

Good afternoon. My name is Jon Devine, and I am representing the Natural Resources Defense Council. I am an attorney in NRDC's Health and Environment program. Before coming to NRDC, I defended and implemented the Clean Air Act in a number of policy and legal positions for both state and federal agencies. I am also a parent of two young sons. I am troubled that the agency is shirking its public health mission and its duties under the Clean Air Act while consigning states to a future of contaminated waterways and fish. Beyond that, EPA's mercury proposal offends me as a parent, because the agency is telling my kids to wait until adulthood to see fewer mercury reductions than the law requires to be accomplished before my youngest is in grade school.

EPA has proposed a program that demands no mercury reductions in the near term except those that would otherwise occur, asks power plants to make only modest improvements by 2018, and sets up a trading mechanism that will actually delay pollution controls far beyond 2018. The agency's approach stands in stark contrast to what the Clean Air Act requires – reducing mercury pollution by as much as 90 percent within three years. My testimony focuses first on EPA's grotesquely weak section 112 proposal, then its proposal to revise history and undo the agency's determination that regulating power plant mercury is necessary and appropriate, and finally its proposal to find the authority in section 111 of the Act to do exactly what the administration had failed to accomplish with the so-called "Clear Skies" Act. That bill would establish a cap-and-trade system for mercury in two phases, with the first phase cap set at the level expected to occur as a "co-benefit" of controlling other pollutants, and the second phase cap requiring a reduction of roughly 70 percent in the far distant future.

Starting with section 112, EPA's mercury emission standards violate the Clean Air Act in several ways. First, EPA used stack tests and coal data from the lowest-emitting facilities, and then, in the name of establishing an "achievable" standard, subjected these data to a series of statistical manipulations that resulted in an emission standard far higher than what the plants achieved as a regular matter. EPA took several short-term emission observations from each facility, ranked them from best to worst, and picked the emission level that was worse than 97.5 percent of the data set, resulting in a figure that represented virtually the worst performance the plant experienced. The agency then took this figure for each of its top-performing sources and applied a second 97.5 percent adjustment, thus resulting in a number that, as best we can tell, is meant to represent a prediction of the worst performance any similar source might experience under the worst conditions. As a last step (or perhaps I should say straw), EPA then took this calculation of the worst-of-the-worst short-term emissions and used the result as the basis for an *annual* emission limit. This statistical manipulation is indefensible – it effectively assumes that the worst conditions that the worst facility in the group briefly experienced will exist throughout the year. EPA goes far beyond ensuring that regulated facilities will be able to meet the standard under "reasonably foreseeable circumstances," and instead makes sure that they will meet them under circumstances statistically certain never to occur. Even if one accepts some of EPA's assumptions, the consequences of the agency's most egregious numbers games are extreme; for example, by using the second 97.5 percent adjustment and by making the emission limit annual, EPA weakened the standard for bituminous coal burning units by more than a factor of four. Had EPA not used these two devices, we calculate that the agency would have to reduce emissions

from bituminous, subbituminous, and lignite units to approximately 10.5 tons per year. By contrast, EPA uses these gimmicks to justify allowing power plants to emit approximately 34 tons per year, which is precisely the same level of mercury control that EPA predicts will occur as a co-benefit of controlling other pollutants. What a remarkable coincidence that EPA's technical staff performed these calculations and just happened to find that they required the exact same level of reductions EPA had sought to achieve legislatively and that it now proposes to accomplish with its alternative section 111 proposal.

The second major flaw with EPA's section 112 proposal is its failure to examine basic emission reduction techniques as MACT. EPA discards precombustion controls by suggesting that some sources in the industry might find them difficult to implement, but it does not undertake a MACT analysis to evaluate whether the superior performers in the industry engage in pollution prevention activities that minimize mercury emissions. Moreover, when one compares EPA's proposed 29 percent reduction to analyses by State regulators and others, the agency's characterization of its program as MACT appears laughable. For instance, the Northeast States for Coordinated Air Use Management recently concluded that "existing control devices designed to reduce other pollutants can deliver substantial mercury reductions," with some bituminous-fired units achieving 95 percent reductions and subbituminous units achieving over 70 percent reductions. NESCAUM also noted that mercury-specific controls, such as activated carbon injection, were successfully deployed in U.S. coal-fired plants and achieve over 90 percent control, and Iowa permitting authorities recently required a new subbituminous plant to achieve 83 percent control.

