

**U.S. Environmental Protection Agency
Public Hearing on the Proposed Revised Supplemental Finding
for the Mercury and Air Toxics Standards and Results of the
Residual Risk and Technology Review,
84 Fed. Reg. 2670 (Feb. 7, 2019), Docket ID No. EPA-HQ-OAR-
2018-0794**

**March 18, 2019
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INTRODUCTION

Good morning. My name is Jillian Riley, and I am an Assistant Attorney General in the Environmental Protection Division of the Office of Massachusetts Attorney General Maura Healey.

The Commonwealth of Massachusetts and twenty-three other states and local governments have long worked together to support federal regulation of power-plant pollution. I appreciate the opportunity to comment on the U.S. Environmental Protection Agency’s (“EPA”) proposal to reverse its previous findings that it is “appropriate and necessary” to regulate coal- and oil-fired power plants under section 112 of the Clean Air Act, and to determine instead that the costs of regulating outweigh the benefits.¹

Nearly twenty years ago, EPA first determined that it was indeed “appropriate and necessary” to regulate power plants under section 112(n)(1)(A) of the Clean Air Act. EPA affirmed that determination in 2012, and again in 2016, when it issued its Supplemental Finding that, taking costs into account as instructed by the Supreme Court in *Michigan v. EPA*,² it remained “appropriate and necessary.” EPA was correct in those determinations—as the American Lung Association has found, coal-fired power plants produce more hazardous air pollution than any other industrial pollution source.³

The Mercury and Air Toxics Rule⁴ has been in effect since 2015, delivering public health benefits by reducing hazardous air pollutant emissions, as well as particulate matter pollution, which poses a substantial health hazard. The Rule has had no adverse impacts on ratepayers or electric system reliability.

I will make three key points in my comments today.

- First, the Clean Air Act is clear that EPA lacks power to reconsider its regulation of power plants under section 112 unless EPA can demonstrate that emissions of hazardous

¹ See 42 U.S.C. § 7412.

² *Michigan v. EPA*, 135 S. Ct. 2699 (2015),

³ See American Lung Association, *Toxic Air: The Case for Cleaning Up Coal-fired Power Plants* (March 2011), <https://www.lung.org/assets/documents/healthy-air/toxic-air-report.pdf>

⁴ National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012)

air pollutants from those sources do not exceed certain thresholds established by Congress, which EPA has failed to do.

- Second, federal standards limiting mercury and other hazardous air pollution are critical to protect human health, natural resources, and the economy of Massachusetts and other states, and should not be left vulnerable by EPA’s reversal of the appropriate and necessary finding.
- Third, EPA’s proposed revised finding disregards fundamental economic principles and the direction of the U.S. Supreme Court in *Michigan* by turning a blind eye to the actual costs and benefits. As a result, EPA’s proposed action would contravene both *Michigan* and EPA’s statutory mandate to protect public health and the environment from air pollution.

For all of these reasons, we urge EPA to withdraw its unlawful proposal.

I. EPA’S HAS NO AUTHORITY TO REVERSE THE APPROPRIATE AND NECESSARY FINDING

The proposal is unlawful for multiple reasons. To start, EPA has no power to reverse its “appropriate and necessary” finding. Outside of a court order to do so, the Clean Air Act expressly prohibits EPA from reconsidering its finding unless EPA can demonstrate that power plants no longer pose an unacceptable risk to human health or the environment.⁵ EPA is not proposing to make such findings here—and indeed, the Proposal itself and extensive record evidence before EPA indicates that EPA cannot do so.

EPA has failed to explain how its new interpretation, which jeopardizes the well-being of the public, “is rationally related to the goals of the Clean Air Act.”⁶

II. NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTION ARE CRITICAL TO PROTECT HUMAN HEALTH AND STATE NATURAL RESOURCES AND ECONOMIES

Mercury and other hazardous air pollution are sources of continuing and substantial harm to our residents’ health, our natural resources, and our state economies. Sensitive and exposed populations, such as children and subsistence fishing communities, are especially vulnerable to the health harms of mercury pollution.⁷

⁵ See 42 U.S.C. § 7412(c)(9).

