Congress of the United States
Washington, DC 20515

April 29, 2004

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

Dear Governor Leavitt:

We are writing to urge you to take immediate action to rescue EPA's fundamentally flawed rulemaking on mercury emissions from power plants. EPA's current rulemaking proposal, issued in December 2003, is so compromised in its process and substance that EPA must issue an additional proposal before finalizing the rule.

We also urge you to analyze the emissions reductions and projected costs of the full range of legally viable options for controlling mercury emissions. This is an essential step in any serious effort to regulate mercury emissions from power plants. States, environmental advocates, industry representatives, members of Congress, and citizens have all been urging EPA to complete this necessary analysis since early 2003, and you have publicly recognized that EPA needs to conduct additional analysis.

We request that you immediately provide EPA's schedule to: complete the necessary analysis of the legally viable options; issue an additional proposal based on the results of that analysis; make the analysis and the proposal available for public comment; and promulgate the final rule by the extended deadline of March 15, 2005.

**Section 112 Utility MACT Rule**

Under section 112(d) of the Clean Air Act, EPA must require sources of hazardous air pollutants to reduce emissions to the maximum degree achievable through application of control technology, taking costs into account. These requirements are commonly referred to as "maximum achievable control technology" or MACT standards. At a minimum, the standard must be at least as stringent as that achieved on average by the best performing 12% of such sources. EPA's data shows that coal-fired power plants can achieve, and some currently are achieving, over 90% reduction in mercury emissions using available technology.

Pursuant to a court-approved settlement agreement, EPA was required to issue a proposed MACT rule for hazardous air pollutants from utilities by December 15, 2003, and a final rule by December 15, 2004. On April 27, 2004, the plaintiffs in the litigation that established these deadlines extended the final rule deadline in the settlement agreement for three additional months, to allow the agency additional time to conduct analyses and extend the public comment period. The new deadline for the final rule is March 15, 2005. The Clean Air Act requires utilities to comply with such a rule by March 15, 2008.

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**EPA's Failure To Conduct the Necessary Analysis**

Because of the important and potentially controversial nature of the rule regulating mercury emissions from power plants, EPA committed in June 2000 to solicit advice from those affected by this rule.[1] To effect this enhanced public involvement in the rulemaking process, EPA established the Working Group on the Utility MACT, formed under the Clean Air Act Advisory Committee Subcommittee for Permits/New Source Reviews/Toxics.[2] Under its charge, the Working Group is to "conduct analyses of the information, identify regulatory alternatives, assess the impacts of the regulatory alternatives, and make preliminary regulatory recommendations for the source category."[3] The Working Group last met on March 4, 2003.

In March 2003, there were extensive communications between the co-chair of the Working Group, other members of the Working Group, and EPA on important EPA analysis to support the rulemaking. Specifically, e-mail correspondence discussed the levels of mercury control EPA would use in its modeling to represent the positions of the different Working Group members on the level of mercury emissions control that EPA should establish in the rule. For example, on March 26, 2003, J. Michael Geers, representing the electric utility Cinergy, wrote to EPA commenting on the proposed MACT analyses and "strongly endorsing" the running of certain scenarios.[4]

The planned analysis would have provided important information for understanding the expected environmental benefits from reduced emissions and deposition of mercury, and the expected costs to install and operate control technologies, under the various control level options under consideration. It was understood throughout this correspondence that EPA would conduct this modeling and present the results to the Working Group members at a scheduled April 15, 2003, meeting.

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[1] *See* EPA, *Meeting Summary: Electric Utilities MACT Project Stakeholder Meeting, Monday, March 12, 2001, State/Local/Tribal Organizations* (online at http://www.epa.gov/ttn/atw/combust/utiltox/slt_031201.html).

[2] Clean Air Act Advisory Committee, Permits, New Source Reviews, and Toxics Subcommittee, *Electric Utility Steam Generating Units MACT Rulemaking Working Group: Charge and Process* (June 2001) (Revision 3) (online at http://www.epa.gov/ttn/atw/combust/utiltox/draft_charge_process.pdf).

