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May 28, 2004

The Honorable Michael O. Leavitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

RE: Clean Air Act Utility Mercury Regulation

Dear Administrator Leavitt:

I am writing you regarding the Environmental Protection Agency's (EPA) plans for regulating mercury emissions from electric utility steam generating units pursuant to the Clean Air Act (CAA). As you know, the regulation of mercury emissions from coal-fired power plants is extremely controversial and there is a very wide range of viewpoints regarding the appropriate timing, stringency, legal authority, feasibility, and impact of your proposed standards. Moreover, at this moment, the process for finalizing the rule over the next 10 months appears extremely unclear. I am troubled by reports that key analytic work remains undone and that while you have committed to performing any necessary analyses in the time remaining, the precise nature and scope of those analyses remain uncertain. Perhaps more important, EPA's plans for incorporating that work into the final rule, in a way that meets the dictates of open and public process, are similarly unclear. I am writing to request clarification regarding the precise nature and schedule of EPA's plans and to request that you provide an appropriate opportunity for public comment on any additional analytic work, so that the public can review and evaluate that work as part of the complete context for the full EPA proposal.

On January 14, 2004, I wrote to you regarding the mercury issue and urged you to provide additional opportunities for public comment, including extending the time for comment and holding hearings in multiple locations. I appreciate your decision to accept these suggestions by me and others and thank you for your letter of April 5, 2004, discussing extension of the public comment period and describing additional EPA hearings in Chicago and Philadelphia. Since that time, EPA has agreed to extend the public comment period once again, in response to the offer of the Natural Resources Defense Council (NRDC) to extend by three months the time by which the rule is to be finalized. In addition, you and members of your staff have recently made several public statements indicating your intention to conduct needed additional analytic work, prior to finalizing the rule. I appreciate your candor in indicating that such work is necessary and your sincere desire to provide further opportunities for public comment.

Despite these encouraging developments, I am unable to determine whether EPA is on track to develop a sound and defensible rule, based on valid science and agreed upon facts, and consistent with a reasonable interpretation of the law. As discussed more fully below, my concerns relate to EPA's process for developing its rule, and to the public health and the economic consequences of EPA's proposal. Before we set out on a path that will largely define the extent of mercury control over the next decade or more, with very substantial public health and energy supply implications, we need to be sure that all necessary analytic work has been performed, publicly vetted, and incorporated into the rulemaking package in a logical and transparent fashion. Otherwise, the ultimate result may well prove to be nothing more than fodder for litigation, controversy, and delay. In the end, that approach benefits neither the environment nor the industries that require certainty and lead time to implement necessary control measures in a cost effective manner.

On March 16, 2004, you were quoted in the *New York Times* and the *Los Angeles Times* regarding your review of the proposed mercury rule and your plan to conduct further analyses. According to these articles, you stated that "[t]he important thing is that the analysis isn't complete" and "I've asked for an array of additional analyses to be done" (*New York Times*, March 16, 2004). You also are quoted as saying that "[t]he process is not complete nor is the analysis. I want it done well and I want it done right," and "'I want it done in a way that will maximize the level of reductions' based on available technology" (*Los Angeles Times*, March 16, 2004). More recently, EPA released a press statement agreeing to extend the comment period, and stated that "the agency will conduct whatever analysis is necessary to ensure the right decision is made and meet the goal of protecting public heath in the most effective way possible. This analysis will be made available for public comment prior to finalization of the rule." (EPA press statement, April 29, 2004.)

As these statements make clear, the EPA mercury rulemaking remains in flux and the agency appears to have significant work to do before all the relevant facts and analysis needed to make its decision are included in the rulemaking record, as required by section 307(d) of the CAA. In light of the NRDC's decision to provide additional time for EPA review and revision of its proposal, using the additional analyses you describe, there is still sufficient time for EPA to do its job properly before March 15, 2005. EPA's precise plans for the coming months, however, remain extremely indeterminate, given that we do not know which analyses EPA plans to perform, what the timing of those analyses will be, and whether EPA plans on taking public comment on a supplemented or revised version of its proposal, or plans on simply releasing any additional analyses for public comment. As discussed more fully below, in light of the time constraints applicable to EPA, the specific answers to these questions may have substantial effects on the public health and economic impacts of your proposal. Accordingly, it is incumbent upon you to set forth clearly the particulars of your plans for finalizing the mercury rule early next year.

As you know, the level and timing of the mercury control rule, and whether this rule can legally include an option to trade mercury emissions, are central to the issue of whether a defensible mercury rule can be promulgated that provides the required level of public health

protection, using available technology at an acceptable cost. Your statements above regarding the analytic work to be conducted make this clear and, as is appropriate, place no limitations on the analyses to be conducted. Recent statements by EPA Assistant Administrator Jeffrey Holmstead, however, suggest otherwise and indicate that EPA is planning on limiting its analyses to the context of the trading rule proposed by EPA, and will not include further analysis relevant to the MACT context, as requested by the Federal Advisory Committee Act (FACA) workgroup convened by EPA (Greenwire Interview with Jeffrey Holmstead, March 25, 2004). Mr. Holmstead is quoted as saying the new studies "would look only at 'some variation on the section 111 [trading] approach'" (Inside EPA Clean Air Report, April 8, 2004).