⁶ *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011); See also 42 U.S.C. § 7401(b)(1) ([purpose is] “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population . . .”)

⁷ 77 Fed. Reg. at 9347, 9441; See also, 76 Fed. Reg. at 25,018 (Children are also particularly vulnerable to other hazardous air pollution from power plants, including emissions of mutagenic carcinogens, like hexavalent chromium, and acid gases.).

Mercury pollution from power plants in our lakes and rivers limits our residents' ability to enjoy recreational and commercial fishing and hurts local economies. All fifty states have mercury-related fish consumption advisories in place⁸ and nearly 73,000 river and stream miles, and 8 ½ million acres of lakes, reservoirs, and ponds, nationwide are impaired under the Clean Water Act.⁹ Mercury contamination reduces the billions of dollars in economic benefit derived from our fisheries.¹⁰

The federal standards decrease these harms to our residents' health, our environment, and our state economies. Rescinding the appropriate and necessary determination would make these important standards more vulnerable to legal attack.

III. EPA'S PROPOSAL IGNORES IMPORTANT PUBLIC HEALTH BENEFITS AND ACTUAL COSTS OF COMPLIANCE

Even if EPA had authority to revise its finding—and it does not—the proposed revised finding lacks any basis in the facts or the law. EPA disregards the purpose of the Clean Air Act, fundamental economic principles, and the direction of the U.S. Supreme Court in *Michigan* by failing to consider all relevant costs and benefits of reducing power-plant emissions.

The proposal ignores the numerous unquantifiable health benefits from reducing mercury emissions and the unavoidable benefits of preventing thousands of premature deaths from harmful particulate matter emissions. The Proposal does not even account for the actual full scope of *quantifiable* benefits, such as new data on mercury contamination of saltwater fisheries.¹¹

EPA's proposal also disregards the actual costs of the compliance investments made by the electric power sector—which were far below EPA's initial estimate¹²—and fails to consider the

⁸ U.S. EPA, 2011 National Listing of Fish Advisories 4 (2013), <http://water.epa.gov/scitech/swguidance/fishshellfish/fishadvisories/loader.cfm?csModule=security/getfile&PageID=685927> (last visited Mar. 15, 2019).

⁹ U.S. EPA, National Summary of Impaired Waters and TMDL Information (summary tables of causes of impairment in assessed rivers and streams and lakes, reservoirs, and ponds), *available at* http://iaspub.epa.gov/tmdl_waters10/attains_nation_cy.control#total_assessed_waters (last visited Mar. 15, 2019). Fourteen states have developed of state- or region-wide “total maximum daily loads” (TMDLs) in order to meet Clean Water Act water quality standards.⁹

¹⁰ Nationwide, more than 30 million freshwater anglers contributed \$29 billion to the states' economies through fishing trip and equipment expenditures in 2016.

¹¹ Cross et al., *Decadal Declines of Mercury in Adult Bluefish (1972-2011) from the Mid-Atlantic Coast of the U.S.A.*, 49 *Environ. Sci. Technol.* 9064-9072 (2015); *see also* Brian Bienkowski, *Cleaner Bluefish Suggest Coal Rules Work*, *Scientific American* (Jul. 20, 2015), *available at* <http://www.scientificamerican.com/article/cleaner-bluefish-suggest-coal-rules-work/>.

¹² *White Stallion Energy Center, LLC v. EPA*, D.C. Circuit Case No. 12-1100, Mot. of Industry Resp't Intervenors to Govern Future Proceedings, filed Sept. 24, 2015, Decl. of James E. Staudt, ¶¶ 5-16.

costly uncertainty that the proposal creates for the power sector and electric ratepayers, which have invested in air pollution controls, as well as the states and cities that depend on nationwide emission standards to reduce harmful pollution.

By relying on a stale record with inaccurate health data and inflated cost projections, EPA's proposal defies *Michigan*'s demand that agencies "pay[] attention to the advantages and the disadvantages" in its decision making.¹³

CONCLUSION

For all of those reasons, we urge EPA to withdraw its misguided and unlawful proposal to reconsider its "appropriate and necessary" finding. Thank you.

¹³ *Michigan*, at 2707.