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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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December 13, 2018

The Honorable Neomi Rao
Administrator
Office of Information and Regulatory Affairs
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Dear Administrator Rao:

I write with great concerns about the Environmental Protection Agency's (EPA) proposed reconsideration of the Mercury and Air Toxics Standards (MATS) Supplemental Finding (81 FR 24420, April 25, 2016). Your office received this reconsideration proposal for review on October 4, 2018. According to press reports,¹ EPA intends to propose to reverse its decision that it is "appropriate and necessary" to regulate mercury and toxic air pollution from coal- and oil-fired power plants. These reports indicate that, in arriving at that conclusion, the EPA is attempting to ignore or dismiss many of the MATS rule's public health benefits. If this is the case, this proposal should be rejected. It would contravene Congressional intent and endanger the health of all Americans.

Mercury and other air toxics (such as lead, arsenic, benzene, and acid gases) harm the public while airborne, and when they settle on the soil and in the waterways we depend on for the water we drink and fish we eat. These toxic substances, which are emitted by power plants, then build up in our bodies, causing cancer, respiratory illness, mental impairment, and death. Mercury pollution is especially dangerous for unborn children, who can suffer long-lasting neurological damage if exposed during development. According to the American Academy of Pediatrics, there is no safe level of mercury exposure for children—none.

After a long delay, in 2012 EPA issued the MATS rule to reduce emissions from power plants, our nation's largest sources of mercury and air toxics. The MATS rule was expected to reduce utility mercury emissions by 90% and other air toxic emissions by 50%. In the agency's 2011 cost-benefit analysis for the MATS rule, EPA estimated that the quantifiable benefits to public

¹ See, e.g., Stuart Parker, "EPA Sends Proposal to Reconsider MATS Rule for White House Review," INSIDE EPA, Dec. 11, 2018, <https://insideepa.com/clean-air-report/epa-sends-proposal-reconsider-mats-rule-white-house-review>.

health (including 11,000 fewer deaths each year) of the MATS rule far outweighed the estimated costs of compliance for the utility industry.²

The substance of the MATS rule survived court challenges, and remains on the books today. However, in the 2015 *Michigan vs. EPA* case, the Supreme Court ruled 5-4 that EPA should have considered costs when deciding whether it is was “appropriate and necessary” to regulate hazardous air emissions from power plants. Instead of vacating the MATS rule, the Court allowed the rule to stay in place while EPA addressed the Court’s concerns. In Justice Scalia’s majority opinion, he wrote: “We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.”³

In April 2016, in response to *Michigan vs. EPA*, EPA issued the MATS “Supplemental Finding.” That finding reconfirms that it is “appropriate and necessary” to regulate hazardous emissions from power plants under Section 112 of the Clean Air Act.⁴ EPA reiterated its conclusion after considering “the full range of factors relevant to the appropriate and necessary finding.”⁵ In coming to this conclusion, EPA reviewed the industry’s compliance costs (*e.g.*, revenue, consumer costs, capital expenditures, operation costs, etc.) based on data provided for the Regulatory Impact Analysis (RIA). EPA also reviewed all the health and environmental benefits, including those that “are impossible, to quantify or monetize, but are no less real than any other advantage of regulation.”⁶

Despite the MATS rule’s overwhelming public health benefits, former-Administrator Scott Pruitt announced in 2017 that EPA would reconsider the April 2016 MATS Supplemental Finding. OMB’s Regulatory Review Dashboard shows that your office is currently reviewing EPA’s proposal to reconsider those determinations.⁷ Based on public comments made by EPA Assistant Administrator Wehrum—both when he was a private citizen representing clients that opposed the MATS rule and supported a reconsideration of the MATS Supplemental Finding, and now in his official capacity at EPA—I believe the agency has decided to make a legal finding that it is no longer appropriate and necessary to regulate power plant air toxic emissions. Further, Mr. Wehrum’s comments suggest that EPA is making such a finding based on a limited view of the benefits from the MATS rule. It is my understanding that EPA has determined that it will only consider quantifiable costs and benefits of reducing hazardous air pollutants, not all the actual benefits. If true, this blatant attempt to undermine the MATS rule would contradict longstanding EPA practice, OMB requirements, Congressional intent, and common sense.

² U.S. EPA. 2011. *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*. Office of Air Quality Planning and Standards, Research Triangle Park, NC. EPA-452/R-11-011. Docket ID No. EPA-HQ-OAR-2009-0234-20131.

³ *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2711 (2015).

⁴ *Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units*, 81 Fed. Reg. 24,419 (Apr. 25, 2016).

⁵ *Id.* at 24,429.

⁶ *Id.*

⁷ US EPA-OAR, *Mercury and Mercury and Air Toxics Standards for Power Plants Residual Risk and Technology Review and Cost Review*, Regulation Identifier No. 2060-AT99, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=2060-AT99>.