These contradictory statements must be reconciled before proceeding further. EPA needs to identify precisely those analyses with precision those analyses it plans on performing. If additional analyses relating to the timing of reductions under the trading proposal are warranted, EPA should state that, as well. In addition, EPA should clearly articulate whether it plans on conducting the analyses requested by the FACA and, if not, stating on the record why not.[1] EPA should also indicate whether it intends to examine a variety of options concerning the appropriate level of MACT control, to ensure that the agency bases the "MACT floor" on the actual emissions of the best performing units,[2] and adequately analyzes additional mercury control technology to establish "above-the-floor MACT." If EPA does not intend to perform such analyses, then it should state the reason for its decision to not do so on the record.[3] At this point,

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[1] See Electric Utility Steam Generating Units MACT Rulemaking Working Group: Charge and Process, at 3 (Draft, June 2001) ("The working group will conduct analyses of the information, identify regulatory alternatives, assess the impacts of the regulatory alternatives, and make preliminary regulatory recommendations for the source category."). These analyses were requested by, and intended to be useful to, both industry and environmental representatives, not only in terms of analyzing the effect on public health, but also for evaluating the economic impacts of the proposal and the feasibility of specific control strategies.

[2] For instance, EPA's proposal, to account for "variability" at the best-performing units, sets the annual emission standard at a level many times higher than the tested average emissions of the top sources. Using this approach, the average tested emission rate of 0.118 lb/TBtu for bituminous-fired units changed to an emission standard of 2.0 lb/TBtu, and the average tested emission rate of 0.738 lb/TBtu for sub-bituminous-fired units changed to an emission standard of 5.8 lb/TBtu. 69 Fed. Reg. 4673 (January 30, 2004). Despite the mathematical multi-page variability discussion contained in the proposal, EPA needs to better explain how these altered emission rates are consistent with the existing statutory and legal framework governing the determination of Maximum Achievable Control Technology under CAA section 112(d).

[3] EPA Assistant Administrator Holmstead stated in recent testimony that conducting such analyses was "scientifically indefensible" because of the time-frame of the MACT rule. Presumably, this statement relates to the availability of Activated Carbon Injection (ACI) technologies during the compliance time period. However, there were model runs requested by the FACA at stringency levels below the 90% control level thought to represent ACI, and it is not clear why those model runs could not be performed. Moreover, some model runs performed by EPA demonstrated 90% control without use of ACI. EPA needs to state clearly whether the failure to conduct such analyses was due to a lack of test runs or data at these levels, or reflected a judgment that an inability to install controls within the compliance time-frame is a proper factor to consider in determining the MACT floor and in conducting a "beyond the floor" analysis. In the latter case, EPA should explain how such an interpretation is consistent with past MACT floor decisions and the existing legal framework, including section 112(i)(3)(A) and (B) of the CAA (allowing up to 4 years for installation of controls).

EPA's failure to publicly provide the information noted above would suggest, at a bare minimum, that the agency currently lacks a plan for developing a rule that satisfies both the substantive and procedural dictates of the law. That situation can only lead to more, rather than less, controversy, uncertainty, and eventual litigation.

As I noted to you on January 14, 2004, it is EPA's job to determine the facts and how they relate to the law established by Congress. That is particularly important given that Congress charged EPA with addressing this issue more than 13 years ago and EPA therefore has had ample time to review the language of the statute. Yet EPA appears to remain highly uncertain about the appropriate interpretation of the law. The EPA proposal contains at least three conflicting interpretations of the law, based on two different sections of the Act (sections 111 and 112) and, in one instance, citing a slight difference between House and Senate versions of the law (as reflected in the United States Code and the Statutes at Large) as the basis for fundamentally different legal approaches to mercury regulation.

While I recognize the need to take comment on a relatively broad array of options, EPA has a duty to provide a coherent interpretation of the law that can be evaluated by outside parties, both for its congruency with the statutory language and in terms of its consistency with accepted facts. This is particularly so in light of the deference afforded to the agency in interpreting the CAA under applicable case law and the need to preserve EPA's credibility in court as it litigates against outside parties. (See, *Chevron U.S.A., Inc,* v. *NRDC*, 467 U.S. 837 (1984). Legal theories that serve policy goals, but that cannot be readily reconciled with the express language of the statute, pose substantial risks of reversal in the United States Court of Appeals for the District of Columbia Circuit. The EPA has a duty to focus the debate by eliminating such theories from serious consideration prior to the ultimate proposal, and by presenting only options with a strong legal basis that the United States Department of Justice could defend.[4] Instead, the EPA appears to be hedging its bets by putting forth a variety of opposing interpretations regarding the true meaning of the law, even though the agency itself is responsible for the law's interpretation and implementation. Proposal by EPA of multiple, conflicting legal bases merely reinforces the impression that the agency has yet to do its job properly, both in terms of its legal review and its factual analyses.

