EPA'S DUTY TO REGULATE ALL NON-MERCURY HAZARDOUS AIR POLLUTANTS EMITTED BY COAL- AND OIL-FIRED ELECTRIC GENERATING UNITS

Clean Air Task Force
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March 3, 2003

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I. Introduction and Summary.

Environmental group participants[1] in the Electric Utility Steam Generating Units MACT Rulemaking Working Group previously have articulated our position that EPA must issue emissions standards for all hazardous air pollutants ("HAPs") listed in section 112(b) of the Clean Air Act, and emitted by coal- and oil-fired electric utility steam generating units ("EGUs"). Letter from Environmental Caucus to Mr. Jeffrey Holmstead, Assistant Administrator for Air and Radiation, U.S. EPA, April 24, 2002; Letter from Environmental Caucus Participants to Mr. John Paul and Ms. Sally Shaver, Utility MACT Working Group Co-Chairs, December 13, 2001. Our position is based on the clear language and structure of the Clean Air Act, as interpreted by the U.S. Court of Appeals for the D.C. Circuit, and as described in more detail herein.

This White Paper further documents our position in response to the memorandum submitted to EPA by various authors from Latham & Watkins on August 5, 2002.[2] That memorandum promotes the view that EPA's December 20, 2000 finding that regulation of HAP emissions from EGUs is appropriate and necessary was a final agency action, dispositive of questions about which HAPs must be regulated by the Agency. However, the United States Court of Appeals for the District of Columbia Circuit has already held that the finding, including the decision to list EGUs as a source category to be regulated, was not a final agency action subject to judicial review. *See* Order, *Utility Air Regulatory Group v. EPA*, No. 01-1074 (D.C. Cir. July 26, 2001)(dismissing industry appeal, and

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[1] Clean Air Task Force, Earthjustice, Environmental Defense, National Environmental Trust, National Wildlife Federation, and Natural Resources Defense Council.

[2] Wyman, Robert A., Claudia M. O'Brien, Nicholas B. Gertler, Latham & Watkins, *Legal and Policy Basis for EPA to Forego the Regulation of Non-Mercury HAP Emissions from Utility Boilers* (August 5, 2002)("Latham & Watkins"). The Latham & Watkins memo was submitted to the Agency on behalf of certain utility stakeholder members of the EGU MACT Working Group.

holding that judicial review of the decision to list EGUs is not available until after the MACT rulemaking is completed).

Furthermore, the language and history of the Clean Air Act ("CAA" or "Act"), as well as subsequent judicial interpretations, underscore our position that the 1998 section 112(n) study was a preliminary step to the Agency's December 2000 regulatory finding and decision to list *the source category* EGUs under section 112(c). Under the clear language of the Act, as well as the Legislative History and subsequent judicial interpretation, listing a source category automatically triggers the duty to regulate major sources in that category under section 112(d), which the D.C. Circuit Court of Appeals has declared includes a "clear statutory obligation to set emissions standards for each . . . HAP [listed in CAA §112(b)]." *National Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000). Once EPA exercises its discretion to list a source category, which it did in this case in December 2000, the Agency is not faced with any additional "decision" about which pollutants to be regulated or whether or not to issue MACT standards for all HAPs emitted by the source category.

II. The CAA Section 112(n) Report Was a Preliminary Step to the Agency's December 2000 Regulatory Finding and Decision to List Electric Generating Units Under Section 112(c).

In the 1990 Clean Air Act Amendments, Congress established a detailed scheme requiring the development of regulations for 188 HAPs emitted by certain stationary sources. *See generally* CAA § 112, 42 U.S.C. § 7412. The initial list of the HAPs to be regulated is codified at Clean Air Act section 112(b)(1), 42 U.S.C. § 7412(b)(1); provisions for amending the list to add or remove a HAP are found at section 112(b)(2), 42 U.S.C. § 7412(b)(2). Congress also directed EPA to publish a list of "all categories and subcategories of major sources and area sources" that emit the section 112(b) HAPs. CAA § 112(c), 42 U.S.C. § 7412(c). For listed categories or subcategories of major sources[3] of HAPs, Congress further directed that EPA *must* promulgate rules requiring the maximum achievable reductions in HAP emissions (known as MACT rules). *See* CAA §§ 112(d)(1)-(3), 112(e)(1), 42 U.S.C. §§ 7412 (d)(1)-(3), 7412(e)(1).

EGUs emit a "significant number of the 188 HAP[s] included on the Section 112(b) list," including mercury, 65 Fed. Reg. at 79,829. Recognizing this, Congress required EPA to study "the hazards to public health reasonably anticipated to occur as a result of [HAP] emissions" from EGUs. *See* CAA § 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A). The statutory scheme created by Congress requires that EPA, upon completion and consideration of the study, "shall regulate" the *source category* EGUs under section 112, if the Agency "finds such regulation is appropriate and necessary."[4]

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[3] A "major source" of HAPs is defined in the Act as "any stationary source or group of sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant, or 25 tons per year or more of any combination of hazardous air pollutants." CAA § 112(a)(1), 42 U.S.C. § 7412 (a)(1).