Third, EPA's proposal does not set emission limits for several hazardous air pollutants the agency admits are released from utility units. Doing so simply flies in the face of prior court decisions interpreting the MACT provisions of the Clean Air Act, and nothing in section 112(n)'s "necessary and appropriate" language allows the agency to issue rules only for those pollutants the agency feels are of concern.

Fourth, EPA proposes to allow sources to participate in a pollution trading scheme so that plants in the aggregate will emit 34 tons of mercury annually, but no individual plant would need to meet any particular emission limit. The agency suggests that either section 112(n)(1) or 112(d) of the Clean Air Act might provide it authority to create such a system, but neither section authorizes such a radical approach. Section 112(n)(1) does not provide authority to vary the characteristics of a MACT standard, and section 112(d) does not permit EPA to create a cap-and-trade program encompassing multiple sources. The agency itself acknowledged this several years ago, when it concluded that "no averaging can be permitted between sources that are not part of the same major source."<sup>1</sup>

Fifth, EPA's proposal arbitrarily defines subcategories based on coal rank. This choice is flawed because EPA admits that nearly a quarter of the coal-fired units in the nation currently fire different ranks of coal, and because many more may be capable of doing so. This fact suggests that the purported differences between units that burn different ranks of coal are of little real-world consequence.

Perhaps because of these obvious legal problems with the agency's attempt to shoehorn its desired result into section 112 of the Act, EPA has developed an alternative plan to avoid section 112 – it proposes to undo the December 2000 regulatory

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<sup>1</sup> 62 Fed. Reg. 52,384, 52,388 (Oct. 7, 1997).

determination that controlling mercury from power plants under section 112 is necessary and appropriate, and proposes to remove utility units from the list of source categories subject to MACT. EPA cannot lawfully rescind its determination because section 112(c)(9)(B) dictates the specific mechanism that EPA must follow in order to avoid setting emission standards for listed source categories. That provision only allows source categories to be removed from the regulatory list if no individual source is a danger to health or the environment, but EPA does not even attempt to make this showing in its proposal.

Finally, I want to turn to EPA's proposed section 111 two-phase, cap-and-trade, mercury program, which is the administrative twin of the Clear Skies proposal. This element of the agency's preferred approach is remarkable because it is simultaneously audacious and feeble. The proposal is audacious because EPA purports to find the authority in section 111 to do virtually anything it pleases in regulating stationary source emissions. The agency interprets the section's use of the terms "best," "system," and "standard of performance" to allow EPA to devise, so long as it considers certain factors in doing so, whatever emission control regime it thinks works best, and to permit the industry to comply at individual units, across whole plant sites, or even by averaging throughout whole industries. This strained interpretation fails because it threatens to swallow the rest of the Clean Air Act whole and because other parts of the Act – such as the MACT provisions – use the same or similar terms and would be rendered absurd if they were read the way EPA now reads section 111. The proposal's reach also exceeds its grasp by concluding that the Clean Air Act can be read to allow EPA to regulate HAPs

under section 111, when the law was clearly intended to achieve HAP control under section 112.

Most of all, however, the section 111 proposal is feeble. It concludes that a 29 percent mercury cut by 2010 and a 69 percent reduction by 2018 represents what companies can achieve, even though greater reductions are possible much earlier with existing technology. Moreover, EPA intends to implement this reduction program using a cap-and-trade scheme that would allow polluters to bank emission credits and therefore would permit emissions to remain significantly elevated far into the future. Last summer, EPA performed modeling analyses of the Clear Skies Act and predicted that power plant mercury emissions would be cut by only 43 percent, to approximately 27.8 tons, by 2026, despite the law's 15-ton cap established for 2018. The trading scheme also raises the specter of toxic hotspots around companies that buy credits rather than clean up.

This brings me back to where I began. EPA's proposals deny our children's generation what the Clean Air Act promises. Rather than deliver dramatic mercury reductions by the time my sons are 7 and 3 years old, EPA has proposed a program that will allow emissions to remain at excessive levels at least until they are well into their twenties. To do so, EPA will have to violate numerous provisions of the Act, and will likely provoke litigation that causes additional delay. Rather than choose this ill-conceived course, the agency can and must implement the law and require companies to implement demonstrated technology to reduce toxic mercury pollution immediately.

Thank you.