EPA should not to turn a blind eye to the societal benefits of the MATS rule that cannot easily be reduced to dollars and cents. Economic tools for projecting and estimating costs and benefits are always evolving and they work better in some situations than others. For example, EPA has good health, exposure, and mortality data that can translate to monetized health benefits for criteria air pollutants like ozone and particulate matter. Yet, EPA has struggled for over four decades to precisely monetize the health benefits of controlling air toxics such as mercury. EPA explains that difficulties in monetizing the health benefits of controlling mercury arise because: “the adverse health effects of toxics are often irreversible, not mitigated or eliminated by reduction in ongoing exposure, and involve particularly painful and/or protracted disease. Therefore these effects are not readily studied and quantified in human clinical studies, in contrast to, for example, ambient ozone.”⁸

Congress, EPA, and OMB have long recognized that if EPA cannot quantify the benefits that does not mean those benefits do not exist. When Congress wrote and passed the 1990 Clean Air Amendments—including Section 112(n)—there were few, if any, quantifiable data available on cancer risks of air toxics and no quantifiable data whatsoever available for non-cancer risks, like birth and neurological defects.⁹ Despite the lack of quantifiable benefits, Congress still found it necessary to require EPA to pursue robust regulations to address major sources of air toxics emissions. At the same time, Congress indicated that it was well aware of the limitations of relying exclusively on cost-benefit analyses when assessing air toxics, stating: “[T]he public health consequences of substances which express their toxic potential only after long periods of chronic exposure will not be given sufficient weight in the regulatory process when they must be balanced against the present day costs of pollution control and its other economic consequences.”¹⁰ Based on this legislative history, it is clear Congress did not intend for EPA to ignore public health benefits that could not be quantified into dollars when determining if it is “appropriate and necessary” to regulate power plant air toxic emissions. Congress also did not intend for EPA to ignore co-benefits that *can* be monetized.

The scientific information critical to determining the monetized value of reducing air toxic pollution is still limited. This has resulted in some of the most important benefits (including reduced incidents of birth defects and cancer) not being able to be quantified in EPA’s cost-benefit analyses for air toxic rules. In 2003, then-EPA Assistant Administrator for Air and Radiation Jeff Holmstead testified before the House Energy and Commerce Committee on the difficulty of quantifying the benefits of reducing air toxic emissions from power plants, saying: “These estimates [for Clear Skies] do not include the many additional benefits that cannot currently be monetized but are likely to be significant, such as human health benefits from reduced risk of mercury emissions, and ecological benefits from improvements in the health of our forests, lakes, and coastal waters.”¹¹

⁸ U.S. EPA. 1997. *The Benefits and Costs of the Clean Air Act, 1970 to 1990, EPA Report to Congress. Office of Air Quality Planning and Standards*, Research Triangle Park, NC. EPA-410/R-97-002, https://www.epa.gov/sites/production/files/2017-09/documents/ee-0295_all.pdf.

⁹ Legislative History 1990 Clean Air Act Amendments, H.Rept 101-490 Part 1, 101st Congress (1989-1990).

¹⁰ Legislative History 1990 Clean Air Act Amendments, S.Rept 101-228, 101st Congress (1989-1990).

¹¹ Statement of EPA Assistant Administrator Jeff Holmstead, Hearing Before the U.S. House of Representatives Energy and Air Quality Subcommittee of the House Energy and Commerce Committee entitled “The Clear Skies

EPA has tried to bridge the air toxic data gaps through various stakeholder workshops over the years. The latest workshop in 2009 concluded that monetizing all air toxic benefits is still not possible, making a cost-benefit analysis “difficult” to do for any action involving hazardous air pollutants: “[F]or many chemicals on the [Clean Air Act hazardous air pollutant] list, the information on potential health effects is so limited that quantitative benefits analysis is not feasible... This lack of information is in contrast to the criteria air pollutants for which there is extensive human exposure or epidemiological data on the health effects at ambient-exposure levels... characterizing the health effects of air toxics at ambient levels can be subject to a very high level of uncertainty; thus, using these health effects in economic benefits assessment is difficult.”¹²

Fortunately, OMB has long-recognized the constraints of using cost-benefit analysis when evaluating a rule, especially when it is difficult to quantify benefits. That is why OMB’s 2003 Circular A-4 requires EPA and other agencies to conduct a complete regulatory analysis that “includes a discussion of non-quantified as well as quantified benefits and costs. When there are important nonmonetary values at stake, you should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs.”¹³ In addition, OMB clarifies in Circular A-4 that all ancillary benefits should be counted in any rule analysis, directing agencies to “look beyond the direct benefits and direct costs of your rulemaking and consider any important ancillary benefits and countervailing risks. An ancillary benefit is a favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking.” OMB also states that when agency personnel “can estimate the monetary value of some but not all of the ancillary benefits of a regulation, but cannot assign a monetary value to the primary measure of effectiveness, you should subtract the monetary estimate of the ancillary benefits from the gross cost estimate to yield an estimated net cost.”¹⁴

