ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460
Attention: Docket No. EPA-HQ-OAR-2018-0794

Midwest Environmental Organizations' Comments on National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 84 Fed. Reg. 2670, Docket No. EPA-HQ-OAR-2018-0794

The Environmental Law & Policy Center,[1] Alliance for the Great Lakes, Friends of the Chicago River, Hoosier Environmental Council, Iowa Environmental Council, and Respiratory Health Association strongly oppose the United States Environmental Protection Agency's (EPA) proposed reversal of the finding that it is "appropriate and necessary" to regulate mercury and other hazardous air pollutant (HAP) emissions of Coal- and Oil-Fired Electric Utility Steam Generating Units (EGUs) under Section 112 of the Clean Air Act. Our organizations, which collectively have thousands of members, work throughout the Midwest and Great Lakes states to protect public health and the environment from air pollution and toxic threats like mercury.

This proposed reversal is bad policy on numerous levels, contrary to law, and imperils the positive impacts of the Mercury and Air Toxics Standards (MATS), which EPA promulgated on the basis of the appropriate and necessary finding it made in 2012 and affirmed in 2016. EPA does not provide a sufficient, reasonable explanation for why its proposed reversal completely contradicts its previous findings— nor can it, because there is no basis for such a departure.

The proposed reversal rests on a legally flawed cost-benefit analysis that ignores billions of dollars of annual health benefits that are already being realized. For the costs and benefits that it *does* consider, EPA uses outdated figures instead of the actual costs and benefits that have occurred since the MATS were implemented. The Edison Electric Institute and many power plant owners and operators are likewise asking EPA to leave the MATS in place because they have already complied with the standard, sought recovery of their compliance costs, and improved air quality. In short, there is no compelling need or reasoned justification to reverse the appropriate and necessary finding, or to rescind the MATS.

[1] The Environmental Law & Policy Center has also joined in the Joint Comments of Environmental and Public Health Organizations.

Recalculating regulatory benefits using 2011 data and predictions, instead of real-world data that is available from several years of successful implementation, is an unprincipled and unjustified academic exercise. EPA's stated view is that it must consider only the record before the Agency in 2011 in responding to the Supreme Court's direction, but the clear intent of the proposed rule is not to protect public health or the environment or to provide an industry much-needed certainty. Instead, the proposed rule is a vehicle for EPA to finalize its preferred approach to doing cost-benefit analysis—an approach that sets the stage to change EPA rulemaking across the board, such that whenever a rule or program delivers multiple benefits, the health benefits side of the equation would be missing a crucial variable. EPA's approach of doing cost-benefit analysis with blinders on also ignores the fact that reducing multiple pollutants at the same time, with the same set of compliance activities, is efficient for the regulated community.

Mercury pollution threatens the health and economy of the Midwest. The region is home to many coal-fired plants that emit mercury and to the Great Lakes and many smaller lakes and rivers into which that mercury deposits. Through rain, snow, or dry deposition, mercury can deposit either directly into waterbodies or indirectly into waterbodies via groundwater seepage through plants and soil.[2] Once in water, mercury chemically transforms into methylmercury, which is readily taken up first by plant and then by animal life.[3] It moves up the food chain to ultimately be consumed by people. When inhaled or ingested by humans, mercury can cause severe neurological damage, cardiovascular harm, endocrine disruption, kidney damage, and muscle coordination issues.[4] When pregnant women are exposed, their babies can suffer IQ and motor skills impairments that will last their lifetime.[5] State public health officials continue to issue mercury advisories warning people to limit their intake of fish from most of the Great Lakes and inland lakes and rivers in the Midwest.[6] The Great Lakes are the largest freshwater ecosystem on earth, containing approximately one-fifth of the world's freshwater supply. *About the Lakes*, GREAT LAKES FISHERY COMMISSION, https://www.glc.org/lakes/. The Great Lakes support

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[2] Woods Hole Oceanographic Institution, *Substantial Amount of Mercury Entering The Ocean Through Groundwater*, SCIENCEDAILY (March 22, 2007), https://www.sciencedaily.com/releases/2007/03/070321181643.htm.

[3] *Id.*

[4] *Public Health Statement for Mercury*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (March 1999), https://www.atsdr.cdc.gov/PHS/PHS.asp?id=112&tid=24#bookmark05.

