Congress of the United States
Washington, DC 20515

May 21, 2003

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Whitman:

We are concerned by recent reports that EPA has cancelled key analytical work intended to support the ongoing rulemaking on mercury and other hazardous air pollutants emitted by the utility sector ("utility MACT rule"). The failure to conduct this analysis threatens to derail this important rulemaking to reduce highly toxic mercury emissions from power plants, as well as impair congressional consideration of pending legislation to reduce air pollution from power plants.

It is particularly disturbing that the Bush Administration may be seeking to delay the release of this information for political reasons. Reports indicate that the analysis may have been cancelled because it could undercut the Administration's Clear Skies Initiative (CSI) by demonstrating that implementation of the existing Clean Air Act toxic air pollution requirements would produce greater reductions in mercury emissions than CSI, sooner, and at an acceptable cost.[1] In the absence of EPA analysis, the Northeast States for Coordinated Air Use Management (NESCAUM) conducted an analysis, which 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 CSI.[2]

EPA should conduct timely analysis of mercury control options identified by the utility MACT rule stakeholder working group established by EPA. Absent such analysis, neither the public, EPA, nor Congress will fully understand the expected environmental benefits from reduced emissions and deposition of mercury, nor the expected costs to install and operate control technologies for the various options under consideration.

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[1] *EPA Delays Mercury Rule Estimates in Favor of Clear Skies Analysis*, Clean Air Report (Apr. 24, 2003).

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

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I. BACKGROUND

A. Mercury

Mercury is a highly toxic substance. It is a potent neurotoxin, and it is particularly damaging to the development of the fetus.[3] Effects from prenatal exposure can include mental retardation, cerebral palsy, deafness, and blindness.[4] Even low-dose prenatal exposure can cause persistent adverse effects on children's development, such as delayed walking and talking and impaired learning abilities.[5] Adult exposure can produce sensory and motor impairment, such as slurred speech, blurred vision, tremors, and memory loss.[6] In addition, several studies suggest that even small mercury exposures may cause adverse cardiovascular effects.[7] The adverse effects of mercury exposure on birds and mammals include impaired growth and development, behavioral abnormalities, liver damage, kidney damage, and neurobehavioral effects.[8]

Mercury exposure is a serious public health concern in the United States. Forty-two states have issued fish advisories warning against consumption of fish caught from various water-bodies based in whole or in part on mercury contamination.[9] EPA has found that 8% of women of child-bearing age in the United States — about 5 million women — have blood mercury levels that would put children born to them at increased risk of adverse health effects.[10]

B. Clean Air Act Requirements

Under section 112 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. These requirements are commonly referred to as "maximum achievable control

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[3] National Research Council, *Toxicological Effects of Methylmercury*, 4 (2000); EPA, *Mercury Study Report to Congress*, 2-5, 2-6 (Dec. 1997); UNEP, *Global Mercury Assessment*, 38–39 (Dec. 2002).

[4] National Research Council, *id.*

[5] *Id.*; EPA, *Mercury: General Information* (July 1, 2002) (available online at http//www.epa.gov/mercury/information.htm#questions).

[6] National Research Council, *supra* note 3; UNEP, *supra* note 3, at 41.

[7] UNEP, *supra* note 3, at 35.

[8] EPA, *supra* note 3, at 2-6.

[9] EPA, *Overview of the Utility MACT Development and Issues* (Mar. 7, 2003) (briefing for Congressional staff).

[10] *Id.*; EPA, *America's Children and the Environment: Measures of Contaminants, Body Burdens, and Illnesses*, 59 (Feb. 2003) (EPA 240-R-03-001).

technology" or MACT standards. For coal-fired power plants, the most significant hazardous air pollutant is mercury. Pursuant to a court-approved settlement agreement, EPA must issue a proposed MACT rule for hazardous air pollutants from utilities by December 15, 2003. Furthermore, EPA must finalize the rule by December 15, 2004, and utilities must comply with the rule by December 15, 2007.