[3] *Id.* at 3.

[4] Letter from J. Michael Geers, P.E., Cinergy to Sally Shaver, U.S. EPA, and John A. Paul, Regional Air Pollution Control Agency, State of Ohio (Workgroup co-chair) (Mar. 26, 2003).

EPA also told Congress during this time that the agency planned to conduct analysis of different control options under the mercury MACT rule. For example, on March 7, 2003, EPA conducted a briefing for congressional staff on the utility MACT rulemaking. EPA showed a slide that stated that analytic tools for the MACT rule included: "Analyses using Integrated Planning Model (IPM) looking at the costs and market impacts of a variety of potential levels of mercury control. Will be discussed with the FACA Working Group at April 15, 2003 meeting."

However, on April 1, 2003, EPA cancelled the planned April 15, 2003, meeting. EPA never rescheduled the meeting and never released the anticipated analyses. Since April 2003, members of the Working Group and members of Congress have repeatedly urged EPA to conduct the analysis requested by the Working Group to support the mercury MACT rulemaking. EPA has rejected or ignored each of these requests.

On April 28, 2003, members of the Senate Environment and Public Works Committee sent this followup question for the hearing record: "When does the Agency plan to deliver to the participants of the utility MACT FACA/work group the modeling and economic analysis that was promised to them for delivery on April 11, 2003?" EPA waited until September 15, 2003, to send the following response from then–Associate Administrator Ben Grumbles of the Office of Congressional and Intergovernmental Relations: "The agency is committed to do all the necessary analysis in order to propose a rule in accordance with our obligations under the Clean Air Act and Administrative Procedure Act."

In the absence of EPA analysis, the Northeast States for Coordinated Air Use Management (NESCAUM) conducted an analysis in May 2003 of limits recommended by the stakeholder groups represented in the Working Group. This analysis indicates that recommendations from all but one of the stakeholder groups would produce greater reductions of mercury emissions and produce them significantly earlier than would the Administration's Clear Skies Initiative.[5] The mercury proposal issued by EPA mirrors the timing and second phase limits of the Clear Skies proposal, while its first phase limits are less stringent than Clear Skies.

On May 21, 2003, we wrote to Governor Whitman expressing our concern that the utility MACT rulemaking and supporting analysis had been delayed and that EPA was in danger of missing the December 15, 2003, deadline for proposal. We noted that EPA appeared to have abandoned a stakeholder process allowing public involvement in the development of the proposal. In particular, we highlighted our concern about the fact that EPA had repeatedly promised to analyze various control options identified by the stakeholder working group, but had apparently failed to conduct any such analysis.

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[5] *See* NESCAUM, *Mercury MACT under the Clean Air Act: An Assessment of the Mercury Emissions Outcomes of Stakeholder Group Recommendations* (May 5, 2003).

In a June 27, 2003, reply, Governor Whitman assured us that work on the rule was continuing and that EPA was committed to meeting the December 15, 2003, deadline for proposing the rule. Governor Whitman stated:

> Thank you for your letter of May 21, 2003, in which you express concerns over the postponement of key analytical work by the [EPA] on the maximum achievable control technology (MACT) rule for electric utilities. I want to assure you that work on developing this rule is continuing even though some of the analyses will be somewhat delayed.

Governor Whitman also stated: "All analyses used to support the proposed rule will necessarily be completed by Dec. 15, 2003." Governor Whitman did not directly address our question regarding whether EPA would commit to model the mercury control levels identified by the environmental and state stakeholders. However, she did commit to conduct further analysis and present it to the Working Group:

> [S]ome of the members asked for additional meetings so that EPA could present the results of the technical analyses for an array of potential MACT scenarios. We intend to convene such a meeting once we have completed the analyses.

EPA has not, however, completed the analyses or convened such a meeting.