[5] *Mercury Matters 2018: A Science Brief for Journalists and Policymakers*, HARVARD UNIVERSITY CENTER FOR THE ENVIRONMENT (Dec. 1, 2018), http://environment.harvard.edu/news/general/mercury-matters-2018-science-brief-journalists-and-policymakers.

[6] See, e.g., *Find the Advice for Eating Fish from Wisconsin Waters*, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, https://dnr.wi.gov/FCSExternalAdvQry/FishAdvisorySrch.aspx; *Current Fish Advisory Map*, ILLINOIS DEPARTMENT OF PUBLIC HEALTH, http://dph.illinois.gov/topics-services/environmental-health-protection/toxicology/fish-advisories/map; *Eat Safe Fish Guide: Southwest Michigan 2018*, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.michigan.gov/documents/mdch/MDCH_EAT_SAFE_FISH_GUIDE_-_SOUTHWEST_MI_WEB_455360_7.pdf; *Fish Consumption Advisory*, INDIANA STATE DEPARTMENT OF HEALTH, https://www.in.gov/isdh/23650.htm; *2018 Ohio Sport Fish Health and Consumption Advisory*, OHIO ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.ohio.gov/dsw/fishadvisory/index; *Fish Consumption Guidelines for Women Who Are or May Become Pregnant, and Children under Age 15, Lakes*, MINNESOTA DEPARTMENT OF HEALTH, https://www.health.state.mn.us/communities/environment/fish/docs/eating/specpoplakes.pdf; *Fish Consumption Advisories*, IOWA DEPARTMENT OF NATURAL RESOURCES, https://www.iowadnr.gov/Environmental-Protection/Water-Quality/Water-Monitoring/Fish-Tissue.

diverse populations of fish, wildlife, and plants, and provide drinking water for over 48 million people in the U.S. and Canada. *Id.* Commercial, recreational, and tribal fishing in the Great Lakes are valued at more than $7 billion annually. *The Fishery*, GREAT LAKES FISHERY COMMISSION, http://www.glfc.org/the-fishery.php. Mercury contamination, therefore, is of extreme concern to the businesses communities in the Great Lakes region.

We have five primary comments about the proposed reversal of the appropriate and necessary finding. We also respond specifically to EPA's numbered solicitations of comment below.

First, the agency has not provided a reasoned explanation for its change in policy. Agencies are required to provide a "reasoned explanation" when making policy changes. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). If a new policy rests upon findings which contradict those underlying the previous policy, yet the agency leaves that inconsistency unexplained, the proposed rule is arbitrary and capricious. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). EPA's conclusory explanations in the proposed rule fall short of its obligation to explain the inconsistencies between its prior appropriate and necessary finding and its current reversal of that finding.

Second, the proposed reversal rests on a legally flawed cost-benefit analysis. EPA's proposal rests on a new interpretation of the proper way to consider benefits and costs in determining whether regulation of HAP emissions from power plants is "appropriate": that only the quantifiable direct benefits of reducing emissions of air toxics should be weighed against regulatory costs. EPA asserts that this new approach, which goes against decades of Office of Management and Budget guidance and agency precedent, is the only legally correct interpretation of the Clean Air Act and the Supreme Court's direction in *Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015).

EPA should not ignore multiple quantifiable benefits (often called "co-benefits"), which occur as an inevitable side effect of the technology used to reduce HAP emissions. These indirect benefits, which come along for the ride, at no extra cost, include reductions in dangerous pollutants like particulate matter and sulfur dioxide that will avoid thousands of yearly heart attacks, hospitalizations, and premature deaths.[7] Furthermore, EPA's proposal distorts cost-benefit analysis in ways that no reasonable business would do. Savvy businesses try to achieve multiple benefits simultaneously when implementing new equipment or management practices, such as company wellness programs that improve employees' health while also holding down insurance costs.

Indeed, that's what the energy industry does when installing pollution control equipment to meet current regulatory standards. Coal plants maximize efficiency in reducing sulfur dioxide, nitrogen oxides, mercury, particulates, and other pollutants by finding a cost-effective combination of scrubbers, catalytic controls, and other approaches. Achieving simultaneous reductions in multiple pollutants is sound business practice and common sense.

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[7] *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, EPA-452/R-11-011, U.S. EPA, at ES-3 (Dec. 2011), https://www3.epa.gov/ttn/ecas/docs/ria/utilities_ria_final-mats_2011-12.pdf.

Third, the cost-benefit analysis ignores readily available current data, on both the cost and benefit sides. EPA is deliberately ignoring information it could use to update the costs and the benefits of the MATS. First, since the utility sector is universally now in compliance with the rule, EPA could gather information about the actual costs utilities have experienced. The information EPA had in front of it in 2011 when the MATS were finalized was for the most part projected costs, and appears to have overestimated the cost to industry (and ultimately ratepayers), as has frequently been the case with environmental programs. Second, since the MATS record was developed in the years leading up to its release in 2011, there have been more studies relevant to the understanding of the health effects of mercury exposure. These studies, which are identified by other commenters, indicate that the quantifiable benefits of the reductions of air toxics from utilities are significantly higher than EPA estimated in 2012 and 2016. EPA should consider these studies, and incorporate the information, as appropriate, into the benefit analysis.

Fourth, the proposed reversal would create unneeded regulatory uncertainty. Although EPA asserts it is not currently proposing to rescind the MATS or to remove EGUs from the list of source categories regulated under Section 112, the proposal asks for comments on alternative interpretations of law that would allow or obligate the agency to take one or both of those regulatory actions. Reversing the appropriate and necessary finding would also open the door to a third-party administrative petition or lawsuit seeking rescission. In either case, the proposed reversal would create exactly the kind of uncertainty industry wants to avoid. Indeed, companies with facilities regulated under MATS have asked EPA to leave the MATS in place because they are already complying: EGUs have already implemented the required control technology at a lower-than-anticipated cost[8] and have, in some cases, reduced mercury emissions to below the maximum amount allowable under the MATS.[9] The inevitable protracted litigation resulting from a rescission attempt would leave the electricity industry, an industry for which advanced planning is particularly crucial, in a state of business and regulatory uncertainty.

Fifth, if this action does lead to rescission of the MATS, public health would be adversely affected. EPA's data show that EGUs' total HAP emissions have reduced by over 90% from 2010 to 2017, and mercury emissions have reduced by 86%. 84 Fed. Reg. 2689. Emissions of other harmful pollutants, including SO_2 and particulate, have decreased as well. If EPA were to rescind the MATS, it is likely that some facilities would choose to no longer run their control equipment, or to run it less often to reduce costs. The possibility of HAP and other pollutant emissions rebounding would pose a significant threat to public health and the environment. EPA's proposal does not discuss these implications at all.

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[8] Letter to Assistant Administrator Wehrum, (July 10, 2018), http://src.bna.com/Ajk; Comment Submitted by Edison Electric Institute, et al., EPA-HQ-OAR-2018-0794-0577, https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0794-0577.

[9] EPA states that estimates of HAP emitted during the annual time period examined in the RTR emissions data set show emissions that "are often lower than the emission levels allowed under the requirements of the current MACT standards." 84 Fed. Reg. 2689.

Response to Solicitation of Comment C-1

Because we understand Solicitation of Comment C-1 to be asking generally for comments about one proposed and two alternative interpretations of law discussed in Solicitations of Comment C-3 to C-9, please see our responses to those solicitations below.

Response to Solicitation of Comment C-2

EPA proposes "that direct comparison of the rule's costs and benefits is a reasonable approach, if not the only permissible approach, to considering costs in response to *Michigan*." 84 Fed. Reg. 2276. Comparing the rule's costs and benefits is a reasonable approach, though it is certainly not the only permissible approach. In holding that EPA had improperly ignored costs in making its renewed appropriate and necessary finding in 2012, the Supreme Court specifically stated that:

> 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.

Michigan v. E.P.A., 135 S. Ct. 2699, 2711 (2015). The way in which EPA has compared costs and benefits in the proposed rule, however, is manifestly unreasonable because it ignores significant quantifiable health benefits from non-HAP pollutant reduction, ignores significant unquantifiable benefits of HAP reduction, and uses outdated figures for both costs and benefits.

EPA asks for comments on whether its cost comparison should focus "primarily on benefits associated with reduction of HAP." 84 Fed. Reg. 2276. However, in its proposal, EPA has not focused "primarily" on the benefits of HAP reduction, but has focused *solely* on the *quantifiable* benefits of HAP reduction, which represent only one portion of the benefits of MATS:

> [W]hile there are unquantified HAP benefits and significant monetized PM co-benefits associated with MATS, the Administrator has concluded that the identification of these benefits is not sufficient, in light of the gross imbalance of monetized costs and HAP benefits, to support a finding that it is appropriate and necessary to regulate EGUs under CAA section 112.

84 Fed. Reg. 2277. EPA uses cost estimates from the 2011 Regulatory Impact Analysis (RIA) on which the "appropriate and necessary" finding was justified to support its new determination that regulation is not appropriate and necessary. The 2011 RIA projected an annual regulatory cost of $9.4 billion in 2015, $8.6 billion in 2020, and $7.4 billion in 2030; annual direct benefits of $4 to $6 million; and annual indirect benefits of $36 to $89 billion. While the RIA concluded that regulation was appropriate and necessary because the total benefits greatly outweighed the costs, EPA now asserts that the regulation creates a net cost because only direct monetizable benefits of regulation should be weighed against costs. EPA bases this reversal on its new interpretation that "[t]he statutory text of CAA section 112(n)(1)(A) and the *Michigan* decision both support focusing the 'appropriate and necessary' determination on HAP-specific benefits and costs." 84 Fed. Reg. 2677.

1. Consideration of Quantifiable Indirect Benefits

EPA's proposed rule criticizes the prior appropriate and necessary finding for giving indirect benefits "equal" weight as the direct benefits of HAP regulation. *See* 84 Fed. Reg. 2675–77. EPA has shown no reason that indirect benefits should be given less weight than direct benefits, and has certainly not justified giving them *zero* weight, which is precisely what EPA has done:

> [I]f the HAP-related benefits are not at least moderately commensurate with the cost of HAP controls, then no amount of co-benefits can offset this imbalance for purposes of a determination that it is appropriate to regulate under CAA section 112(n)(1)(A).

84 Fed. Reg. 2276. Using EPA's 2011 numbers for the costs and benefits (which, as we discuss below, are outdated), even if monetized indirect benefits were only counted at *one-third* of their true value, they would still outweigh the costs of regulation by *billions* of dollars. The billions of dollars of projected benefits from the reduction of particulate matter represent real lives saved, health harms averted, and health care costs avoided, and EPA's justification for giving these benefits no value is groundless.

EPA asserts that, because the determination whether to regulate HAP emissions from EGUs occurs after particulate matter and other pollutants emitted by coal plants have already been regulated under other sections of the Act, Congress did not intend any indirect benefits to be considered in the "appropriate and necessary" decision. In making this argument, EPA brushes aside the multiple ways in which Congress acknowledged the importance of indirect benefits under the Clean Air Act, including the Act's requirement that EPA consider HAP reductions achieved as indirect benefits of other regulation when making the appropriate and necessary determination and a Senate Report acknowledging that control technologies implemented under Section 112(d) would have the benefit of reducing non-HAP pollutants. EPA states multiple times that nothing in the text of Section 112(n)(1)(A) allows it to consider benefits of reducing non-HAP pollutants, but Congress has established a general background principle that indirect benefits be considered when regulating under the Clean Air Act. Office of Management and Budget guidance on conducting cost-benefit analysis directs agencies to count both direct and indirect benefits.[10] Unless the text of Section 112(n)(1)(A) specifies that EPA should ignore that background principle (and nothing in the text does), EPA should consider the full range of health and environmental benefits.

Michigan also supports consideration of the full range of benefits. The Supreme Court reiterated the importance of considering indirect costs of regulation when it stated that "'cost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost." 135 S. Ct. at 2707. Likewise, the benefits of a regulation include more than just the direct benefits. The Court stated both that EPA has flexibility in how it evaluates costs and benefits when making the appropriate and necessary finding, *id.* at 2711, and that "an agency may not 'entirely fai[l] to consider an important aspect of the problem' when deciding whether regulation

[10] Circular A-4, OFFICE OF MANAGEMENT AND BUDGET (Sept. 17, 2003), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.

is appropriate." *Id.* at 2707 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Benefits that include preventing thousands of hospitalizations, thousands of heart attacks, and thousands of premature deaths every year[11] surely count as an important aspect of the problem.

2. Consideration of Unquantifiable Direct Benefits

In addition to treating benefits of reducing non-HAP pollutants as nonexistent, the proposed rule treats unquantified direct benefits as essentially worthless. These unquantified benefits include:

> [I]mpacts of Hg on human health (including neurologic, cardiovascular, genotoxic, and immunotoxic effects), a variety of adverse health effects associated with exposure to certain non-Hg HAP (including cancer, and chronic and acute health disorders that implicate multiple organ systems such as the lungs and kidneys), and effects on wildlife and ecosystems.

