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THE NATION

## Mercury Emissions Rule Geared to Benefit Industry, Staffers Say

**Buffeted by complaints, EPA Administrator Michael Leavitt calls for additional analysis.**

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WASHINGTON — Political appointees in the Environmental Protection Agency bypassed agency professional staff and a federal advisory panel last year to craft a rule on mercury emissions preferred by the industry and the White House, several longtime EPA officials say.

The EPA staffers say they were told not to undertake the normal scientific and economic studies called for under a standing executive order. At the same time, the proposal to regulate mercury emissions from coal-burning power plants was written using key language provided by utility lobbyists.

The Bush administration has said that the proposed rule would cut mercury emissions by 70% in the next 15 years, and is tied to the president's "Clear Skies" initiative. Critics say it would delay reductions in mercury levels for decades at a risk to public health, while saving the power and coal industries billions of dollars.

Studies designed to address such questions are the ones that were not conducted.

EPA veterans say they cannot recall another instance when the agency's technical experts were cut out of developing a major regulatory proposal.

The administration chose a process "that would support the conclusion they wanted to reach," said John A. Paul, a Republican environmental regulator from Ohio who co-chaired the EPA-appointed advisory panel.

He said its 21 months of work on mercury was ignored.

"There is a politicization of the work of the agency that I have not seen before," said Bruce C. Buckheit, who served in major federal environmental posts for two decades. He retired in December as director of the EPA's Air Enforcement Division, partly because he felt enforcement was stymied. "A political agenda is driving the agency's output, rather than analysis and science," he said.

Russell E. Train, a Republican who headed the EPA during the Nixon and Ford administrations, said: "I think it is outrageous. The agency has strayed from its mission in the past three years."

Buffeted by complaints about the mercury proposal from both within and outside the agency, EPA Administrator Michael O. Leavitt in recent days has called for additional analysis. EPA staffers say they have been asked to suggest possible comparative studies for the agency to run, much like the analysis that, they say, they were ordered not to conduct last year.

"The process is not complete nor is the analysis," Leavitt said in an interview Monday. "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 the available technology.

Leavitt noted that while the EPA expressed a clear preference for a more flexible, market-driven plan, its proposed mercury rule also includes an alternative approach using a traditional regulatory system requiring all plants to install pollution controls.

Leavitt portrayed the new period of inquiry as part of the "normal process" of rule-making, noting that the agency had so far filed only a provisional rule. But veteran regulators say it is unusual to propose a rule first and do extensive comparative studies later — unless new information emerges.

Leavitt said he could not speak to what happened at the agency before he arrived in November, but that he has had "no pressure to do anything other than the right thing from the White House."

Christie Whitman was the EPA administrator when the career employees say they were told not to conduct the analysis. She left the agency in June, six months before the proposed rule was announced.

"I did not know that we were cutting a process short or shortchanging the analysis," Whitman said in an interview Monday. Had she heard such allegations, she said, she would have intervened.

Five current career employees — all speaking on condition they not be named for fear of job retribution — and several former officials provided a behind-the-scenes account of the EPA's decision-making in the mercury case.

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A cascade of studies in recent years has cast mercury as an escalating health danger, although its threat to the human nervous system has been known since at least the 19th century. That is when hat makers in England literally went mad from exposure to a mercury compound used in processing felt — hence the expression "mad as a hatter."

Today, the use of mercury in U.S. manufacturing is tightly restricted. But there has been no strict limit on mercury released into the atmosphere from the nation's 1,100 coal-fired power plants, the largest single source of mercury in the U.S.

Mercury occurs naturally in the environment, in fossil fuels like coal, and is released into the atmosphere when those fuels are burned. When mercury particles and gases drop into water, some turn into a more toxic form known as methyl mercury, which then enters the aquatic food chain. People are exposed to mercury chiefly by eating fish.

In 2000, a National Research Council study commissioned by Congress estimated that each year about

60,000 children born in the United States could have neurological problems because they were exposed to mercury before birth. Exposure could lead to developmental problems.

In the past few months, there has been a flurry of other disturbing reports, most focusing on the threat to the fetus from mothers eating fish with elevated levels of mercury. In December, the Food and Drug Administration warned all women of child-bearing age to limit their intake of tuna and other fish because of concern about mercury.

Coal and utility executives don't dispute the dangers of mercury, but they question how much of the threat comes from power plants. And they warn that overly aggressive regulation of the nation's coal-fired plants could damage those industries and the economy and endanger already stretched supplies of electricity.

In its final days, the Clinton administration determined mercury to be a toxic substance and thus subject to strict regulation under the Clean Air Act. The administration's decision required that the EPA propose standards for utility plant emissions by the end of 2003.

As part of this process, the EPA selected a 21-member federal advisory panel in 2001 to make recommendations to the agency.

Mercury was on the agenda at a staff meeting last spring at EPA headquarters presided over by Jeffrey R. Holmstead, a lawyer who represented industry interests on air pollution issues before Bush appointed him to run the EPA's Office of Air and Radiation. Several of the staff members said they had expected to discuss plans to carry out comparative studies of proposals to reduce mercury emissions. The studies had been requested by the federal advisory panel.

The studies were designed to examine the effects of mercury regulation on energy markets, electricity prices and public health. This analysis, generated through EPA computer models, typically becomes the basis upon which agency officials — and outsiders — weigh alternatives.