On July 8, 2003, Rep. Tom Allen questioned Jeffrey Holmstead, Assistant Administrator for Air and Radiation regarding the MACT analysis at a hearing in the House Energy & Commerce Committee. Rep. Allen asked if EPA had done the modeling to do the MACT standard. Mr. Holmstead assured the Committee that EPA was doing all the necessary analysis, including analyzing various control options, in order to propose a MACT standard by December 15, 2003.

On July 21, 2003, Reps. Waxman, Markey, Pallone, Capps, and Allen wrote Mr. Holmstead with additional questions for the record of the July 8, 2003, hearing. These members of Congress again pointed out that EPA had failed to conduct the modeling requested by the Working Group and needed to support the rule. The members asked EPA to provide its schedule for completing the appropriate modeling and analyses. Although federal agencies customarily answer questions for the record on a reasonably timely basis, Mr. Holmstead ignored this request for almost eight months. When he finally responded on April 12, 2004, Mr. Holmstead did not provide any indication that EPA planned to conduct the requested analysis, or, indeed, any additional analysis.[6]

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[6] Letter from John E. Reeder, Principal Deputy Associate Administrator, Office of Congressional and Intergovernmental Relations, U.S. EPA, to Rep. Henry A. Waxman (Apr. 12, 2004) (enclosing response from Mr. Jeffrey R. Holmstead, Assistant Administrator, U.S. EPA).

**The Existing Analysis for the Mercury Rule Is Inadequate**

EPA's issuance of the regulatory proposals to control mercury from power plants in December 2003 was met with widespread condemnation.[7] EPA's proposed preferred approach is to regulate mercury from power plants under section 111 of the Clean Air Act. However, this approach is illegal under the Clean Air Act, which specifically lists mercury as a hazardous air pollutant under section 112(b) and requires regulation of hazardous air pollutants under section 112(d).

In addition, EPA's proposed limits on mercury emissions require far fewer reductions than the industry can achieve, and EPA's proposal obtains most of these reductions decades later than the Clean Air Act requires. It has also been revealed that significant portions of the proposal were lifted almost directly from industry-drafted position papers.[8] Although EPA claimed that its proposal would reduce mercury emissions by 70% in 2018, the agency now admits that EPA modeling projects that a 70% mercury emissions reduction will not be achieved until 2025 or possibly after 2030.[9] Finally, EPA apparently failed to analyze or consider any requirements more stringent than its preferred option, which fails to meet the statutory requirements or protect public health.

In response to continuing public objections to these serious deficiencies, you and the chief architect of the proposal, Assistant Administrator Jeffrey Holmstead, have recently stated publicly that EPA will perform additional analyses and consider adjusting the proposal. Specifically, we understand that you have recognized that the analysis "is not complete" and have requested staff to conduct additional analysis. Mr. Holmstead has stated: "We are looking

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[7] For example, since December 2003, newspapers nationwide have published approximately 90 editorials condemning the Administration's proposal. *See, e.g., Michael Leavitt's Baptism*, New York Times (Dec. 7, 2003); *Stop Plans to Relax Mercury Rules*, Kansas City Star (Dec. 8, 2003); *Florida Program Proves Tough Pollution Controls Work*, Miami Herald (Dec. 8, 2003); *Deadly Mercury: Public Won't Excuse Delays in Reducing Emissions*, Houston Chronicle (Dec. 9, 2003); *A Familiar Tune at the EPA*, Chicago Tribune (Dec. 14, 2003); *Wrong Turn on Mercury*, Nashville Tennessean (Dec. 16, 2003); *A Mercury Non-Policy*, Washington Post (Dec. 20, 2003); *Mercury Worries Rising: Proposals That Let Polluting Industries Set the Rules*, Sarasota Herald-Tribune (Feb. 12, 2004); *Act Fast on Mercury Threat*, Los Angeles Times (Feb. 16, 2004); *Mercury: Tighter Rules Can and Should Go Further*, Detroit Free Press (Feb. 22, 2004); *EPA Mustn't Be Industry Lapdog*, Atlanta Journal-Constitution (Mar. 24, 2004); *Mercury's Taint*, Boston Globe (Apr. 3, 2004).

