Mercury and the Clean Air Act

The Clean Air Act Gives EPA Broad Flexibility in Determining How, and How Much, to Reduce Power Plant Mercury Emissions

The Clean Air Act is the most important federal air quality law. Congress originally passed the Act in 1970, adding significant amendments in 1977 and 1990, to establish health- and technology-based air quality standards administered by the U.S. Environmental Protection Agency (EPA).

The Clean Air Act gives EPA broad discretion in crafting regulations to reduce power plant mercury emissions, if appropriate and necessary to protect public health. The statute does not require that utilities be subject to a "maximum achievable control technology" (MACT) standard, nor does it require that utilities reduce emissions by any specific amount (such as 90 percent). Rather, the Clean Air Act requires EPA to "develop and describe … alternative control strategies" for controlling emissions.

The Clean Air Act Does…

- Give EPA broad discretion in crafting regulations to reduce power plant mercury emissions
- Require EPA "to develop and describe … alternative control strategies" for controlling emissions

The Clean Air Act Does NOT…

- Require that utilities be subject to a specific regulatory approach such as a MACT standard
- Require utilities to reduce emissions by any specific amount (e.g., 90 percent)

Mercury Emissions Are Regulated Under Section 112 of the Clean Air Act.

Section 112 of the Clean Air Act established the current framework under which EPA regulates mercury and other hazardous air emissions. Under this section, as amended in 1990, Congress identified 189 substances, including mercury, as "hazardous air pollutants." Congress also directed EPA under Section 112(c) to list source categories—based on industry—of these emissions.

Once a source is listed under Section 112(c), the Clean Air Act requires EPA to set emissions standards under Section 112(d) based on the maximum degree of reduction in emissions achieved by the best-performing technology, also known as a MACT.

EPA is currently considering regulating mercury emissions by setting standards of performance under Section 111 of the Clean Air Act.

Electric Utilities Are Treated Differently Than Other Source Categories Because They Are Already Regulated by Other Provisions of the Clean Air Act.

In contrast to the basic approach it used for regulating hazardous air pollutants from most sources, Congress elected to treat electric utilities differently, in part because power plants already were being specifically targeted for regulation under other provisions of the Clean Air Act, including the acid rain provisions of Title IV.

Congress enacted Section 112 (n)(1)(A) to govern any regulation of electric generating units. This section requires EPA to undertake a study of hazards to public health reasonably anticipated to occur as a result of hazardous air pollutant emissions from electric utility steam generating units, after considering the impact of additional Clean Air Act requirements on these sources. As part of this evaluation, Congress directed EPA, under the 1990 amendments, to "develop and describe" alternative control strategies for power plant emissions, should the agency decide they warrant regulation.

Finally, Congress directed EPA to determine whether regulation of power plants "under this section" is "appropriate and necessary after considering the results of the study" of possible health impacts. Section 112(n)(1)(A) of the Clean Air Act says:

> *The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this Act. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.*

The Clean Air Act Does Not Require MACT Regulation for Utilities.

Congress directed EPA (in Section 112(n)) to make a regulatory determination regarding the need to regulate utilities' hazardous air pollutant emissions based on any concerns identified in the above-referenced health effects study. However, nowhere in Section 112, nor under any other provisions of the Act, does Congress specify that utilities must be regulated under subsection (d), as is explicitly required of most other source categories.

In other words, the Clean Air Act does not require EPA to regulate electric utility mercury provisions under the MACT provisions of the law. To the contrary, the statute directs the agency to "consider alternative control strategies." In addition, nowhere in the Act does it specify that a MACT requires any specific level of emission reduction, 90-percent or otherwise.

Historically, EPA Has Interpreted Section 112 of the Clean Air Act As Congress Intended.

Consistent with these requirements, EPA historically did not interpret Section 112(n) to require a specific regulatory approach for addressing utility mercury emissions. In a court brief filed by EPA in response to a 1992 lawsuit brought by the Natural Resources Defense Council, the agency wrote:

> *"[S]ection 112(n)(1) anticipates that the study of electric utility boilers is required for EPA to determine what regulation of such boilers, if any, is 'appropriate and necessary.' NRDC's contention that EPA is required to impose MACT regulation regardless of the results of the study eliminates the Agency's discretion to determine what regulation is 'appropriate and necessary' based on the results of the study."*

EPA's December 2000 Regulatory Determination Inappropriately Pre-Empted the Act's Requirement That EPA Consider Alternative Control Strategies.

Despite EPA's response above and other earlier agency statements, former EPA Administrator Carol Browner, on December 14, 2000, issued a regulatory determination finding regulation of electric utility mercury emissions to be "appropriate and necessary" and taking the additional step of listing utilities under Section112(c), requiring development of a MACT.

Section 112(n)(1)(A) provides the agency with broad discretion to address utility mercury regulation—a fact historically recognized by EPA. If the agency's only option for regulating utility mercury emissions was to adopt a MACT, then the insistence by Congress that EPA weigh alternative control strategies would amount to a pointless paper exercise, because the Act's MACT provisions require unit-by-unit controls that exclude most control options.

EPA's December 2000 regulatory finding and its subsequent interpretation of Section 112(n)(1)(A) unnecessarily constrain the agency's ability to develop the most efficient way to control mercury emissions from electric utilities. Alternative control strategies, such as a cap-and-trade approach, provide the most cost-effective and efficient way to regulate power plant mercury emissions, and are consistent with the intent of the Clean Air Act.