But William Wehrum, a senior advisor to Holmstead who also represented industry clients before joining the Bush administration, told the dozen or so staffers that comparative studies would be postponed indefinitely.

"I was floored," said one participant, who has served several administrations. "We pointed out that the studies were required ... that the data runs were promised to a federal advisory committee."

Holmstead did not respond to expressions of concern, participants said. "There was an awkward silence," one recalled.

After the meeting, two staffers said, Holmstead informed them that the studies would not be conducted partly because of "White House concern."

Holmstead and Wehrum declined repeated requests for comment. On Monday, Leavitt expressed full confidence in them.

Paul, the co-chairman of the advisory committee, which was made up of regulators, environmentalists and industry representatives, says his panel was promised the comparative data last March, but its next meeting was canceled by the EPA and the group never met again.

"We were cut off without any warning or explanation," said Paul, director of the Ohio Regional Air

Pollution Control Agency in Dayton, who says he voted for Bush in 2000.

Lisa Heinzerling, a professor at Georgetown University Law Center who specializes in regulatory law and has studied the mercury proposal, said the "EPA's analytical work on mercury was extraordinarily thin."

Even as career staffers and some members of the EPA's advisory panel felt that their contributions to the mercury proposal were being restricted, utility industry lobbyists were given extraordinarily direct input.

When the Bush administration took office in 2001, slowing mercury regulation was a priority for the coal and power industries. Documents obtained under the Freedom of Information Act show that the coal industry dispatched lobbyists to meet with staff of Vice President Dick Cheney's Energy Task Force on mercury and other pollution issues.

Since 1999, coal and electricity companies and executives have donated \$40 million to Republican candidates and committees, including \$1.3 million directly to Bush campaigns, according to figures compiled by the Center for Responsive Politics.

The administration has responded to key industry priorities: It ended U.S. participation in the Kyoto process to reduce global warming and relaxed regulations that required the power industry to install pollution controls when renovating its plants.

The administration's proposed mercury rule, published in the Federal Register in December, contains numerous paragraphs of verbatim language supplied by two separate industry advocates.

Several complete paragraphs were lifted from three memos provided by Latham & Watkins, a national law firm whose clients include large coal-fired utility plants.

Both Holmstead and Wehrum are former Latham & Watkins attorneys.

More seriously, according to critics, the proposal also includes exact language provided by West Associates, a research and advocacy group representing 20 power and transmission companies in California and other Western states.

The West language suggests a standard for determining likely mercury emissions at power plants.

That standard — largely incorporated by the EPA — is enormously beneficial to the industry, according to S. William Becker, executive director of the State and Territorial Air Pollution Program Administrators organization, which represents state and local regulators in Washington.

Leavitt said use of lobbyists' memos in this fashion is not consistent with "normal agency procedure" and that he would prefer that wholesale use of any group's language be disclosed.

Under the proposal, the government would set a national annual cap on emissions but then permit individual companies to choose whether to reduce their own emissions or buy "credits" from other companies that do.

This is designed to provide an incentive to cut emissions nationwide, without limiting them at each individual facility. This approach was widely hailed in the 1990s for reducing power plant emissions that produced acid rain, but critics say it would be ill advised for a toxin such as mercury.

Some scientists believe mercury, which is heavier than acid-rain-producing sulfur dioxide and nitrogen oxide, will remain close to the point of emission, creating "hot spots" of potentially high levels of mercury contamination near power plants. Power plants in communities with high levels of mercury could opt to buy credits rather than spend the money to make reductions.

The EPA's own Children's Health Protection Advisory Committee, which includes academic, industry and environmental professionals, wrote on Jan. 26 that "the cap and trade program, as proposed, may not address existing hot spots and may create new local hot spots for mercury."

Overall, the committee said the Bush proposal "does not go as far as is feasible to reduce mercury emissions from power plants, and thereby does not sufficiently protect our nation's children."

Today, coal-fired power plants pump out about 48 tons of mercury annually. The Clinton administration order under the Clean Air Act would have mandated reducing the amount produced by coal-fired power plants by as much as 90%, to about 5 tons annually by 2008.

The Bush Clear Skies plan, as modified on Capitol Hill, calls for a national cap of 34 tons in 2010, a level that wouldn't require any extra spending by the industry because it would be automatically reached if utilities added scrubbers and other equipment to comply with the Clear Skies rules regulating nitrogen oxide and sulfur dioxide emissions.

Opponents of the Bush plan contend that setting a lower cap in the near future would encourage innovation by assuring a market for the new equipment. But officials of the coal-fired utility industry argue that forcing rapid adoption of that technology would be so expensive that it would lead electric generators to shift from coal to natural gas.

"The result would be increased electricity prices and higher costs for home heating, food and a host of consumer and industrial products," said Scott Segal, director of a coal utility trade association.

Segal and the coal utility companies that make up the Electric Reliability Coordinating Council back the administration's market-based approach as the most effective way to reduce emissions of mercury and other pollutants without harming the economy.

Meantime, longtime EPA employees say the administration exaggerated data on the effectiveness of its proposed rule, which would take effect in December.

In announcing the mercury plan, the EPA said it would reduce mercury emissions from power plants by 70% by 2018.

However, the EPA's own database shows that emissions would, at best, be reduced by only about half by then. And EPA models suggest that the 70% goal may not be reached until 2025, if ever.

In recent days, the administration has backed away from those claims. The 70% reduction will be achieved when the rule is "fully implemented," Leavitt said Monday, without providing a date.

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