[8] *Proposed Mercury Rules Bear Industry Mark; EPA Language Similar to That in Memos from Law Firm Representing Utilities*, Washington Post (Jan. 31, 2004).

[9] *E.P.A. May Tighten Its Proposal on Mercury*, New York Times (Mar. 16, 2004).

at things that fall within the basic structure of the proposal that could be slightly different variations of what we proposed."

**The Procedural Requirements for Rulemaking**

As you know, the Clean Air Act, the Administrative Procedure Act, and several Executive Orders prescribe specific requirements for the rulemaking process. The purpose of these requirements is to ensure that the public has a genuine opportunity to provide comment on an agency rulemaking proposal and that the agency fully evaluates a range of regulatory options and adequately justifies its final decision. An agency must also reveal to the public and allow comment on the information that underpins the agency's rulemaking decisions.[10]

In practice, this means that EPA must complete and make available for public comment, before the close of the comment period, any analysis that EPA will rely on to support the final rule. This includes both analysis relating to the regulatory option selected by EPA, as well as analysis of options that the agency subsequently rejects. When additional information central to the rulemaking becomes available late in the process, EPA commonly publishes that information in the *Federal Register* and reopens the public comment period to meet this requirement.

In the case of the mercury regulations, EPA has clearly failed to consider the full range of regulatory options for the stringency and timing of mercury controls. Specifically, EPA apparently conducted no analysis of and gave no consideration to options more stringent than the options preferred by the agency, even though more stringent options were formally recommended by the Working Group members representing the states and environmental interests.

To correct these deficiencies, EPA must immediately analyze and consider mercury control limits supported by the members of the Working Group representing state and environmental interests (either as those limits were initially proposed or have since been modified). EPA must present the results of its analysis and evaluation of these options for public comment, and EPA must consider the comments it subsequently receives.

Any rulemaking that fails to consider key regulatory options is highly vulnerable to remand by a federal court. If EPA continues to refuse to conduct sufficient analysis and public process for the mercury rule to withstand legal challenge on procedural grounds, this would raise serious questions regarding the Administration's desire to promulgate a defensible rule.

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[10] *See Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency").

**Timing and Substance of Analysis and Supplemental Proposal**

EPA has adequate but not ample time left to address the fundamental flaws in the mercury proposal. EPA must promulgate the final rule by March 15, 2005, to meet its deadline under a court-approved settlement agreement, as subsequently extended by the plaintiffs in the underlying litigation. Given the tight timing for completing the rulemaking, establishing and meeting a schedule for rulemaking activities will likely be critical to your success.

EPA generally provides at least 60 days for public comment on complex or highly controversial proposals, such as this one. After the close of the public comment period, EPA generally needs at least several months to consider the comments, draft the final rule, and respond to the comments. The draft rule is then reviewed by OMB and other interested federal agencies during a 90-day period.

There appears to be a discrepancy between your public commitments to conduct sound analysis and an inclusive process for the mercury rule, and the approach planned by Mr. Holmstead. In reference to the process and the analysis, you recognized that they are not complete and stated: "'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."[11]

In contrast, Mr. Holmstead does not appear to recognize the significant amount of work that needs to be done on the rule. In the aftermath of your decision to revisit the analysis of the mercury rule, Mr. Holmstead initially committed only to look at "things that fall within the basic structure of the rule that could be slightly different variations of what we proposed."[12] According to another news report, Mr. Holmstead subsequently explained that the additional analysis will only look at reductions under EPA's preferred approach under section 111 of the CAA.[13] Apparently he justified EPA's continued refusal to conduct the analysis requested by the members of the Working Group on the grounds that the approaches recommended by the Working Group rely "on pollution control technologies that will not be commercially available by the deadline for utilities to reduce emissions."[14] Mr. Holmstead reportedly also indicated that in making the decision to reject again the modeling requests, he had consulted with top White House officials, including James Connaughton, Chairman of the Council on Environmental Quality, and John Graham, Director of the Office of Information and Regulatory Affairs.[15]

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[11] *Mercury Emissions Rule Geared to Benefit Industry, Staffers Say*, Los Angeles Times (Mar. 16, 2004).