This rule will for the first time require controls of mercury emissions from coal-fired power plants, which are the largest source of anthropogenic mercury emissions in the United States and contribute approximately one-third of annual mercury emissions.[11]

C. Stakeholder Process

Before beginning the rulemaking process, EPA recognized that promulgating a utility MACT standard would be a significant and potentially controversial rulemaking that would attract substantial public interest. In June 2000, EPA committed to solicit and consider the ideas and comments of the groups affected by this regulatory process.[12] Subsequently, EPA has engaged in an extensive process to develop and use input from states, tribes, local governments, industry representatives, and environmental representatives throughout the development of the rule. This process has been carried out under the auspices of the Working Group on the Utility MACT, formed under the Clean Air Act Advisory Committee Subcommittee for Permits/New Source Reviews/Toxics.[13]

As stated in the charge to the Working Group, the overall goal of the Working Group is to provide input to EPA regarding federal air emissions regulations for coal- and oil-fired electric utility steam-generating units that will maximize environmental and public health benefits in a flexible framework at a reasonable cost of compliance, within the constraints of the Clean Air Act.[14] 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."[15]

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[11] EPA, *supra* note 9.

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

[13] 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) (draft) (available online at http://www.epa.gov/ttn/atw/combust/utiltox/draft_charge_process.pdf).

[14] *Id.* at 4.

[15] *Id.* at 3.

The Working Group has met 14 times to date.[16] While the initial intent was for the Working Group to develop consensus recommendations, that did not prove possible.[17] However, the Working Group has done extensive work identifying technical and policy issues, thoroughly discussing these issues, and clearly identifying the various stakeholder positions on each issue.[18] In October 2002, the Working Group presented a report to EPA laying out eight key issues for the rulemaking and the stakeholder positions on each of these issues, including recommended approaches for setting the MACT standard.[19] Since October, the Working Group has continued to build upon this work, last meeting on March 4, 2003. Although EPA has promised at least one if not more further meetings, none have been scheduled to date.

II. MERCURY CONTROL OPTION ANALYSIS

A. Purpose of IPM Analysis of Mercury Control Options

Conducting an Integrated Planning Model (IPM) analysis of the control options identified by the stakeholders is an important step in the rulemaking process for the utility MACT rule. IPM is an electric utility planning model that EPA uses to estimate air emission changes, emission control technology choices, incremental electric power system costs, changes in fuel use and prices, and other impacts of various approaches to air pollution control.[20] IPM simulates how the utility industry would respond to an air pollution control requirement by selecting the least-cost compliance options for a set of model plants representing all of the power plants in the United States. IPM indicates where in the country control technology would be applied, the resulting emissions reductions, the costs of the technology, changes in fuel use, any resulting shifts in generation costs, and other effects.

The results of an IPM run are then fed into EPA's air quality models to project what a specified emissions control requirement will produce in terms of air quality effects and, in this case, the quantities and location of mercury deposition.

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[16] *See* EPA, *Electric Utility Steam Generating Units Section 112 Rulemaking* (online at http://www.epa.gov/ttn/atw/combust/utiltox/utoxpg.html#MAC).

[17] Working Group for the Utility MACT, Formed Under the Clean Air Act Advisory Committee, Subcommittee for Permits/New Source Reviews/Toxics, *Recommendations for the Utility Air Toxics MACT, Final Working Group Report*, 3 (Oct. 2002).

[18] *Id.*

[19] *Id.*

[20] EPA, *Integrated Planning Model (IPM)* (online at http://www.epa.gov/capi/).

Every major EPA analysis of a rule or legislation related to the power sector over the past eight years has relied upon IPM analysis. These include the Ozone Transport Assessment Group process, the NOx SIP call, and most recently CSI.

B. Issues Regarding IPM Model's Simulation of Mercury Controls

The Working Group process has addressed the need for technical adjustments to the IPM model. In May 2002, EPA heard recommendations from various members of the Working Group regarding adjustments to the IPM model.[21] In June 2002, EPA issued a memo indicating how it planned to address such recommendations and the timeframe for such actions.[22] In July 2002, EPA received further feedback from Working Group members on the proposal for addressing the recommendations.[23] For example, the environmental representatives made recommendations for input assumptions on the effectiveness of certain mercury control technologies, particularly when applied to facilities combusting subbituminous and lignite coals.[24] They also urged EPA to update the model to incorporate the latest findings on control technology demonstrations, particularly with respect to activated carbon injection.[25]

C. Cancellation of Planned IPM Analysis

EPA has indicated that the next step in EPA's intended rulemaking development process is to analyze regulatory alternative control options. The members of the Working Group have expended substantial effort in developing their recommendations for these options.

Initially, EPA planned to conduct this analysis far earlier in the utility MACT rulemaking process. The proposed regulatory development schedule included in the charge to the Working Group stated that EPA would conduct overall economic impacts and benefits analyses of regulatory alternatives from June through August 2002.[26] After a period for the Clean Air Act Advisory Committee to consider the alternatives and provide recommendations to EPA by February 2003, the schedule provided that EPA would select the proposed regulatory alternative or alternatives in March 2003, and EPA would draft and review the proposed rule from April

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[21] *See* EPA, *Clean Air Act Advisory Committee, Permits/New Source Review/Air Toxics Subcommittee, Utility MACT Working Group, Suggested Additional IPM Analysis 06/18/02* (June 18, 2002) (memo).

