

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

No. 12-1100 and consolidated cases

WHITE STALLION ENERGY CENTER, LLC, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**ON PETITIONS FOR REVIEW OF FINAL RULE OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**BRIEF FOR STATE AND LOCAL GOVERNMENT
INTERVENORS-RESPONDENT IN SUPPORT OF EPA**

FOR THE COMMONWEALTH OF
MASSACHUSETTS

MARTHA COAKLEY
ATTORNEY GENERAL

TRACY TRIPLETT
CAROL IANCU
Assistant Attorneys General

MELISSA HOFFER
Assistant Attorney General, Chief
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2431
tracy.triplett@state.ma.us

FOR THE STATE OF CALIFORNIA

KAMALA D. HARRIS
ATTORNEY GENERAL

SALLY MAGNANI
Senior Assistant Attorney General
JANILL RICHARDS
Supervising Deputy Attorney General
SUSAN L. DURBIN
Deputy Attorney General
1300 I Street, P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324-5474
susan.durbin@doj.ca.gov

(Additional Counsel Listed on Following Pages)

FOR THE STATE OF
CONNECTICUT

GEORGE JEPSEN
ATTORNEY GENERAL

Kimberly P. Massicotte
Matthew I. Levine
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06106
(860) 808-5250

FOR THE STATE OF
ILLINOIS

LISA MADIGAN
ATTORNEY GENERAL

Matthew J. Dunn
Gerald T. Karr
James P. Gignac
Assistant Attorneys General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660

FOR THE STATE OF
DELAWARE

JOSEPH R. BIDEN, III
ATTORNEY GENERAL

Valerie M. Satterfield
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3rd Floor
Dover, DE 19904
(302) 739-4636

FOR THE STATE OF IOWA

THOMAS J. MILLER
ATTORNEY GENERAL

David R. Sheridan
Assistant Attorney General
Environmental Law Division
Lucas State Office Building
321 E. 12th Street, Ground Floor
Des Moines, IA 50319
(515) 281-5351

FOR THE STATE OF MAINE

JANET T. MILLS
ATTORNEY GENERAL

Gerald D. Reid
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, ME 04333-0006
(207) 626-8545

FOR THE STATE OF MINNESOTA

BY ITS COMMISSIONER OF THE OF
THE MINNESOTA POLLUTION
CONTROL AGENCY

LORI SWANSON
ATTORNEY GENERAL

Max Kieley
Assistant Attorney General
Karen D. Olson
Deputy Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(951) 757-1426

FOR THE STATE OF MARYLAND

DOUGLAS F. GANSLER
ATTORNEY GENERAL

Roberta R. James
Assistant Attorney General
Office of the Attorney General
Maryland Department of the
Environment
1800 Washington Blvd., Suite 6048
Baltimore, MD 21230
(410) 537-3748

FOR THE STATE OF NEW
HAMPSHIRE

MICHAEL A. DELANEY
ATTORNEY GENERAL

K. Allen Brooks
Senior Assistant Attorney General
33 Capitol Street
Concord, NH 03301
(603) 271-3679

FOR THE STATE OF NEW MEXICO

GARY K. KING
ATTORNEY GENERAL

Stephen R. Farris
Ann Moore
Tannis L. Fox
Assistant Attorneys General
Water, Environment and Utilities
Division, Office of the New Mexico
Attorney General
P.O. Box 1508
Santa Fe, NM 87504
(505) 827-6695

FOR NORTH CAROLINA

ROY COOPER
ATTORNEY GENERAL

James C. Gulick
Senior Deputy Attorney General
J. Allen Jernigan
Marc Bernstein
Amy L. Bircher
Special Deputy Attorneys General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6600

FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

Denise Hartman
Assistant Solicitor General
Michael J. Myers
Kevin P. Donovan
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 402-2594

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
ATTORNEY GENERAL

Paul A. Garrahan
Assistant Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201
(971) 673-1943