[12] *EPA May Tighten Its Proposal on Mercury*, New York Times (Mar. 16, 2004).

[13] *EPA Will Spotlight Cap-and-Trade Approach in New Mercury Analysis*, Greenwire (Mar. 25, 2004).

[14] *Id.*

[15] *Id.*

EPA has provided no support for its assertion that mercury control technology will not be commercially available by the deadline for utilities to reduce emissions, and we strongly disagree that such a projection would justify a refusal to analyze the recommendations of the Working Group.[16] There are a variety of technologies currently being developed and demonstrated to control mercury emissions from power plants. Among them, injection of activated carbon is probably the most mature control technology. Activated carbon has been used for decades to control mercury emissions from hazardous waste combustors and has been demonstrated to be effective at power plants.

For example, in full-scale demonstrations at power plants using a variety of coal types, activated carbon achieved upwards of 90% mercury reductions when applied at power plants with fabric filters, and lesser but still significant reductions at plants with other control devices in place.[17] According to an article published in the American Coal Council's magazine last year: "This technology is simple and near-term and provides the capability of removal of all species of mercury from both Eastern and Western coal."[18] In fact, EPA's highly sophisticated computer model of the utility industry already incorporates activated carbon as a control technology with accompanying assumptions about costs and rates of mercury emission reductions.

In addition, decades of experience with technology-forcing pollution control requirements demonstrate that a reasonably aggressive regulatory requirement is both necessary and sufficient to stimulate technological progress and competition, and produce cost-effective pollution controls. Section 112 of the CAA directs EPA to identify the "maximum achievable" emissions reductions, taking costs into account. Nothing in the statute, case law, or past practice limits EPA to consideration of technologies that are already on the market. There is simply no reason for EPA to refuse to analyze the costs and environmental outcomes of faster and more stringent mercury emissions limitations.

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[16] In the preamble to the proposed rule, EPA discusses the prospects for activated carbon control of mercury emissions in a single conclusory paragraph, stating the following: "[T]his technology is not currently available on a commercial basis and has not been installed, except on a demonstration basis, on any electric utility unit in the U.S. to date. Further, no long-term (e.g., longer than a few days) data are available to indicate the performance of this technology on all representative coal ranks or on a significant number of different power plant configurations. Therefore, we do not believe these technologies provide a viable basis for going beyond-the-floor."

[17] American Coal Council, *Tools for Planning and Implementing Mercury Control Technology* (2003).

[18] *Id.*

**Request for Information**

In light of the concerns we have outlined, we request that you provide the following information:

1. EPA's schedule for carrying out the following activities in time to assure final issuance of the mercury rule by March 15, 2005: (a) conducting additional analyses of the mercury control levels identified by environmental and state stakeholders (as specifically recommended in the Working Group report or as subsequently updated by the Working Group members); (b) issuing a new or supplemental proposal based on such analyses; (c) providing for public comment; (d) drafting the final rule; and (e) providing for OMB review of the draft.

2. A detailed description of the additional analysis EPA plans to conduct. Please explicitly state whether you intend to limit additional analysis to the proposal issued under section 111 of the CAA, as Mr. Holmstead indicated.

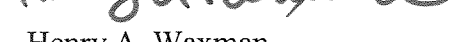
3. A detailed description of the additional regulatory options or variations on current options that you will consider.

4. A detailed description of the additional public process that you commit to provide, including when you will make new information and proposals available for public comment, the length of the comment period, and any additional public hearings you will hold.

5. An explanation of the manner and extent to which Mr. Connaughton and Dr. Graham, or any other White House officials, have been involved in planning the additional analysis that EPA will conduct to provide technical support for its decisions on the mercury rule.

We would appreciate receiving a response to this request by May 13, 2004, as this is a time-sensitive and urgent matter.

Sincerely,



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