Senate Democratic Policy Committee Hearing

"An Oversight Hearing on the Administration's Mercury Emissions Proposal"

John A. Paul
Supervisor
Regional Air Pollution Control Agency
Dayton, Ohio

and

Co-Chair
EPA Utility MACT Working Group

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Mr. Chairman and Members of the Committee, my name is John Paul and I am the Supervisor of RAPCA – the Regional Air Pollution Control Agency – a six-county local agency centered in Dayton, Ohio. Thank you for inviting me to provide testimony on EPA's proposed rules for controlling emissions of mercury from coal-fired utility boilers. I offer this testimony from a number of perspectives – as the director of a local agency whose primary mission is to protect public health; as the co-chair of EPA's Utility MACT Working Group; as an active participant in STAPPA/ALAPCO – the national associations of state and local air pollution control officials; and as a concerned citizen with two grandchildren.

I have followed the issue of mercury contamination of our air and waterways, and its grave impacts, since my graduate school days in the early 1970s and have waited patiently for the development of rules governing the emissions of mercury from our nation's aging fleet of coal-fired boilers. Given the substantial level of mercury emissions from utilities, the preponderance of evidence regarding the detrimental health and welfare impacts of these emissions, the promise of viable technologies to achieve meaningful reductions and the clear mandate of the Clean Air Act, I believe the rules proposed by EPA fall woefully short on all counts and represent a failure on the part of EPA to fulfill its responsibilities to this nation. Similar to EPA's recent rules on New Source Review, the mercury rules leave little alternative but to conclude that the Administration has as its primary goal the protection of the special interests of the utility industry rather than the protection of the health and welfare of our citizens.

In April, RAPCA submitted written comments to EPA outlining our objections to the agency's mercury proposal. This morning, I would like to briefly summarize our key concerns.

EPA's Proposal Fails to Protect Public Health

Mercury is a powerful neurotoxin that accumulates in the food chain; when ingested, it can cause damage to the brain and nervous system. Pregnant women and developing fetuses are especially sensitive to this hazardous pollutant. Sadly, it has become necessary for nearly every state in the continental U.S. to issue fish consumption advisories to the public due to elevated concentrations of mercury. It is incumbent upon EPA to take aggressive regulatory action under the Clean Air Act to adequately reduce mercury emissions. Unfortunately, the agency has not risen to this important challenge and, instead, has issued a proposal that will leave public health insufficiently protected from the threats of mercury pollution.

EPA's Proposal Provides Too Little, Too Late

The Clean Air Act includes clear directions to EPA regarding the regulation of hazardous air pollutants such as mercury. Specifically, the agency is required under Section 112 to develop Maximum Achievable Control Technology (MACT) levels based on the average of the best-performing 12 percent of sources and industry must comply with these MACT standards within three years. EPA, however, has ignored this statutory mandate and, instead, offered two extremely flawed alternatives for controlling mercury.

EPA's preferred approach raises four serious concerns. First, compliance with the mercury emissions cap is delayed for at least 10 years – and likely more, considering the banking and trading provisions – beyond the deadlines established by Congress under Section 112. Second, the emissions cap is excessively lenient. The 2010 interim cap – expected to be 34 tons per year – would not require any mercury-specific controls at all. Instead, EPA expects the cap to be achieved entirely from co-benefits anticipated to occur as the result of other programs designed to reduce emissions of nitrogen oxides and sulfur dioxide, such as the Interstate Air Quality Rule proposed by EPA in January 2004. In addition, the 15-ton final cap in 2018 does not reflect the level of emission reductions that are technologically achievable. Third, EPA's approach is further weakened by a trading program that would not only delay reductions beyond 2018, but would also leave individual areas vulnerable to "hotspot" problems. Finally, EPA attempts to justify this deficient approach by offering a convoluted rationale for using Section 111 of the Clean Air Act – a section Congress never intended for controlling mercury or other hazardous air pollutants.

While not EPA's preferred option, the agency has also proposed an alternative under Section 112 of the Clean Air Act. However, although Section 112 requires that MACT for existing sources be calculated based on the average of the best-performing 12 percent of sources, EPA has proposed a MACT level of 34 tons per year, which is not only clearly inconsistent with the statutory MACT requirements, but also much weaker than what was recommended by any of the stakeholders in EPA's Utility MACT Working Group – including industry – whose MACT recommendations ranged from 2 to 28 tons per year. So, how did EPA arrive at a 34-ton MACT level? The agency appears

to have relied on a statistical analysis of data using a method proposed independently by industry that is copied verbatim by EPA into the rule.

EPA Totally Ignored the Recommendations of Its Own Federal Advisory Group

EPA established an inclusive Working Group under the Federal Advisory Committee Act to provide advice on setting utility MACT standards and then proceeded to wholly ignore the Working Group's recommendations. This is, perhaps, the most disconcerting fact of all. The Working Group – which EPA appointed me to co-chair, along with an EPA representative – was comprised of experts representing all facets of interest: federal, state and local governments, industry and environmental and public health groups. Over a period of 18 months, we held 14 meetings. Per EPA's charge to us, we remained focused on the Section 112 MACT process, which has clear, statutory constraints, including not allowing the trading of emissions between facilities. Several times during our deliberations the issue of trading arose and was quickly dispensed with because the Working Group agreed that under Section 112 trading is clearly not an option. Moreover, throughout the entire course of our discussions, there was never even a hint that EPA was considering any alternative (e.g., Section 111) to the Section 112 MACT process.

Further, the Working Group examined the available data on current and projected emissions. We heard from researchers who are testing possible control technologies. We identified issues and discussed possible solutions with each stakeholder group offering recommendations for future control levels. Although EPA modeled the impact of some of our early work, the agency abruptly halted Working Group meetings in spring 2003 and ceased further analysis – never producing the promised modeling of the impact of the Group's final recommendations.

In sum, EPA's proposal is astonishing in its complete disregard for the very hard work and thoughtful and technically credible recommendations of the advisory Working Group the agency itself convened.

What EPA Should Do

In light of the very serious public health threat posed by mercury and the tremendous shortcomings of EPA's proposal, the agency should abandon its preferred option under Section 111 of the Clean Air Act and revise its approach under Section 112 to conform with the statutory mandates for MACT. In particular, RAPCA recommends that EPA promulgate a national mercury cap on the order of 5 to 7.5 tons. Further, EPA should also act promptly to conduct the modeling analyses the Utility MACT Working Group recommended.

Conclusion

My staff and I have examined the public docket on EPA's utility mercury proposal. I attended, and testified at, the agency's public hearing in Chicago. And we have closely followed national news reports on the issue. What has become abundantly clear is the widespread opposition to EPA's proposal and the nationwide call for stringent and timely controls on mercury. The public expects EPA to adopt rules that are protective of its health and welfare. It expects EPA to be EPA. So does RAPCA, and so should Congress. We join the public in desiring a utility MACT rule that is truly protective of public health and welfare. The critical opportunity is before us, and it must not be sacrificed.

Once again, thank you for inviting me to present my views on this very important issue. I will be happy to answer any questions you might have.