FOR THE STATE OF
RHODE ISLAND

PETER F. KILMARTIN
ATTORNEY GENERAL

Gregory S. Schultz
Special Assistant Attorney General
Rhode Island Dept. of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2400

FOR THE DISTRICT OF
COLUMBIA

IRVIN B. NATHAN
ATTORNEY GENERAL

Amy E. McDonnell
Office of the Attorney General
Deputy General Counsel
District Department of the Environment
1200 First Street, NE, Seventh Floor
Washington, DC 20002
(202) 535-2608

FOR THE STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

Thea J. Schwartz
Assistant Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186

FOR THE CITY OF BALTIMORE

GEORGE A. NILSON
CITY SOLICITOR

William R. Phelan, Jr.
Chief Solicitor
Dawn S. Lettman
Assistant Solicitor
Baltimore City Department of Law
100 Holliday Street
Baltimore, MD 21202
(410) 396-4094

FOR THE CITY OF CHICAGO

STEPHEN R. PATTON
CORPORATION COUNSEL OF THE
CITY OF CHICAGO

Benna Ruth Solomon
Deputy Corporation Counsel
J. Mark Powell
Assistant Corporation Counsel
City of Chicago Department of Law
30 N. LaSalle St., Suite 800
Chicago, IL 60602
(312) 744-7764

FOR THE CITY OF NEW YORK

MICHAEL A. CARDOZO
CORPORATION COUNSEL

Christopher King
Carrie Noteboom
Assistant Corporation Counsels
100 Church Street
New York, NY 10007
(212) 788-0771

FOR THE COUNTY OF ERIE,
NEW YORK

MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

Jeremy Toth
Second County Attorney
Erie County Department of Law
95 Franklin Street, Room 1634
Buffalo, New York 14202
(716) 858-2208

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Intervenors-Respondent states and local governments the Commonwealth of Massachusetts and the States of California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, and Vermont, and the District of Columbia, the Cities of Baltimore, Chicago, and New York, and the County of Erie in New York (collectively, State Intervenors) certify as follows:

A. Parties and *Amici*: Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Respondent United States Environmental Protection Agency (EPA), filed January 22, 2013: American Thoracic Society, the American College of Preventive Medicine, the American College of Occupational and Environmental Medicine, the American College of Chest Physicians, the National Association for the Medical Direction of Respiratory Care, William W. Buzbee, Jody Freeman, Oliver A. Houck, Richard J. Lazarus, Robert V. Percival, and Zygmunt J.B. Plater.

B. Rulings Under Review: References to the rulings at issue appear in the Brief for EPA.

C. Related Cases: State Intervenors adopt the statement of related cases set forth in the Brief for Respondent EPA.

Respectfully submitted,

MARTHA COAKLEY
ATTORNEY GENERAL

TRACY L. TRIPLETT
CAROL IANCU
Assistant Attorneys General
MELISSA HOFFER
Assistant Attorney General, Chief
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2431
tracy.triplett@state.ma.us

KAMALA D. HARRIS
ATTORNEY GENERAL

SALLY MAGNANI
Senior Assistant Attorney General
JANILL RICHARDS
Supervising Deputy Attorney General
SUSAN L. DURBIN
Deputy Attorney General
1300 I Street, P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324-5474
susan.durbin@doj.ca.gov

/s/ Tracy L. Triplett

Tracy L. Triplett

Dated: February 21, 2013

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* 76 Fed. Reg. 24,976 (May 3, 2011) 2, 3, 5, 8, 9, 10, 12, 14

* 77 Fed. Reg. 9304 (Feb. 16, 2012) 2, 5, 9, 10, 12, 13

Other AuthoritiesEPA, *Memorandum: Emissions Overview: Hazardous Air Pollutants
in Support of the Final Mercury and Air Toxics Standard*, EPA-
454/R-11-014 (Nov. 2011).....8EPA, *Technical Support Document: National-Scale Mercury Risk
Assessment Supporting the Appropriate and Necessary Finding for
Coal- and Oil-fired Electric Generating Units*, EPA-452/D-11-002
(2011)3, 5

