Clean Air Task Force · Earthjustice · Environmental Defense
National Environmental Trust · Natural Resources Defense Council

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Dear Mr. Paul and Ms. Shaver:

The undersigned environmental organizations are pleased to have the opportunity to express our strong support for the utility air toxics rulemaking the U.S. Environmental Protection Agency (EPA) is undertaking to combat the public health and environmental threats posed by hazardous air pollutants (HAPs). Specifically, we support the agency's efforts to regulate the full suite of air toxics emitted from utilities in the utility maximum achievable control technology (MACT) rule, and urge the agency to move forward expeditiously to include all the nonmercury HAPs in the utility working group process.

According to EPA, electric utility boilers emit 67 different hazardous air pollutants, including mercury, benzene, dioxins, arsenic, polycyclic organic matter, cadmium and hydrogen chloride. Because of the adverse effects that such pollutants have on public health and welfare, EPA determined that "regulation of HAP emissions from coal- and oil-fired electric utility steam generating utilities under section 112 of the CAA is appropriate and necessary," and listed these categories for regulation pursuant to § 112(c) of the Clean Air Act. USEPA, "Regulatory Finding on the Emissions of Hazardous Air Pollutants From Steam Utility Generating Units," 65 Fed. Reg. 79825 – 79831 (December 20, 2000).

By placing electric utilities on the § 112(c) list, EPA incurred a mandatory duty to promulgate § 112(d) standards for them. 42 U.S.C. § 7412(c)(2). Section 112(d) imposes two requirements that are highly significant to EPA's rulemaking for electric utilities. First, EPA must promulgate emission standards for each HAP that electric utilities emit. 42 U.S.C. § 7412(d)(1), (2). *See National*

Lime Ass'n v EPA, 233 F.3d 625, 634 (D.C. Cir. 2000) (EPA has "a clear statutory obligation to set emission standards for each listed HAP"). Thus, EPA may not decline to set standards for any HAP that electric utilities emit, even if the agency believes that utilities are not deploying a particular technology to control that HAP. *Id.* at 633-634.

Second, EPA must assure that its emission standards for existing electric utilities are at least as stringent as the actual performance of the best performing twelve percent (12%) of sources for which it has emission information. 42 U.S.C. § 7412(d)(3). *See Cement Kiln Recycling Coalition v EPA*, 255 F.3d 855, 861 (D.C. Cir. 2001); *National Lime Ass'n*, 233 F.3d at 632; *Sierra Club v EPA*, 167 F.3d 658, 662-663 (D.C. Cir. 1999). Thus, EPA may not, as it has in the past, simply set floors at levels that it believes to be achievable through the use of certain technologies.

Many different factors, including the types of fuel used, the design of the facility, the combustion process and conditions, operator skill and training, and a wide range of different control technologies that are currently in use, influence electric utilities' actual performance with respect to each of the different HAPs. Only the emissions test data for a given HAP reflects the influence of all the relevant factors on the emissions of that HAP at any given facility. Therefore, to set floors that comply with the Clean Air Act, EPA needs adequate emissions test data for each HAP to identify the best performers with respect to each HAP and ascertain their actual performance.

We are concerned that EPA may not be taking the necessary steps to assure that it has adequate emissions test data for the nonmercury HAPs. If EPA does not already have adequate emissions data for the nonmercury HAPs, the agency must take immediate steps to obtain that data. Otherwise, the agency risks violating the Clean Air Act (by promulgating floors that do not reflect the best sources' actual performance) or the consent decree (by failing to meet the December 15, 2004 deadline).

Significantly, the consent decree represents an enforceable commitment by EPA to complete its § 112(d) standards for electric utilities by December 15, 2004. EPA was well aware when it entered into that consent decree that § 112(d) requires emission standards for the nonmercury HAPs. Moreover, even if EPA now needs to supplement its existing data on nonmercury HAPs, the agency still can do so without missing the December 15, 2004 deadline. As indicated by EPA's recent consent decree for the Hazardous Waste Combustion rule, the agency can complete a full rulemaking including extensive data gathering within 3 years and 4 months, less than EPA is allowed for this rulemaking. However, EPA cannot afford to delay. Any necessary data gathering must begin immediately.

To advance this process, the environmental and public health representatives on the working group have held discussions with EPA. EPA has agreed to provide the following information at the next meeting of the utility MACT working group scheduled for December 18, 2001:

- A summary presentation on nonmercury HAPs data, including a listing of the nonmercury HAPs, the content and form of EPA's data on nonmercury HAPs, and a summary of the 1998 Report to Congress.
- The data that EPA is assembling on nonmercury HAPs and the format that information will be presented in.
- A timeline for receipt of nonmercury HAPs data.

- A revised utility MACT timeline that includes nonmercury HAPs

Thank you for your attention to this matter. We look forward to working with you to regulate these air toxics.

Sincerely,

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cc: Utility MACT Working Group members