[4] In furtherance of that duty, the Administrator is authorized to make a preliminary decision to list EGUs under §112(c) as a source category requiring the development of MACT regulations. CAA § 112(c)(5). Once a source category is listed, the Agency *must* promulgate MACT regulations, through a rulemaking,

Id. There is no provision in the Act allowing the listing or de-listing of any of the section 112(b) pollutants as part of any of the steps preliminary to the MACT rulemaking for electric utility steam generating units. Nor does the Act allow for judicial review of the steps preliminary to the MACT rulemaking until that rulemaking is finalized. *See* CAA § 112(e)(4), 42 U.S.C. § 7412(e)(4).

III. EPA's December, 2000 Regulatory Finding Listed the Source Category EGUs , Not the Pollutants to be Regulated.

In 1998, EPA completed the health hazards study concerning HAPs emissions from EGUs as mandated by Congress in section 112(n) of the CAA. U.S. EPA, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units–Final Report to Congress*, EPA-453/R-98-004a (Feb. 1998). Congress, as part of the 1999 EPA appropriations process, further directed the Agency to fund the National Academy of Sciences ("NAS") to complete an independent study specific to the toxicological effects of one utility HAP, mercury, and prepare recommendations on the establishment of a safe methylmercury exposure reference dose. Committee on the Toxicological Effects of Methylmercury, National Research Council, *Toxicological Effects of Methylmercury,* Executive Summary at 2 (2000) ("NRC Study").

In 2000, relying on the section 112(n) utility health hazards study, the additional study released by the NAS, subsequent peer review analyses, and other available information including public comment, EPA determined that regulation of HAP emissions from EGUs under section 112 of the Act is appropriate and necessary. *See* 65 Fed. Reg. at 79,830. EPA found that regulation of HAP emissions from EGUs is

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including public notice and an opportunity to comment. *See* CAA §§ 112(c) & (d), 307(d)(1)-(3), (5), 42

appropriate because EGUs "emit a significant number of the 188 HAP included on the section 112(b) list." *Id.* at 79,829. The Agency further found that "a number of control options . . . will effectively reduce HAP emissions from" EGUs, and that the regulation of EGU HAP emissions is necessary "because the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from [EGU HAP] emissions. . ." *Id.* The EPA at the same time added EGUs to the list of source categories under section 112(c) of the Act, for which MACT regulations must be developed. *Id.* at 79,826, 79,830.

The plain language of CAA section 112(c)(2) states that the EPA Administrator "shall establish emissions standards under subsection [112](d)" for each of the listed source categories. CAA § 112(c)(2), 42 U.S.C. § 7412(c)(2); *see also* CAA § 112 (c)(5), 42 U.S.C. § 7412(c)(5) (EPA Administrator "shall promulgate" emissions standards under section 112(d) for source categories added to the section 112(c) list after 1991). CAA section 112(d)(2) in turn states that the emissions standards to be promulgated must be MACT standards: EPA "*shall* require the *maximum degree of reduction* in emissions *of the hazardous air pollutants subject to this section* . . . . that the Administrator . . . determines is *achievable* . . . ." CAA § 112(d)(2), 42 U.S.C. § 7412(d)(2)(emphasis added). Once a source category is listed, therefore, under the express terms of the Act it is the Administrator's mandatory duty to promulgate MACT standards for each of the hazardous air pollutants listed in section 112(b)(1), and emitted by that source category.[5]

U.S.C. §§ 7412(c) & (d), 7607(d)(1)-(3), (5).

[5] Contrary to the industry's assertions, Latham & Watkins at 6, the statutory duty to regulate all HAPs emitted by EGUs is not "separate and distinct from" but is found in precisely the same authorities in the CAA as was the case for the portland cement MACT rules considered in *National Lime*. In both instances, the MACT rules are or will be issued under the authority of section 112(d), for a source category listed in section 112(c). *Cf.* 63 Fed. Reg. 14,182, 14,186, 14,192 (Mar. 24, 1998)(the portland cement rule, noting

The Agency is not faced with any additional "decision" about which pollutants should be regulated or whether or not to issue MACT standards for the source category.

The utility industry and its lawyers, having lost their attempt to have the D.C. Circuit review the section 112(n) regulatory finding and section 112(c) listing decision, now argue that these were somehow final decisions with respect to the HAPs to be regulated in the subsequent MACT rulemaking. The Latham & Watkins memo argues that the December 2000 Regulatory Finding constituted not merely a decision to list EGUs, but also a decision about which pollutants would be regulated in the subsequent MACT rulemaking proceeding. The memo suggests that the 112(n) finding defines the "factual predicate" or full record on which a MACT standard would be based.