GLOSSARY

Act	Clean Air Act, 42 U.S.C. §7401 <i>et seq.</i>
<i>Amici Br.</i>	Combined Brief of Institute for Policy Integrity, <i>et al.</i> as <i>Amici Curiae</i> in Support of Respondent, Doc. 1417795
EGU	Electric Utility Steam Generating Unit, as defined in 42 U.S.C. §7412(a)(8)
EPA	U.S. Environmental Protection Agency
EPA Br.	Brief for Respondent, Doc. 1416613
JA	Joint Appendix
Joint Br.	Joint Brief of State, Industry and Labor Petitioners, Doc. 1401252
MACT	Maximum achievable control technology
MATS Rule	Mercury and Air Toxics Standards, Final Rule, <i>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</i> , 77 Fed. Reg. 9304 (Feb. 16, 2012)
MassDEP	Massachusetts Department of Environmental Protection
Minnesota TMDL	Minnesota Statewide Mercury Total Maximum Daily Load (March 27, 2007)
NEIWPC	New England Interstate Water Pollution Control Commission
Northeast TMDL	Northeast Regional Mercury Total Maximum Daily Load (October 24, 2007),
NYSDEC	New York State Department of Environmental Conservation

Glossary – Continued

Proposed MATS

Rule Mercury and Air Toxics Standards, Proposed Rule, *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*, 76 Fed. Reg. 24,976 (May 3, 2011)

RfD Reference Dose

SELC Southern Environmental Law Center

State Intervenors Intervenors-Respondent, Commonwealth of Massachusetts and the States of California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, and Vermont, and the District of Columbia, the Cities of Baltimore, Chicago, and New York, and the County of Erie in New York

TMDL Total Maximum Daily Load

TSD Technical Support Document, *National-Scale Mercury Risk Assessment Supporting the Appropriate and Necessary Finding for Coal- and Oil-fired Electric Generating Units*, EPA-452/D-11-002 (March 2011)

INTRODUCTION

Over twenty years ago, Congress mandated that listed sources of hazardous air pollutant emissions install stringent controls. Today, however, the largest emissions source of mercury and many other hazardous air pollutants—electric utility steam generating units (EGUs)¹—remains mostly uncontrolled. While many states, including many of the undersigned, have enacted controls on EGU mercury emissions, those controls cannot rein in emissions originating outside our state borders. EGU mercury emissions have continued to pollute our waters, making fish consumption unsafe for pregnant women and children, and making local fish advisories our last option to protect our residents.

In 2012, after extensive study mandated by §112 of the Clean Air Act (Act), the Environmental Protection Agency (EPA) adopted the long-overdue Mercury and Air Toxics Standards (MATS Rule). The MATS Rule will reduce toxic EGU emissions nationwide. It requires EGUs to implement strict technological pollution controls that achieve the maximum degree of reduction in emissions of hazardous air pollutants. Because the MATS Rule is consistent with the Act and well-supported by the record, it should be upheld.

¹ EGUs are defined in the Clean Air Act, 42 U.S.C. §7412(a)(8), as fossil fuel fired combustion units of more than 25 megawatts that produce specified amounts of power for sale.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are found in the addendum to Respondent EPA's Brief (EPA Br.)

STATEMENT OF ISSUES AND OF THE CASE

State Intervenors address EPA's issues 1, 2, 3, and 11, and adopt its Statutory and Regulatory Background. EPA Br. 1-2, 4-16.