For decades, and in multiple Administrations, EPA has followed OMB’s direction by providing a robust record of *all* the quantifiable and qualitative data for air toxic rules. The Congressional Research Service has found that, since January 1, 2000, EPA has issued at least thirty-two Regulatory Impact Analyses (RIAs) for rules that involve regulating air toxics under Section 112(d) of the Clean Air Act, including the MATS rule. None of these thirty-two RIAs fully quantified the direct benefits of reducing hazardous air pollutants, yet the rules discuss benefits that cannot be quantified as important justifications for reducing the toxic emissions—particularly those regarding critical health benefits. For the MATS rule specifically, EPA concluded “there are some costs and important benefits that EPA could not monetize, such as other mercury reduction benefits and those for the [hazardous air pollutants] other than mercury

Initiative: A Multipollutant Approach to the Clean Air Act,” (July 8, 2003), https://archive.epa.gov/ocir/hearings/testimony/108_2003_2004/web/pdf/2003_0708_jh.pdf.

¹² Gwinn et al, “Meeting Report: Estimating the Benefits of Reducing Hazardous Air Pollutants—Summary of 2009 Workshop and Future Considerations,” *Environ Health Perspectives*. 2011 Jan; 119(1): 125–130, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3018491/>.

¹³ 68 FR 58366.

¹⁴ *Id.*

being reduced by this final rule. Upon considering these limitations and uncertainties, it remains clear that the benefits of the MATS are substantial and far outweigh the costs.”¹⁵

In these thirty-two RIAs, EPA also provided monetized ancillary benefits, sometimes referred to as “co-benefits.” These co-benefits included the dollar value of lives saved and other health benefits from the reduction of sulfur dioxide and ozone pollution that occurs along with—and often as a result of—the reduction of air toxics. EPA found that the quantified ancillary benefits for MATS are significant, up to \$90 billion in benefits per year.

Based on all the health and scientific data, Congressional intent, and historical justification and precedent, it just does not make sense for EPA to change course regarding the consideration of non-quantifiable benefits in its Supplemental Finding for MATS. No judicial or legislative directive requires this willful blindness to the public health consequences of EPA’s proposal. This decision is especially peculiar given that MATS is resulting in faster and significantly more cost-effective public health benefits than EPA initially predicted in 2011. On July 10, 2018, every major electrical utility trade organization representing coal-fired and other utilities joined with labor organizations in a letter to EPA that confirmed our power plants have already “reduced mercury emissions by nearly 90 percent over the past decade.”¹⁶ These reductions are in large part due to the investments that were made to comply with MATS—investments that turned out to be about one-quarter the costs EPA conservatively predicted. The utilities and labor organizations explained that industry compliance with the MATS rule was easier than first estimated, stating that today “all covered plants have implemented the regulation [MATS] and that pollution controls—where needed—are installed and operating.”¹⁷ The letter went on to cite the importance of regulatory certainty given all the investments made to meet the MATS rule and asked EPA to “leave the underlying MATS rule in place and effective.”¹⁸

My hope is that OMB will ensure that EPA follows Congressional intent under the Clean Air Act when it comes to determining if it is “appropriate and necessary” to regulate air toxic emissions from power plants. If EPA looks at all the actual benefits and updated costs of this rule instead of persisting in its tortured effort to re-define its own legal authority and responsibility, there is no reasonable conclusion other than that it is appropriate and necessary to regulate these dangerous power plant emissions under Section 112 of the Clean Air Act. I echo the call of health and environmental groups, states and the business community: Keep the entirety of the MATS rule in place.

¹⁵ U.S. EPA. 2011. *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*. Office of Air Quality Planning and Standards, Research Triangle Park, NC. EPA-452/R-11-011. Docket ID No. EPA-HQ-OAR-2009-0234-20131.

¹⁶ Letter to USEPA Assistant Administrator of Office of Air and Radiation William Wehrum from The Edison Electric Institute, The American Public Power Association, The National Rural Electric Cooperative Association, The Clean Energy Group, The Class of ‘85 Regulatory Response Group The International Brotherhood of Electrical Workers The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, July 10, 2018, can be found at https://www.eenews.net/assets/2018/07/11/document_gw_04.pdf. Hereafter “2018 Industry Letter to EPA.”

¹⁷ *Id.*

¹⁸ *Id.*

I thank you for your prompt attention to this matter. If you or your staff have questions about this letter, your staff is encouraged to contact Laura Gillam of my Environment and Public Works Committee staff at laura_gillam@epw.senate.gov.

With best personal regards, I am,

Sincerely yours,


Tom Carper
Ranking Member