84 Fed. Reg. at 2677. The *only* direct benefit of HAP reduction that EPA quantified in its 2011 RIA was "IQ loss in children born to a subset of recreational fishers who consume fish during pregnancy."[12] The proposed rule states that "after fully acknowledging the existence and importance of such benefits, the EPA proposes to conclude that substantial and important unquantified benefits of MATS are not sufficient to overcome the significant difference between the monetized benefits and costs of this rule." 84 Fed. Reg. 2678. While there may be no clear answer as to how an agency should weigh unquantifiable benefits against monetary costs, EPA's proposal of giving essentially no weight to these important benefits is surely inappropriate, and is a departure from its past practice of considering unquantifiable benefits when promulgating rules under the Clean Air Act.[13]

3. Use of Outdated Data from 2011

Finally, the conclusion that regulation of HAPs is not "appropriate" because of "the gross disparity" between direct costs and benefits is based on eight-year-old data that overstates the disparity. The costs of compliance have been lower than the predicted costs because prices for control technology, natural gas, and renewable energy have all proven to be lower than projected.[14] Additionally, recent studies suggest that the 2011 RIA greatly underestimated the value of benefits associated with reduced mercury pollution from power plants.[15] If these new

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[11] *Regulatory Impact Analysis*, *supra* note 7, at ES-3.

[12] *Revised Technical Support Document: National-Scale Assessment of Mercury Risk to Populations with High Consumption of Self- Caught Freshwater Fish In Support of the Appropriate and Necessary Finding for Coal- and Oil-Fired Electric Generating Units*, EPA–452/R–11–009, U.S. EPA (2011). Docket ID No. EPA–HQ–OAR–2009–0234–19913.

[13] See, e.g., *NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing*, 80 Fed. Reg. 65,470, 65,514 (Oct. 26, 2015) (discussing unquantified benefits of HAP emissions standards promulgated under Section 112 for brick, clay, and ceramic manufacturers).

[14] In a March 26, 2019 letter to EPA, a coalition of energy industry associations stated that "Since the Mercury and Air Toxics Standards (MATS) became effective in 2012, it is estimated that the owners and operators of coal- and oil-based electric generating units (EGUs) have spent more than $18 billion to comply." *See supra* note 8.

[15] *Mercury Matters 2018*, *supra* note 5 (citing several scientific studies).

studies are correct that the direct benefits amount to several billion dollars, then there is hardly a "gross disparity" between costs and benefits.

EPA's justification for continuing to rely on 2011 projected figures instead of on the actual costs and benefits that have been experienced is that:

> Given that the CAA section 112(n)(1)(A) finding is a threshold analysis that Congress intended the Agency would complete prior to regulation, the EPA believes it is reasonable for purposes of this reconsideration to rely on the estimates projected prior to the rule's taking effect, *i.e.*, the estimates of costs and benefits calculated in the 2011 RIA.

84 Fed. Reg. at 2678. EPA is essentially saying that because it now believes it made a mistake in methodology in 2011, it should apply its new methodology to numbers it now knows, in hindsight, to be incorrect.

Response to Solicitation of Comment C-3
Also responsive to solicitation of comment C-1.

EPA correctly concludes that reversing the appropriate and necessary finding would not give the agency either the obligation or the authority to remove EGUs from the list of source categories regulated under Section 112 or to rescind the MATS emissions standards.

This is a correct legal interpretation. EPA is bound by the D.C. Circuit's holding in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) that, although Section 112 provides a unique process for adding EGUs to the list of regulated source categories, any source category added to the list may only be removed by making the findings required by Section 112(c)(9). This holding was never reviewed, let alone overturned, by the Supreme Court and thus continues to bind EPA. Because EPA is not proposing to do a delisting analysis required by Section 112(c)(9),[16] EPA cannot delist EGUs.

Response to Solicitations of Comment C-4 and C-6
Because we understand Solicitations of Comment C-4 and C-6 to be asking generally for comments on the two alternative interpretations of law discussed more specifically in C-7 and C-8, please see our responses to those solicitations below.

Response to Solicitation of Comment C-5
Because we understand Solicitation of Comment C-5 to be asking the same question as C-9, see response to C-9 below.