STATEMENT OF FACTS

I. MERCURY HARMS PUBLIC HEALTH AND THE ENVIRONMENT.

Mercury, a potent neurotoxin, enters the environment every day in emissions from EGUs, the largest source of anthropogenic mercury emissions in the nation. 76 Fed. Reg. 24,976, 24,977/3, 24,994/2 (May 3, 2011); 77 Fed. Reg. 9304, 9310/2 (Feb. 16, 2012).² Once airborne, mercury emitted by EGUs is deposited into rivers, lakes, and other surface waters, where it is transformed into methylmercury, a highly toxic form that bioaccumulates in fish. 76 Fed. Reg. 25,000/1. When people eat those fish, they ingest harmful levels of mercury. *Id.* 24,983/2. Of particular concern, significant numbers of women of child-bearing age are

² State Intervenors focus here on mercury. We also strongly agree with EPA that regulation of EGU emissions of other heavy metals, including arsenic, hexavalent chromium, and nickel, and acid gases, is appropriate and necessary under §112. EGUs are among the largest emissions sources nationally of these toxic pollutants. 77 Fed. Reg. 9310/2-3. Their emissions pose significant cancer risks to exposed populations, *id.* 9363/1-2, and contribute to adverse ecosystem effects, *id.* 9363/2. Either of these additional harms from EGU emissions, independently, supports listing of EGUs under §112. EPA Br. 28-30.

exposed, through fish consumption, to methylmercury at levels that can cause serious adverse developmental effects in children. *Id.* 24,983/3; Combined Brief of Institute for Policy Integrity, *et al.* as *Amici Curiae* in Support of Respondent (*Amici Br.*) 17-19.

Mercury ubiquitously contaminates state waters;³ all fifty states have fish consumption advisories in place.⁴ In the Northeast, over 10,000 lakes, ponds, and reservoirs and over 46,000 river miles are impaired for fish consumption, primarily due to atmospheric deposition of mercury.⁵ In the Southeast, all of North Carolina's water bodies are mercury-impaired.⁶ In the Midwest, as of 2007,

³ EPA, *Technical Support Document: National-Scale Mercury Risk Assessment Supporting the Appropriate and Necessary Finding for Coal- and Oil-fired Electric Generating Units* (TSD), EPA-452/D-11-002, at 32, Figs. 2-1, 2-2 (2011) (showing mercury deposition throughout the U.S. in 2005 and 2016) (JA ___).

⁴ EPA, *2010 Biennial National Listing of Fish Advisories*, EPA-820-F-11-014, at 5 (Nov. 2011), *available at* http://water.epa.gov/scitech/swguidance/fishshellfish/fishadvisories/upload/technical_factsheet_2010.pdf (last visited Feb. 19, 2013).

⁵ Northeast Regional Mercury Total Maximum Daily Load, at vi (Oct. 24, 2007) (Northeast TMDL), *available at* <http://www.epa.gov/region1/eco/tmdl/pdfs/ne/tmdl-Hg-approval-doc.pdf> (last visited Feb. 19, 2013).

⁶ Declaration of Sheila Holman ¶6, Exhibit 1 to North Carolina's Motion to Intervene as Respondent (Doc. 1368730) in *Utility Air Regulatory Group v. EPA*, No. 12-1147 (D.C. Cir. 2012).

Minnesota classified approximately 820 lakes as impaired for fish consumption because of mercury contamination.⁷

II. EGU MERCURY EMISSIONS CROSS STATE BORDERS, CREATING A NATIONAL PROBLEM.

To address in-state mercury releases, states have enacted a range of mercury control requirements within their own borders.⁸ At least fourteen states have enacted EGU mercury emission standards under state law, some of which are more stringent than the MATS Rule.⁹ The experience of those states demonstrates that such standards can be met with existing technology that is widely used by the utility sector.¹⁰ In addition to direct regulation of mercury emissions from EGUs,

⁷ Minnesota Statewide Mercury Total Maximum Daily Load, Mar. 27, 2007 (Minnesota TMDL), at vi, available at <http://www.pca.state.mn.us/index.php/view-document.html?gid=8507> (last visited Feb. 20, 2013). In the West, mercury deposition traceable to EGUs also reaches California's waters. TSD, 32, Figs. 2-1, 2-2 (JA __, __).