Finally, and apart from the concerns described above, I am also very concerned that the rule that you have proposed fails to meet the mark in another very important respect, relating to production and utilization of all types of coal from all regions of the country. An appropriate solution to the mercury problem will balance the need to control mercury emissions with requirements that meet minimal standards of fairness and equity for affected regions that produce and use differing types of coal. In Michigan, coal produced in both the eastern and western

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[4]Once the agency has settled on such an interpretation, it also has duty under Executive Order 12866 (and accompanying OMB orders) to analyze alternatives to its proposal that are designed to maximize the net benefit of the rule. Although sound principles of government require that EPA conduct such analyses on a static and coherent rule proposal, EPA has yet to do so. Without such an analyses, it is not possible for either industry or other interested parties to evaluate publicly EPA's decisions on a comparative basis, as is appropriate.

United States makes up the utility fuel mix, as is appropriate. That should continue to be the case. It is not up to EPA to determine winners and losers among coal types. To the maximum extent possible, your rule should avoid unnecessarily making decisions that could affect this balance. I do not believe and will not accept that the use of coal (including eastern bituminous coal) and the regulation of air pollution are fundamentally at odds. It is my contention that a mercury rule that is technically sound, fuel neutral, and consistent with the law remains possible.

I am therefore very troubled by indications that the rules that you have proposed, under both sections 111 and 112, could substantially disadvantage bituminous coal and lead to decreased production and use of bituminous coal in the eastern United States. I understand that the United Mine Workers have filed comments in this regard, requesting withdrawal of the proposed rule as a result of such concerns. In fact, EPA's own documents indicate that for both sub-bituminous and lignite coals, mercury emissions would actually increase under the MACT rule and that the only coal type that would be required to reduce emissions would be bituminous coal (*see,* "Economic Analysis For The Proposed Utility MACT Rulemaking" ("Economic Analysis"), January 28, 2004, p. 4). Thus, in some situations, your rule could perversely lead to increased emissions of mercury as a result of fuel switching to other coals.

EPA's own cost document for the rule indicates that "coal use reflects a shift away from bituminous and toward sub-bituminous and lignite coal relative to the base case. . . .[i]n addition there is fuel switching among bituminous coals" ("Economic Analysis," p. 2). According to that document, the proposed MACT would result in a reduction of Appalachian coal production of approximately 11 million tons and an attendant increase in western coal production of 18 million tons ("Economic Analysis," p. 7). When my staff inquired informally regarding these results, EPA staff disavowed its own results and indicated that the analysis used to reach these results was based largely on the use of Activated Carbon Injection, which EPA projects may not be required as a result of future regulatory scenarios (such as the Interstate Air Quality Rule).

As I noted previously, before all interested parties can meaningfully participate in the rulemaking, EPA needs to indicate which analyses it intends to perform and when such analyses will be available to better inform the public. EPA needs to provide reliable information regarding how its proposal affects differing types of coal and provide its technical justification as to whether any such fuel shifts are required for either technical or legal reasons. And EPA should do so based on a realistic set of assumptions for future scenarios. These should include any planned or ongoing rulemaking proposals, such as the Interstate Air Quality Rule, that could significantly affect the cost and availability of specific control technologies, such as scrubbers and ACI.

With regard to its MACT approach, EPA should indicate precisely how its assessment of the economic and environmental impacts of a MACT rule addresses the potential for, and extent of, coal rank switching, under a realistic regulatory scenario. Moreover, EPA needs to determine whether it is possible or probable that units will switch from bituminous to sub-bituminous coal as a result of the rule, and whether such a switch will result in either no change in mercury emissions, or in an increase in mercury emissions. Presumably, EPA will seek to avoid a

situation in which increased mercury emissions are accompanied by a decrease in use of eastern coals. EPA should also analyze the effect of its rule on companies that are or will be in the process of switching coal types in order to reduce sulfur emissions.

Similarly, with regard to its trading scheme under section 111 (assuming EPA continues to believe such an approach is legally viable), EPA's allocation scheme for allowances should not advantage one coal type over another. An allocation scheme that gives substantially greater allowances to one type of coal simply places additional economic burdens on units burning other coals, with little corresponding environmental benefit. I urge you to re-examine these issues carefully and to take appropriate action to ensure that fundamental fairness and the economic viability of all coal types is preserved in your rule.

If you have any questions regarding this letter please contact me or have your staff contact Michael Goo, Minority Counsel, Committee on Energy and Commerce at 202-226-3400.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Ralph Hall, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality