories and your comments on the findings of the report, and on other issues related to mercury pollution in the United States. In particular, we are deeply concerned that you have not accurately communicated to the public the real risks of mercury exposure through consumption of certain fish. In addition, recent developments indicate that EPA is continuing to pursue a rulemaking process for hazardous air emissions from power plants that abandons the Clean Air Act mandates to protect the public from mercury and other air toxics.

First, we would like to address your comments on the fish advisory. We are deeply troubled that your statement "It's about the trout not tuna. It's about what you catch on the shore, not what you buy off the shelf," as reported by the Associated Press, is inconsistent with the EPA-Food and Drug Administration (FDA) joint national fish consumption advisory and may confuse the public about which types of fish they should avoid eating in order to limit their mercury exposure. In contrast to your statement, the fish consumption advisory for mercury specifically informs women that they and their young children should limit consumption of tuna (especially albacore and tuna steak), swordfish, shark and other fish that they buy off the shelf or at the fish market.

Trout, on the other hand, are not mentioned in the fish advisory because freshwater trout bioaccumulate much less mercury than other fish, are consumed in smaller amounts by the public as a whole, and are therefore infrequently specified in state fish consumption advisories as fish of concern. As you know, EPA and FDA spent a considerable amount of effort to develop the consumption guidelines. While we believe the guidance could be strengthened – in particular to take account of subpopulations with high mercury exposure – and made easier to understand, we are concerned that your recent statements minimize the dangers of eating certain tuna and inaccurately inflate the danger of eating trout.

In your press statements from last week, you also stated that the increase in reported state fish advisories is a result of more monitoring and not an increase in mercury pollution. While it

may be true that overall mercury pollution has declined in the United States, this statement neglects to recognize that emission levels occurring right now – especially from power plants – still pose a major public health problem. The latest research, reported last week at the U.S. Geological Survey 2004 Mercury Workshop, supports this and suggests that recently emitted mercury is more easily methylated and transported through the food chain than mercury that has been in the environment for a long time. EPA's National Fish Tissue Study shows that forty percent of the fish samples collected during 1999-2003 have concentrations of mercury above the EPA water quality criterion of 0.3 parts per million.

Such findings are alarming and should prompt EPA to re-propose a utility regulation that fully complies with the maximum technology standards required by the Clean Air Act. Unfortunately, we continue to have grave concerns about the Administration's process and substantive proposals on the utility regulation for hazardous air pollutants. Recent statements by you and other Agency officials have in no way allayed these concerns.

We were pleased to see that your August 24 press briefing emphasized that protecting the health of pregnant women and small children is EPA's goal. However, we continue to believe that the Agency's proposal to reduce mercury emissions from coal-fired power plants by 70 percent beginning in 2018 flouts this goal by falling far short of what can and must be done to protect public health and the environment. EPA's own modeling data show that Clear Skies legislation, which calls for essentially the same mercury reductions on the same schedule as the preferred proposed cap-and-trade approach, will exempt almost two hundred of the oldest and dirtiest coal-fired power plants from installing advanced pollution control devices for decades. Furthermore, additional Clear Skies modeling demonstrates that such an approach would actually achieve at best a 58 percent reduction in utility mercury emissions by 2020, well below the proposed 70 percent goal for 2018. The Energy Information Administration predicts that the Clear Skies plan would amount to a mere 40 percent reduction by 2025 when fully implemented.

We are also very concerned that as EPA works to finalize a utility rule for mercury, the Agency has failed to conduct the basic analysis of regulatory options necessary to comply with the Clean Air Act and issue a sound and defensible rule. Many members of Congress, States, citizens, and EPA's own advisory group have repeatedly called upon EPA to analyze the Section 112 control options identified by the advisory group, which include options more protective than EPA's proposed approaches. In response, you and former Administrator Whitman have repeatedly committed to conduct the additional analysis necessary to support the mercury rulemaking. In addition, a statement in late June from EPA spokesperson Cynthia Bergman confirmed that you asked for "additional analysis to be done to make sure we reduce mercury in the most effective way possible given the state of available mercury control technology."

Yet five months after you publicly recognized that more analysis would need to be done, EPA has apparently failed to do the minimal work required to support a final rule. Nor does it appear that the Administration has any intention of providing the analytical data that would allow the Administration's proposal to be compared with any more stringent option. Last week, Assistant Administrator Holmstead seemed to indicate EPA will not be taking public comment on any additional analysis conducted by EPA (see BNA Daily Environment Report, 8/27/04). Instead, Mr. Holmstead indicated that EPA would rely on analysis conducted by outside parties,

which would be an abdication of EPA's rulemaking responsibilities. Bill Wehrum, counsel to Mr. Holmstead, confirmed at an EPA/EPRI emissions control technology conference this week that he does not know of anyone at EPA conducting analysis on any section 112 (MACT) approach. Mr. Wehrum also referenced a possible model run on the combined effect of the Administration's preferred approach under section 111 with another rule (InsideEPA, 8/30/04). We do not believe that this mitigates EPA's failure to analyze the primary regulatory options legally available under the Clean Air Act and recommended by EPA's advisory committee. Your own statements regarding the need for additional research on issues related to exposure pathways and bioaccumulation also do not seem to contemplate EPA analysis to address the regulatory question of what constitutes the "maximum achievable control technology." At this late stage in the rulemaking, we are deeply concerned that EPA's rulemaking process is off track and will not produce a sound or defensible rule.

As you correctly pointed out last week, mercury is a serious public health concern for pregnant women and young children. We sincerely hope that earlier promises will be fulfilled and you will quickly pursue the analysis of the full range of mercury control options before finalizing your mercury rule. On June 24, 2004, members requested a meeting with you to discuss when the analysis will be completed and other concerns about the proposed utility rule. We would like to restate our strong interest in such a meeting and hope to schedule one as soon as possible.

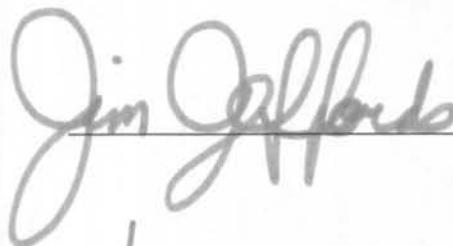
EPA has the responsibility to protect the health of our Nation's people and environment; therefore, at a minimum, please ensure that future statements regarding fish consumption and mercury exposure are consistent with current guidance and enhance a mother's ability to protect her own and her family's health. Moreover, we urge you to complete the promised regulatory analysis and finalize a utility rule that requires the greatest possible reduction in pollution of mercury and all other air toxics.

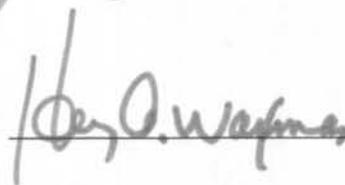
Thank you for your prompt attention to our questions. Our staff will be contacting your office to schedule a meeting to discuss these issues. We also look forward to your written response.

Sincerely,









Barbara Poyer

Edward J. Markey

Jan Schakowsky

Hillary Rodham Clinton

Chair Van Hollen

Tom Allen