[22] *Id.*

[23] National Wildlife Federation et al., *Comments on EPA's Suggested Modifications to IPM Modeling Analysis (dated 6/18/02)* (July 9, 2002).

[24] *Id.*

[25] *Id.*

[26] Clean Air Act Advisory Committee, *supra* note 13.

through August 2003.[27] OMB would review the draft proposal through November 2003, allowing the Administrator to sign the proposal by December 15, 2003.[28]

While the initial target date for conducting this analysis slipped substantially, as of earlier this year EPA planned to conduct the analysis in time for the Working Group meeting on March 4, 2003.[29] When EPA failed to complete the analysis by that date, EPA informed the stakeholders that EPA would conduct the analysis prior to a scheduled April 15 meeting of the Working Group. EPA said it would present the results of this analysis at that meeting.[30] EPA also stated that at that meeting it would present to the Working Group the changes EPA had made to the IPM model.[31]

Instead, EPA did not conduct the analysis and cancelled the April 15 meeting. EPA still has not informed the Working Group of how the agency has responded to the recommendations for modifications to the IPM model that stakeholders made during the summer of 2002, or of any other changes that EPA has made to the model. EPA also has not scheduled another meeting of the Working Group.

In addition, there does not appear to be any internal agency deadline for conducting the IPM analysis of utility MACT options. Assistant Administrator Holmstead has reportedly stated that conducting modeling for the CSI is "higher priority" than modeling for the utility MACT rule.[32]

EPA's deviation from its announced plan to conduct this important analysis is sudden and inexplicable. It is simply not credible for EPA to point to resource constraints in this instance, as Assistant Administrator Holmstead is reportedly doing.[33] While agency resources are undoubtedly constrained due to the Bush Administration's budget cuts, EPA is apparently running the IPM model for CSI. There is no reason why further analysis of CSI should take precedence over the utility MACT rule. EPA has been conducting analyses of the CSI for over two years, and the agency has completed dozens of runs analyzing variations on CSI options.

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[27] *Id.*

[28] *Id.*

[29] *EPA Delays Mercury Rule Estimates in Favor of Clear Skies Analysis*, *supra* note 1.

[30] E-mail from Bill Maxwell, EPA, to Utility MACT Working Group members (Mar. 19, 2003).

[31] *Id.*

[32] *EPA Delays Mercury Rule Estimates in Favor of Clear Skies Analysis*, *supra* note 1.

[33] *See EPA Delays Mercury Rule Estimates in Favor of Clear Skies Analysis*, *supra* note 1.

Yet to date, EPA has released no analysis of the identified utility MACT regulatory options, and it is unclear whether EPA has conducted any analysis of these options. Moreover, there is no legal deadline for additional CSI work, in contrast to the utility MACT rule.

Viewed in the larger political context, it appears that the Bush Administration has a strong incentive to delay release of information on the utility MACT regulatory options. The Administration has been engaged in a public relations battle to publicize and support its assertion that the CSI represents an environmental improvement over, and not a rollback of, the existing Clean Air Act.[34] Most of the utility MACT regulatory options identified by the stakeholders would result in a greater quantity of emissions reductions and all of them would produce these emissions sooner than CSI would, if it is enacted.[35] Information on the costs and benefits of most of the utility MACT options seems unlikely to help the Administration make its case for CSI.

CSI is the Administration's own initiative, with no deadline, while the utility MACT rule was required by Congress under existing law, is already past the statutory deadline, and is now required under a court-approved deadline. There is no legal or policy-related justification for deferring the utility MACT modeling in favor of CSI modeling. To the extent that the modeling delay may be in furtherance of the White House's political agenda, the delay is even more troubling.

