

Before the U.S. Environmental Protection Agency

Regarding

Proposed National Emission Standards for Hazardous Air Pollutants; and
in the alternative, Proposed Standards of Performance for New and
Existing Sources: Electric Utility Steam Generating Units,
69 Fed. Reg. 4652 (January 30, 2004)

Docket No. OAR-2003-0056

Philadelphia Public Hearing
February 25, 2003

Testimony of
Ann Brewster Weeks
(delivered by Jonathan Lewis)

CLEAN AIR TASK FORCE



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Good afternoon. For the record, my name is Jonathan F. Lewis, and I am an attorney with the Clean Air Task Force. I am appearing today to provide the testimony of Ann Weeks, CATF's Litigation Director. Ms. Weeks was an alternate member of EPA's Electric Steam Generating Units MACT Rulemaking Working Group of stakeholders from industry, environmental organizations, and state governments, which offered the Agency a range of recommendations for the development of a MACT standard for EGUs, in the Fall of 2003.

Now the Agency proposes both a weak MACT standard and a radically different alternative approach to the regulation of power plant hazardous air pollutants. EPA's alternative approach not only is radically different than the approach considered by EPA and the stakeholders in the Working Group, it is radically different than the approach mandated by the Clean Air Act. Martha Keating, the CATF representative to the Working Group, is presenting today in North Carolina oral testimony on the MACT alternative proposed by the Agency in this rulemaking package. I will therefore limit my remarks to the inadequacies, both legal and from a public policy perspective, of the alternative New Source Performance Standards and cap and trade approach contained in the proposal.

EPA first listed mercury as an air toxic in 1971. The public health effects of this toxic are not just coming to light, we have known for over a century about neurological disorders stemming from exposure to high levels of mercury in the environment. Each year, the science improves, and we learn more, for example, about how eating mercury contaminated fish leads to children's delayed language development, impaired memory and vision, problems processing information and impaired fine motor coordination.

The Center for Disease Control and Prevention has recently noted that 1 in 12 women of childbearing years in the United States have unsafe levels of mercury in their blood. EPA's own Federal Advisory Committee on Children's Health Protection has

noted its concern that this proposed rule package does not go as far as possible towards reducing emissions of mercury from the electric utility industry.

Existing coal-fired power plants are the largest uncontrolled industrial source of mercury in the United States today. Congress recognized this when it drafted the Clean Air Act Amendments of 1990, when it listed mercury under section 112, and demanded to be kept in the loop as your Agency made its determination whether to regulate hazardous air pollutant emissions from the electric generating industry.

EPA now seeks to administratively rewrite section 112 of the Act in an effort to try to find a way to treat mercury differently from the other 187 air toxics listed in the Act. Rather than regulating the power industry under the "Maximum Achievable Control Technology" approach required by the Act, EPA instead proposes to finalize New Source Performance Standards under section 111, for mercury emitted by new coal-fired power plants, and a cap and trade system including caps of 34 tons of mercury by 2010 and 15 tons in 2018.

This aspect of your proposal is completely without merit.

First, an NSPS approach to regulating hazardous air pollutants emitted by the utility industry is simply not authorized by the Clean Air Act. Congress revised section 112 in 1990 in an effort to promote faster regulation of hazardous air toxics, through the identification and the MACT regulation of the industrial categories of most concern. EPA listed coal- and oil-fired power plants under section 112(c) in 2000, which triggered the requirement to issue MACT standards for all hazardous air pollutants emitted by the industry. Congress did not direct the use of section 111 for utility industry HAP air emissions, as it did for solid waste combustors in Clean Air Act section 129. If Congress had meant to grant such authority to the Agency, it clearly knew how. It chose not to do so.

Second, your attempt to “de-list” the utility industry in order to advance your section 111 proposal does not meet the express terms of the Clean Air Act, and in any event is unsupportable on the merits. Section 112(c)(9) of the Act requires that a listed industrial category can be deleted from the 112(c) list only if certain specific statutory criteria are met. Your Agency has not even attempted to satisfy these criteria. For toxics that “may result in cancer in humans,” as is the case with nickel from oil-fired units as recognized by the Agency in 1998 and 2000, the Administrator must determine that “no source in the category . . . emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source.” For air toxics like mercury, the Administrator must determine “that emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.” Neither of these determinations is supportable on the record before the Agency, as we will point out in our detailed comments.

Finally the proposed cap and trade approach is not supported by the Act and represents very bad public policy. The tonnage caps are transparently based on the legislative targets in the Administrations Clear Skies approach to utility regulation, and do not go near far enough or fast enough -- either to adequately protect public health, or to satisfy the requirements set out by Congress to govern the regulation of hazardous air pollutants.

The Agency asserts broad authority under section 111 to establish a cap and trade program for listed hazardous air pollutants, although no such authority is articulated in the statute. Resorting to the tired and long discredited argument that since

it is not expressly prohibited, an action must be allowable, the Agency severely overreaches in this proposal.

Furthermore, while the Agency asserts that a 34 ton 2010 target is based on what can and must be achieved to control other conventional pollutants for the IAQR, the Act requires far more than this level of effort for the control of a hazardous air pollutant. Even if EPA attempted to justify this cap based on the results of its MACT approach, the MACT floor emissions levels EPA has conjured up in this proposal to support a 34 ton emissions level are themselves fundamentally flawed, legally and technically, as Ms. Keating is testifying in North Carolina today.

Finally, even if it were authorized by the Act, the Administration's approach in the proposed cap and trade program is just abysmal public policy. Despite the fact that 60% of the mercury emitted by U.S. power plants is deposited locally or regionally, the proposal would do absolutely nothing to avoid the creation of toxic hot spots – geographic areas that will experience even more mercury contamination than at present, because local sources are permitted to trade away the requirement to reduce their emissions levels. The caps are set at “no action” levels, furthermore: on the final pages of the proposal, the Agency admits that meeting the mercury caps will require very little (if any) effort beyond controlling for conventional pollutants. “Look,” the Administration seems to be saying to the industry – “just control your conventional pollutants a little further, and we will give you a hall pass on mercury.” This approach is taken despite ample evidence, well-known to the Agency, that much deeper cuts in mercury and other hazardous air pollutants are achievable cost-effectively from the industry in the short term. It is taken despite the clear requirements of the Clean Air Act that a listed industry must be required to make the maximum reductions achievable, and to do so within 3, or at most 4 years of a final rule.

EPA's NSPS cap and trade approach to EGU toxics is simply unacceptable. It is unacceptable legally, and unacceptable from a public health perspective.