United States Congress

June 24, 2004

The Honorable Michael O. Leavitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Docket ID No. OAR-2002-0056, "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;" Proposed Rule, 69 Fed. Reg. 4652 (January 30, 2004) and Supplemental Notice, 69 Fed. Reg. 12398 (March 16, 2004)

Dear Administrator Leavitt:

We are writing to convey our very serious concern that the Agency's proposed National Emissions Standards for Hazardous Air Pollutants emitted by coal- and oil-fired power plants, announced on December 15, 2003, fails to meet the requirements of the Clean Air Act and contravenes Congressional intent. The proposed rule includes three alternative proposals to regulate only mercury emissions from electric utilities, each of which is inadequate to satisfy the mandates of both Section 112(d) of the Clean Air Act and a 1998 settlement agreement. As nearly half of the Senate requested in an April 1, 2004 letter, we again urge you to re-propose an appropriate rule expeditiously for public comment, so that the terms of the settlement agreement can be met and a legally defensible final rule to reduce utility air toxics emissions at each electric generating unit can be promulgated by March 15, 2005.

The proposed rule lays out three alternate proposed approaches for controlling utility mercury emissions: 1) regulate mercury emissions under Section 111, thereby contravening a three-year old regulatory determination made by the previous Administrator and effectively delisting coal- and oil-fired utilities as a source category under Section 112 of the Act (without adherence to Clean Air Act sections 112(c)(9) and 307(d)) and abandoning the settlement agreement; or 2) establish an unauthorized mercury cap-and-trade program under Section 112, without imposing a maximum achievable control technology (MACT) standard applicable to each electric generating unit; or 3) set a legally inadequate MACT standard for mercury only under Section 112. None of these proposed approaches is legally supportable under the Clean Air Act, and each of them violates Congress' intent that EPA shall regulate toxic air pollution under Section 112.

In adopting section 112(n) in the 1990 Clean Air Act Amendments, Congress established a commonsense process for regulating all hazardous air pollutants (HAPs) from electric utilities. The Act expressly directs the EPA Administrator to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility...units of pollutants listed under subsection (b) [a lengthy list of HAPs including mercury compounds] after imposition of the requirements of this Act." Congress mandated, "The Administrator shall regulate electric utility...units under this section [112], if the Administrator finds such regulation is appropriate and necessary after considering the results of the study...." By 1998, that and another study by EPA had been completed. The studies showed not only that mercury pollution causes severe health threats to unborn children by way of maternal consumption of certain contaminated fish, but also that utilities are the largest domestic source of mercury emissions. The National Academy of Sciences (NAS) later confirmed such health findings in a 2000 study mandated by Congress.

In December of 2000, after considering the EPA and NAS studies, EPA Administrator Carol Browner named mercury the hazardous air pollutant of greatest concern from electric utilities and determined, "regulation of HAP emissions from coal- and oil-fired steam generating units under Section 112 of the CAA is appropriate and necessary." The determination stated, "the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from such emissions identified in the utility RTC [Report to Congress] and confirmed by the NAS study, and which Section 112 is intended to address." Pursuant to the 1998 Natural Resources Defense Council settlement agreement, the Administrator, having made that determination, must regulate "under Section 112 of the Clean Air Act." Moreover, Administrator Browner in the determination explicitly "add[ed] coal- and oil-fired electric utility steam generating units to the list of source categories under section 112(c) of the CAA," thereby requiring regulation under Section 112.

Section 112 of the Clean Air Act requires EPA to promulgate regulations establishing emissions standards for new and existing sources of hazardous air pollutants that require the maximum degree of reductions in emissions that the Administrator determines is achievable, taking into consideration the cost of achieving those reductions, as well as any non-air quality health and environmental impacts and energy requirements. In other words, the statute requires a MACT, or maximum achievable control technology, standard. For each new electric generating unit, the standard must be at least as stringent as the emission control achieved in practice by the best-controlled similar source. Emission standards for existing electric generating units must be at least as stringent as the emission limits achieved by the average of the best performing twelve percent of existing sources. The Clean Air Act requires that emission standards for a listed industrial category must be finalized "within 2 years after such source category is listed"; if finalized in the Spring of 2005, MACT for coal- and oil-fired power plants will be more than three years late. We adamantly do not wish to see any further delay in fulfilling the requirements of Section 112.