⁸ Northeast States for Coordinated Air Use Management, Comments, Proposed MATS Rule, at 3, EPA-HQ-OAR-2009-0234-17843 (JA __).

⁹ National Association of Clean Air Agencies, Comments, Proposed MATS Rule, at Attachment 1, EPA-HQ-OAR-2009-0234-17620 (JA __, __); Massachusetts Department of Environmental Protection, Comments, Proposed MATS Rule, at 2, EPA-HQ-OAR-2009-0234-18039 (MassDEP Comments), (JA __).

¹⁰ Connecticut Department of Energy and Environmental Protection, Comments, Proposed MATS Rule, at Attachment, 1-2, EPA-HQ-OAR-2009-0234-20298 (JA _ - _); MassDEP Comments, 7 (JA _ - _); New Jersey Department of Environmental Protection, Comments, Proposed MATS Rule, at cover, 1,

seven states in the Northeast are addressing widespread mercury surface water contamination by implementing a regional mercury “total maximum daily load” (TMDL), pursuant to the Clean Water Act, 33 U.S.C. §1313(d)(1)(A) (requiring the development of TMDLs for impaired waters).¹¹ *See generally*, Northeast Regional Mercury TMDL (Northeast TMDL).

Mercury emitted by EGUs, however, travels far from its sources, sometimes hundreds or even thousands of miles, without respect to state borders. *See* 76 Fed. Reg. 24,983/1, 25,089/3; 77 Fed. Reg. 9444/3.¹² For example, in developing the Northeast TMDL, participating states concluded that returning fish methylmercury concentrations to safe levels requires action by EPA to “implement significant reductions from upwind out-of-region sources, primarily coal-fired power plants.”¹³

comments 5, EPA-HQ-OAR-2009-0234-18444 (JA __, __); Brief of Industry Respondent Intervenors 10-11.

¹¹ A TMDL calculates the maximum amount of a pollutant, or load, that a water body can receive while still attaining applicable water quality standards, and allocates the load among point and non-point sources. 33 U.S.C. §1313(d)(1)(C); 40 C.F.R. 130.2(f)-(i). The Northeast TMDL recommends a 98.2 percent reduction in atmospheric deposition of mercury to achieve the target fish tissue methylmercury concentration. Northeast TMDL, ix, 31, Table ES-1.

¹² *See also* TSD, 33, Figs. 2-3, 2-4 (showing mercury deposition attributable to EGUs by watershed in 2005 and 2016) (JA __, __).

¹³ Northeast TMDL, 44. *See* MassDEP Comments, 6 (JA __); New York State Department of Environmental Conservation, Comments, Proposed MATS Rule, at

Many of the State Intervenors were petitioners¹⁴ in *New Jersey v. EPA*, this Court's decision which ultimately led EPA to address EGU mercury emissions under the stringent standards required by §112(d) of the Act. 517 F.3d 574 (D.C. Cir. 2008). We intervene here to support EPA's listing of EGUs as a source of hazardous air pollutants that must be controlled pursuant to §112 and to support the MATS Rule. The MATS Rule imposes nationally applicable controls that will address EGUs outside our borders and that meet the maximum achievable control technology (MACT) standards that §112 mandates. *See* 42 U.S.C. §7412(c), (d)(2),(3).

STANDARD OF REVIEW

State Intervenors adopt the Standard of Review provided by EPA. EPA Br. 16-17.

cover, 1, EPA-HQ-OAR-2009-0234-17796 (NYSDEC Comments) (JA __); New England Interstate Water Pollution Control Commission, Comments, Proposed MATS Rule, at 1, EPA-HQ-OAR-2009-0234-17625 (NEIWPCC Comments) (JA __). *See also* Minnesota TMDL, 20-21 (approximately thirty percent of mercury deposition in Minnesota originates within the U.S., but beyond Minnesota's borders), 45 (noting that national regulation of mercury emissions from out-of-state sources, such as electric utilities, holds most promise for reaching TMDL goals).