But EPA's regulatory determination was not, and indeed could not possibly have been, a decision about which HAPs would be regulated. First, the determination includes only EPA's decision to list EGUs as a category for regulation under § 112(c), and the Agency's finding that regulation of HAPs (not some subset of pollutants) emitted by coal- and oil-fired EGUs is appropriate and necessary. Second, once that finding is made, section 112(n) mandates that EPA must regulate the EGU source category "under this section" – namely section 112. The statute is clear that the finding and listing decision concern the *source category*, not the *pollutants* to be regulated. *See* CAA §§ 112(n)(1), 112(c). EPA's Regulatory Finding and listing decision reflect this. 65 Fed. Reg. at 79,830 ("[t]herefore, the EPA is adding coal- and oil-fired electric utility steam generating units to the list of source categories under section 112(c) of the CAA"). Furthermore, the statute states that judicially reviewable final agency action occurs only

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that those MACT standards were issued pursuant to the mandate in the source category's listing under section 112(c)).

at the time the final MACT standards are promulgated for a source category, as the D.C. Circuit Court of Appeals recognized in dismissing utility industry challenges to the 2000 regulatory finding. Order, *Utility Air Regulatory Group v. EPA*, No. 01-1074 (D.C. Cir. July 26, 2001).

IV. The D.C. Circuit Has Recognized EPA's "Clear Statutory Obligation" to Set MACT Standards for a Listed Source Category, Pursuant to § 112(d), and for Each HAP Listed in CAA § 112(b).

In *National Lime Ass'n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000), the Sierra Club and the National Lime Association challenged EPA's MACT standards for HAPs emitted by the listed source category "portland cement manufacturing plants." During the process leading up to the publication of the MACT standards for that source category, EPA found that portland cement plants emit significant levels of several categories of HAPs listed in CAA section 112(b). *National Lime*, 233 F.3d at 629-30. In the final MACT rule, however, EPA set no standards ("floors of no control") for three of the HAPs emitted by the source category, because it "found no cement plants using control technologies for these pollutants." *Id.* at 630, 633. Sierra Club argued, and the Court agreed, that the result – EPA's failure to set emission limits for three HAPs listed in CAA section 112(b) and emitted by the major sources in the listed source category – violated CAA section 112(d)'s requirement that the Administrator must establish emission limits for each of the HAPs listed in CAA section 112(b). *Id.* at 633 ("the statute lists over one hundred specific HAPs, 42 U.S.C. § 7412(b)(1), and requires EPA to 'promulgate regulations establishing emissions standards for each category or subcategory of major sources . . . of [HAPs] listed for regulation.'" *(quoting* 42 U.S.C. § 7412(d)(1))). The court noted that while the earlier case *Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999)

allows EPA to "look at technological controls to set emissions standards, that case does not say that EPA may avoid setting standards for HAPs not controlled with technology." *National Lime*, 233 F.3d at 634. Nor does anything in *Sierra Club* relieve EPA of "the clear statutory duty to set emission standards for each listed HAP." *Id.*

The *National Lime* Court did *not*, as the Latham & Watkins memo for utility stakeholders further suggests, interpret a "different subsection of 112" than is pertinent and dispositive here. In *National Lime*, the court interpreted CAA section 112(d) as imposing a mandatory duty to regulate all HAPs emitted by a listed source category. Although the ruling in *National Lime* pertained to MACT standards for another source category, the court's ruling is equally relevant to any other source category listed in CAA section 112(c), and for which MACT standards must be developed under CAA section 112(d).

V. Statements Made By Representative Oxley Support The Environmental Caucus's Position.

The floor "statements" of Rep. Michael Oxley, on which the utility industry memo misleadingly relies, do not contradict this view. Nor do they support the notion that Congress intended any different result for EGUs than for any other source category listed under section 112(c) – that is the development of MACT regulation for all emitted HAPs. Representative Oxley's "statements," which were not delivered orally and subjected to live colloquy, but inserted into the record, *see* 136 Cong. Rec. E 3670 (Fri. Nov. 2, 1990), simply describe the process leading up to the listing decision for EGUs. Rep. Oxley argues that the conferees accepted the provisions of the bill that became section 112(n) "because of the logic of basing any *decision to regulate* on the results of scientific study . . . ." 136 Cong. Rec. E3670, E3671 (emphasis added). The "decision

to regulate," referred to by Rep. Oxley, and reflected in the plain language of section 112(n) of the Act, is the decision reached in 2000 by the Agency that it is appropriate and necessary to regulate the source category EGUs, and therefore to list the EGU source category under section 112(c).