EPA's preferred proposal entirely rejects the Section 112 MACT approach, substituting instead a weak regulation of mercury under Section 111 of the Clean Air Act, which provides EPA general authority to set performance standards for stationary sources of air pollution. EPA is now arguing, without adequate justification, that regulation under Section 112 is no longer "necessary." However, the Agency's proposal entirely misconstrues Congress' intent in adopting the Section 112 requirements in 1990. Congress required that before regulating toxic air emissions from utilities, EPA must study the hazards to public health from these emissions and find that regulation is appropriate and necessary. Congress understood that regulating these emissions could be costly and wanted to ensure that such regulation would address a real environmental concern. If there was a need for regulation, however, Congress certainly intended EPA to regulate under the provisions of Section 112, which Congress specifically designed to address toxic air pollutants like mercury. The purpose of Section 112(n) was not to allow EPA to scour the Clean Air Act for alternate sources of authority that arguably could be used to regulate air toxics from utilities, and then substitute regulation under such other provisions for regulation under Section 112. Furthermore, once EPA listed the coal- and oil-fired utility industry under 112(c), which it did in December 2000, it cannot de-list the industry unless it follows the Congressionally-mandated process outlined in section 112(c)(9) of the Act. But EPA cannot do so: the facts do not support a determination that no coal- or oil-fired power plant emits hazardous air pollutants at levels low enough that: (1) the emissions pose no lifetime risk of cancer greater than one in one million, (2) the emissions do not exceed levels adequate to protect public health with an ample margin of safety, and (3) no adverse environmental effect will result from emissions from any power plant. Because EPA cannot, based on the facts, make this determination, the Agency attempts an end run around the delisting requirements in Section 112(c)(9). That is simply not acceptable.

Moreover, the Agency does not have any basis for reversing the 2000 determination. Since 2000, no other requirements have been imposed by the Act on electric utilities, and EPA has not performed a new study

or otherwise produced new information of diminished hazards. Additionally, the bulk of the scientific evidence since 2000 points in a direction justifying more stringent regulation of mercury and other hazardous air pollution from electric utility units. Therefore, the Agency cannot credibly conclude that "after considering the results of the [1998] study" it is no longer "necessary" to stringently control utility emissions in the manner required by Section 112.

In addition, the Section 111 proposal would not result in major reductions in mercury emissions for at least ten years beyond what the Section 112 MACT approach stipulated by the Clean Air Act would bring about. This means that more pollution will be emitted, and more mothers and children will be exposed to danger, increasing the hazard to public health. Such a standard will also fail to drive clean technology innovation. EPA's own modeling data show that Clear Skies legislation, which calls for essentially the same mercury reductions on the same schedule as the Section 111 approach, will exempt almost two hundred of the oldest and dirtiest coal-fired power plants from installing advanced pollution control devices for decades. Additional Clear Skies modeling demonstrates that such an approach would achieve at best a fifty-eight percent reduction in utility mercury emissions by 2020, well below the sixty-nine percent goal for 2018. Even more dire are the Energy Information Administration's predictions that this plan would amount to a mere forty percent reduction by 2025.

EPA's other alternative proposal is to adopt a cap-and-trade approach to controlling mercury emissions under the authority of Section 112. This proposal also is legally invalid and scientifically unsupported. Congress' intent in adopting Section 112 was for EPA to set technology-based standards for toxic controls that require sources to reduce emissions to the maximum degree achievable. The Clean Air Act, therefore, assures a level playing field and minimal controls on each source. In contrast, a trading approach necessarily assumes that some sources will be allowed to under-control, while others choose to over-control. The Clean Air Act does not provide EPA with the authority to regulate mercury, or any other hazardous air pollutant, by means of a cap-and-trade program. The reason for this is clear: local toxicity could remain a serious health danger. Both the Section 111 and the Section 112 cap-and-trade approaches fail to adequately protect local populations from toxic hot spots. EPA has instead proposed to evaluate the health risks that remain, without committing to prevent or eliminate those risks.