D. Effect of Continued Failure to Perform Analysis

At this point, EPA's continued failure to reconvene the Working Group and to conduct the IPM analysis threatens the timing and substance of the utility MACT rule, as well as the achievement of significant reductions of mercury emissions from power plants. This analysis is not a legal prerequisite to EPA's identification of the minimum level at which it may set the MACT standard (known as the "MACT floor") under section 112 of the Clean Air Act, as the MACT floor is a technology-based standard.[36] EPA's failure to perform such analysis would in no way justify delaying issuance of the utility MACT rule proposal beyond the court-enforceable deadline. Nonetheless, if EPA fails to complete this analysis soon and falls further behind schedule in drafting the proposal, EPA may well try to make the bootstrap argument that the analysis is necessary and therefore the agency needs more time for the rulemaking. Moreover, the IPM analysis will provide critical information, both for understanding the effects of the

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[34] *See, e.g., Mercury Rising*, Philadelphia Inquirer (Mar. 7, 2003); *Breathe Deeply*, Washington Post (Mar. 2, 2003); *A Pallid Clean Air Plan*, New York Times (July 31, 2002); *Cloudy Skies*, New York Times (Apr. 28, 2002); *A Too-Dirty Clean Air Plan*, Los Angeles Times (Feb. 18, 2002) (editorials criticizing the Clear Skies Initiative).

[35] *See* NESCAUM, *supra* note 2.

[36] *See* 42 U.S.C. § 7412(d)(3).

options recommended by the stakeholders and for informing Congress regarding the level of mercury reductions and environmental effects that may be achieved under the utility MACT rule. In addition, EPA likely must complete this or comparable analysis to comply with Executive Order 12866 prior to issuance of the proposal.

Considering practical constraints, it is clear that EPA is already in danger of missing a court-approved deadline. Working backward from the December 15 deadline, EPA must provide the draft rule to OMB by the end of August 2003 to allow OMB its mandated 90 days to review the draft prior to issuance. As you know well, staff drafting and management review commonly take many months, particularly for a technically complex rule such as this one. Assuming a minimum timeframe of several months to draft and review the rule internally, it appears that EPA should begin this process immediately, and certainly no later than June. Before the bulk of the drafting begins, EPA management must select the regulatory alternative to propose. To the extent that EPA believes it would be helpful to have information on technology options, costs, air quality and environmental effects, and other factors, EPA must conduct the analysis now.

III. QUESTIONS

We would appreciate your response to the following questions regarding EPA's planned activities on the utility MACT rule:

1. Is EPA committed to continuing the stakeholder process for the utility MACT rule? If so, when will EPA reconvene the Working Group and present to the Working Group a description and explanation of any changes EPA has made to the IPM model? If not, why is EPA abandoning this process for maximizing public involvement in this controversial and important rulemaking?

2. Will EPA model mercury control levels identified by the environmental and state stakeholders (as specifically recommended in the Working Group report or as subsequently updated by the stakeholders)?

3. If EPA commits to complete this modeling, by what date will EPA complete it and present the results to the stakeholders?

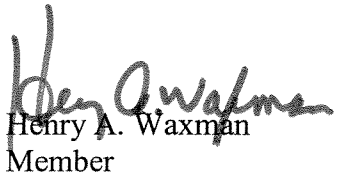
4. Is EPA committed to meeting the court-approved deadline of December 15, 2003, for issuing the proposal regardless of the status of EPA's modeling efforts? Please provide EPA's current schedule (with dates) for completing: all analyses EPA is planning to conduct; management decisions on regulatory options; a staff draft of the proposal; intra-agency review of the proposal; and submission to OMB.

5. In making the decision to postpone this analysis, did EPA officials consult with Administration officials outside of EPA, such as officials from the White House

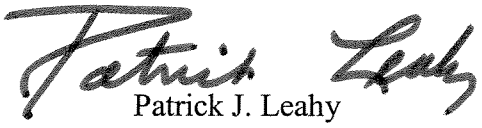
(including the Council on Environmental Quality and the Office of Management and Budget), DOJ, and DOE? If so, which entities were consulted and what did they recommend? Did EPA officials consult with any of the stakeholders represented on the utility MACT Working Group? If so, which entities were consulted and what did they recommend?

We would appreciate receiving a response to this letter by June 2, 2003, as this is a time-sensitive and urgent matter.

Sincerely,



Henry A. Waxman
Member
U.S. House of Representatives



Patrick J. Leahy
Senator
U.S. Senate

Thomas H. Allen
Member
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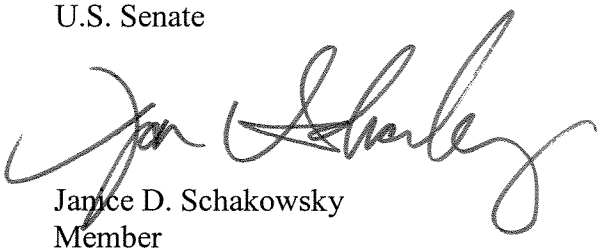

Janice D. Schakowsky
Member
U.S. House of Representatives