Rep. Oxley further notes that in his view, the EPA Administrator may "regulate only those units that he determines . . . have been demonstrated to cause a significant threat of serious adverse effects on the public health." *Id.* The utility industry construes this comment to mean that "the regulation of *any HAP emissions* from power plants that do not satisfy this criteria . . . would be ultra vires," Latham & Watkins at 4. But Rep. Oxley explicitly refers in his comment to the decision to regulate *units*, not HAPs. And by her December 2000 determination and listing of coal- and oil-fired EGUs, the Administrator has made the decision Representative Oxley referred to: she determined, on the basis of a great deal of scientific evidence[6] that major EGU source emissions indeed present a significant threat of serious adverse effects on the public health, and therefore should be listed under section 112(c), and MACT regulations should be developed for them under section 112(d).

Even if Rep. Oxley's comments could be construed as the utility industry would like, they are still nothing more than the comments of one conferee, submitted to the record in written form and therefore not subject to oral debate. *See, e.g., National Small Shipments Traffic Conf., Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 828 (D.C. Cir. 1980) (noting that statutory language should control over inserted statements in the legislative history). Moreover, these comments are further discredited by the fact that they are at odds with the language of section 112(n), which requires EPA to regulate

EGUs under section 112 of the Act. " *Cf. Brock v. Pierce County*, 476 U.S. 253, 263 (1986)(controlling effect should not be given to individual legislators' statements; although they may be helpful if they are consistent with the statutory language). Section 112(n) does not require EPA to regulate only those units that EPA determines to present a threat to public health.

VI. Conclusion.

Industry stakeholders are simply wrong to suggest that EPA's actions have not been undertaken "in compliance with subsection (n)." Latham & Watkins at 6. In fact, the Agency complied with the requirements of that subsection in issuing its regulatory finding based, in part, on the section 112(n) study. The Agency simultaneously determined to list EGUs under 112(c), and that decision triggered the agency's obligation to promulgate MACT regulations under section 112(d) for the source category "coal- and oil-fired EGUs." It is within that process, the promulgation of MACT standards under section 112(d), which the Agency has now begun, that EPA has the mandatory duty to promulgate regulations for all HAPs emitted by a major source in the listed source category.

Utility stakeholders state that Congress did not intend for EGUs to be regulated "independently" of the section 112(n) study. We concur with this view – but do not agree that the section 112(n) study (or any of the studies supporting the section 112(n) finding and listing decision) limited which pollutants will be regulated. Congress established a framework, as described above, in which the section 112(n) study is to be "considered" by the Agency in making the finding that it is appropriate and necessary to regulate EGUs. CAA § 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A).

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[6] Indeed, far more than Congress required in 1990, see CAA § 112(n), 42 U.S.C. § 7412(n).

In short, the Latham memo attacks a strawman by suggesting that regulation of all the HAPs that EGUs emit would somehow occur "independent of" the section 112(n) study. To the contrary, the section 112(n) study has already played its intended role in the regulatory process: as required by section 112(n)(1)(A), EPA considered the study in reaching its determination that EGUs must be regulated under section 112. But stating that the development of MACT standards "cannot be independent of the section 112(n) study" is surely not the same thing as saying that development of the MACT standard must be *constrained by the contents of* the section 112(n) study. Nor does it mean that the CAA section 112(n) study constitutes any final decision by the Agency about which of the section 112(b)(1) listed HAPs, of the many emitted by EGUs, must be regulated as a result of the MACT process. Nor could EPA legally have reached any such decision.

There is no indication anywhere in the Act or in the legislative history that Congress intended that the section 112(n) finding to be the last word about which of the many HAPs emitted by EGUs would be regulated. To the contrary, section 112(n) makes clear that EPA's only decision is whether or not EGUs must be regulated "under this section." Because EPA has determined that they must, the plain language of section 112(d) governs; language that has already been construed by the D.C. Circuit to require emission standards for each HAP emitted.

Indeed, Congress included in the Act provisions enabling the Agency to collect additional information about HAP emissions from a listed source category during the MACT rulemaking process for that source category. Section 114(a) states that "[f]or the purpose (i) of developing . . . any emission standard under section [112]" the Administrator may collect additional information about HAP emissions from owners and

operators of sources in the listed source category. *See* CAA § 114(a), 42 U.S.C. § 7412(a). In granting EPA this authority, Congress contemplated the possibility of additional information gathering about all HAPs emitted by a listed source category during the course of the MACT rulemaking process. Nor did Congress make any special provision in this section limiting EPA's information gathering authority with respect to EGU sources.

For the foregoing reasons, EPA has a statutory duty to issue MACT standards for all hazardous air pollutants emitted by coal- and oil-fired electric utility steam generating units.

Respectfully submitted,

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Dated: March 3, 2003