The Agency's third and least preferred approach to regulating mercury would impose a MACT standard on utilities under Section 112, as is required by law. However, the proposed emissions reduction requirement of twenty-nine percent does not represent the "maximum achievable control technology" required under Section 112. EPA's proposed limit falls far short of what is both needed and possible with today's technologies, and it does not even reflect the emissions reductions being achieved now by the best performing plants, as is required by Section 112(d)(3). The proposed requirement also fails to demand emissions reductions that can be obtained by simply enhancing controls for nitrogen oxides and sulfur dioxide – steps that the EPA Office of Research and Development indicates could control sixty to ninety percent of mercury emissions beginning in 2010. This deficiency violates the letter and intent of the Act, and appears to be based on a flawed statistical manipulation of data that otherwise indicate facilities can achieve much more stringent levels of control. Additionally, EPA has documented that control technologies exist in the market today to reduce utility mercury emissions by over ninety percent in an economically sound way, but failed to consider these technologies in identifying the maximum achievable level of reductions. We urge that you swiftly re-propose a utility MACT standard for public review and comment that reflects this technological capability.

Finally, we are concerned that a number of EPA's actions on this rule may have been inappropriate or insufficient to meet procedural requirements for rulemaking, including those outlined in Section 307(d) of the Clean Air Act. It appears that the Agency did not comply with Executive Order 12866 to fully analyze the impacts of its proposal, using the best scientific information available. Further, since the Agency's first option

would dramatically alter course by essentially abandoning the Agency's regulatory determination and listing decision, with no rational basis for doing so, and contravening a settlement agreement, the rulemaking package should have contained a much more comprehensive discussion of the environmental, energy, economic, and public health impacts of this aspect of the proposed action. We are moreover deeply troubled that the Agency prematurely ended its consultation with the Federal Advisory Committee Act (FACA) Utility HAPs Work Group – established in accordance with section 117 of the Act to inform the regulatory development process – while at the same time the Agency appeared to be disproportionately influenced by industry law firms in developing the proposal. Lastly, we were very concerned to learn that certain scientific evidence in the proposal appears to have been changed in order to diminish the significance of health risks associated with exposure to mercury pollution.

This proposed rule, as drafted, would create more problems for America than solutions. Regulating air toxics from utilities is already nearly ten years later than what Congress originally intended. We can and must do a better job to protect human health and the environment. The proposals put forward thus far by the Agency seem dilatory, as the deadlines are extended and the process and substance appear intended to invite litigation, as they do not comport with the Clean Air Act. The need for stringent mercury controls, and controls on other air toxics, has never been more urgent, as EPA's own scientists have estimated that twice as many American children are born at risk from mercury exposure as previously thought.

We seek an explanation of the process by which the proposed rule was drafted and developed, to ensure applicable administrative standards were followed. We are pleased that you have publicly committed to performing new analysis for the proposal; we would like to know what additional analysis the Agency has done and plans to perform, and how the new analysis and results will be considered in finalizing a rule. We request that you demonstrate how the Agency plans to respond to the record-breaking number of public comments on the proposal. Most importantly, we urge you to change the Agency's course by promptly re-proposing a legally defensible and scientifically supported rule. As Members of Congress, we must be able to address the concerns raised by our constituents and the hundreds of thousands of Americans who commented on this proposal. In addition to receiving your written response, we would like to meet with you in person as soon as possible.

We look forward to working with you to reduce mercury pollution and other hazardous air pollution sooner rather than later.

Sincerely,

James M. Jeffords
U.S. Senator

Henry A. Waxman
U.S. Representative

Patrick J. Leahy
U.S. Senator

Frank R. Lautenberg
U.S. Senator

Barbara Boxer
U.S. Senator

Mark Dayton
U.S. Senator

John Edwards
U.S. Senator

Edward M. Kennedy
U.S. Senator

Thomas H. Allen
U.S. Representative

Janice D. Schakowsky
U.S. Representative

Joseph I. Lieberman
U.S. Senator

Olympia J. Snowe
U.S. Senator