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[16] The proposed rule states that any comments about whether a Section 112(c)(9) analysis should be conducted or what an analysis would demonstrate are outside the scope of this rulemaking. 84 Fed. Reg. 2679. However, EPA's own risk analysis (which it asserts may differ meaningfully from a 112(c)(9) analysis) shows that even with the MATS in place, the estimated remaining cancer risk to the individual most exposed to emissions from the source category is 9 in 1 million. *Id.* Section 112(c)(9)(B) allows for delisting only if "no source in the category" emits HAPs in a quantity that would cause a cancer risk greater than 1 in 1 million for the most-exposed individual. It therefore seems unlikely that, were a delisting analysis completed, the statutory criteria for delisting would be met.

Response to Solicitation of Comment C-7
Also responsive to Solicitations of Comment C-1, C-4, and C-6.

EPA asks for comments about an alternative legal interpretation under which "*New Jersey* is distinguishable" and therefore "EPA would have authority to rescind MATS and remove EGUs from the list of source categories regulation under CAA section 112 after finalizing this reversal of the 2016 supplemental finding." 84 Fed. Reg. 2679. This alternative interpretation is that "*New Jersey* does not limit the effect of an action made in response to a Supreme Court decision finding the original action flawed, nor does it limit the Agency's ability to revise its response to a Supreme Court decision." *Id.*

Unless and until the Supreme Court reviews and overturns *New Jersey*'s holding, that case *does* limit EPA's actions. The Supreme Court's holding in *Michigan* regarding the justification behind EPA's appropriate and necessary finding under Section 112(n)(1)(A) did not overrule or displace *New Jersey*'s holding on whether the delisting procedure in 112(c)(9) applies once an appropriate and necessary finding has been made.

As noted below, in the response to Solicitation of Comment C-8, the structure of the Clean Air Act does not allow for the MATS to be rescinded so long as EGUs remain on the list of regulated sources.

Response to Solicitation of Comment C-8
Also responsive to Solicitations of Comment C-1, C-4, and C-6.

EPA asks for comments on an alternative legal interpretation under which "EGUs would remain on the CAA section 112(c) list of sources, but the EPA would have the authority to rescind the standards." 84 Fed. Reg. 2679. In support of this interpretation, EPA notes that "*New Jersey v. EPA* held that the EPA may not remove a source category from the CAA section 112(c) list without demonstrating that the delisting analysis under CAA section 112(c)(9) has been satisfied, but the decision did not address the question whether, in the absence of a valid appropriate and necessary finding, the EPA must regulate EGUs for HAP." *Id.*

The structure of the Clean Air Act does not allow for the MATS to be rescinded so long as EGUs remain on the 112 list of regulated sources. Section 112(c)(2) states that "[f]or the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section." Section 112(d)(1) requires that "[t]he Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section." These provisions would be violated if a source remained on this list without being subject to emissions regulations. Section 112 provides procedures for delisting sources, but not for rescinding the regulations that "the Administrator shall establish" for those sources. Therefore, the only way to properly rescind the MATS would be to follow the delisting procedure in 112(c)(9).

Response to Solicitation of Comment C-9
Also responsive to Solicitations of Comment C-1 and C-5.

EPA asks whether, under either of the alternative interpretations of law proposed in C-7 or C-8, it would have the *obligation*, rather than the *authority* to rescind the MATS emissions standards or to remove EGUs from the list of regulated source categories. As explained above, EPA lacks the authority to delist EGUs or rescind the MATS and therefore necessarily lacks any such obligation.

Response to Solicitation of Comment C-10
Because Solicitation of Comment C-10 asks for comments on all aspects of the alternative legal interpretations of the impact of replacing the 2016 appropriate and necessary finding, please see our responses to C-7, C-8, and C-9 above.

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We strongly oppose the proposal to find that it is not appropriate and necessary to regulate HAP emissions from power plants under Section 112(n) of the Clean Air Act. EPA's prior determination that regulation was appropriate rested on a cost-benefit analysis that correctly considered important health benefits, including unquantifiable benefits and those that would result from reduction of pollutants other than HAP. That finding resulted in a successfully implemented set of emissions standards that is currently benefiting the health of people, animals, and ecosystems. A reversal of the appropriate and necessary finding would only jeopardize the health gains the MATS have achieved and create uncertainty for an industry that has put this successful program in the rear-view mirror. We thank the EPA for considering our comments.

Sincerely,

Environmental Law & Policy Center

Alliance for the Great Lakes

Friends of the Chicago River

Hoosier Environmental Council

Iowa Environmental Council

Respiratory Health Association