¹⁴ California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Rhode Island, Vermont, and the City of Baltimore were also Petitioners in *New Jersey v. EPA*.

SUMMARY OF ARGUMENT

EPA correctly determined that regulation of hazardous air pollutants from EGUs under §112 of the Act is “appropriate and necessary.” EGUs are the largest domestic source of anthropogenic mercury, and mercury contamination of state and local waters causes serious, long-term, health and welfare effects to the public, including vulnerable children, that is not being effectively addressed by other provisions of the Act. Because harms caused by mercury are a result of the cumulative effect from emissions by EGUs and other sources, EPA properly declined to base its decision on harms caused by mercury emissions from EGUs alone.

Once EPA determined that regulation of EGU emissions was “appropriate and necessary,” it was required to adopt MACT standards under §112(d). At minimum, given Congress’s goal of protecting public health and the environment by regulating all major hazardous air pollutant sources through comprehensive and stringent MACT standards, EPA permissibly concluded that Congress intended regulation of the largest source of mercury under §112(d) following an affirmative “appropriate and necessary” determination.

EPA also properly refrained from granting a blanket extension of time for all publicly-owned EGUs to comply with the MATS Rule. To grant a blanket

extension regardless of demonstrated need would have allowed continuing levels of harmful emissions, contradicting the purpose of the Act.

ARGUMENT

I. EPA HAD AMPLE BASIS FOR ITS DETERMINATION THAT REGULATION OF EGUs UNDER §112 IS APPROPRIATE AND NECESSARY.

Given the scientifically well-documented public health and environmental effects of mercury emissions, and the fact that roughly half of domestic emissions are attributable to EGUs and are not being controlled by other provisions of the Act, the record strongly supports EPA's determination that regulation of EGUs is "appropriate and necessary" under §112.

A. The record amply supports EPA's conclusion that EGUs are a major source of harmful mercury, warranting regulation under §112.

The record flatly contradicts Petitioners' characterization of EGUs as making an "exceedingly small" contribution to the nation's mercury problem. *See* Joint Brief of State, Industry, and Labor Petitioners (Joint Br.) 9. EGUs account for approximately fifty percent of national mercury emissions.¹⁵ 76 Fed. Reg. 25,002, Table 3. By 2016, after application of the other control programs in the

¹⁵ The proportion of national mercury emissions attributable to EGUs has steadily increased. In 1990, EGUs contributed less than twenty-five percent of national mercury emissions. EPA, *Memorandum: Emissions Overview: Hazardous Air Pollutants in Support of the Final Mercury and Air Toxics Standard*, EPA-454/R-11-014, at 3 (Nov. 2011). In 2000, EGUs contributed thirty percent of the total. 65 Fed. Reg. 79,825, 79,827/2 (Dec. 20, 2000).

Act, EGUs will emit nearly six times more mercury than the next largest source category.¹⁶ *Id.* 25,015, Tab. 3.

Moreover, EPA found that mercury deposition from EGUs alone results in potential mercury exposures to individuals that exceed the Reference Dose (RfD)¹⁷ in ten percent of those watersheds for which EPA had adequate data. 77 Fed. Reg. 9355/3. EGUs are a major source of mercury contamination in some of the nation's most iconic water bodies, including the Great Lakes and Chesapeake Bay. 76 Fed. Reg. 25,016; 77 Fed. Reg. 9341/3-9342/1.¹⁸ Without national controls on EGU mercury emissions, the Northeast's mercury-impaired surface waters cannot be brought into compliance with applicable state and federal law, and the fish dwelling in those waters cannot be made safe for regular consumption.¹⁹

In light of the compelling record evidence, EPA reasonably, and correctly, found that EGUs are a major source of harmful mercury emissions that needs to be

¹⁶ The next two largest sources are certain steel manufacturing furnaces and industrial, commercial, and institutional boilers and process heaters. 76 Fed. Reg. 25,002.

¹⁷ Because there is no known safe level of exposure, EPA set a RfD for methylmercury representing the level above which there is a known increased risk of neurological effects in children. 77 Fed. Reg. 9310/3; 9351/3.

¹⁸ *See also* Southern Environmental Law Center, Comments, Proposed MATS Rule, at 16, EPA-HQ-OAR-2009-0234-17836 (SELC Comments) (JA ___).

¹⁹ MassDEP Comments, 6 (JA ___); NYSDEC Comments, cover, 1 (JA ___); NEIWPC Comments, 1 (JA ___).

addressed and, therefore, that it is “appropriate and necessary” to regulate EGU mercury emissions under §112 of the Act.

B. EPA reasonably determined that mercury exposure has serious and long-term health effects, making regulation of EGUs “appropriate and necessary.”

There is no known safe or zero risk level of mercury exposure, 76 Fed. Reg. 25,000/3; 77 Fed. Reg. 9351/3; even seemingly minute amounts can be unsafe for a pregnant woman to consume.²⁰ Once ingested, mercury poses serious and long-lasting health risks to people, especially to children born to women who consumed contaminated fish during pregnancy. 76 Fed. Reg. 24,983/3; *Amici Br.* 17-19. Children exposed to relatively high levels of methylmercury in utero have shown a frightening array of neurological problems, including cerebral palsy, delayed developmental milestones, and the lowering of IQ. 65 Fed. Reg. 79,825, 79,829/3 (Dec. 20, 2000); 76 Fed. Reg. 25,007/3; *Amici Br.* 18-19. As this Court noted in *Coalition of Battery Recyclers Association v. EPA*, 604 F.3d 613, 618-19 (D.C. Cir. 2010) in the context of upholding EPA lead standards, “a small change in IQ at the level of an individual is a substantial change at the level of a population.”

By acting to protect one of the most vulnerable segments of our population, children, EPA has hewn closely to the goals of the Clean Air Act and §112. *See*

²⁰ MassDEP Comments, 6 (JA ___).

Chemical Mfrs. Ass'n v. EPA, 217 F.3d 861, 866 (D.C. Cir. 2000) (“The [Act’s] purpose is to ‘protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare’”) (quoting 42 U.S.C. § 7401(b)(1)); *Battery Recyclers*, 604 F.3d at 617 (“[T]he [Act] allows protection of sensitive subpopulations.”). Given that seven percent of women of childbearing age may already be exposed to dangerous mercury levels, 65 Fed. Reg. 79,829/3, the serious health effects of mercury contamination, and the limitations of the patchwork of fish consumption advisories²¹ and other controls in place, national regulation of EGU mercury emissions is not only “appropriate and necessary,” it is imperative.

C. EPA properly considered the cumulative effects of mercury when studying the health and environmental hazards caused by EGU mercury emissions.

Contrary to Petitioners’ contention that EPA was required to base its decision on whether EGU mercury emissions *alone* harm public health and the environment, Joint Br. 47-48, EPA correctly evaluated whether the *contribution* by EGUs to the public health and environmental threats posed by mercury makes §112 regulation “appropriate and necessary.” Petitioners disregard the intermingled nature of mercury pollution from EGUs and other sources. Fish do not discriminate between EGU-derived methylmercury and that from any other source, nor do the people exposed to it. An individual who consumes more than

²¹ SELC Comments, 12-13 (JA __).

the RfD amount of mercury risks health damage, *see* 76 Fed. Reg. 25,000/3; it makes little difference whether EGUs contributed the first or last increment of that mercury. EPA was not required to determine whether EGUs emissions, considered in a vacuum, expose individuals to levels over the RfD. *See Grand Canyon Trust v. FAA*, 290 F.3d 339, 346 (D.C. Cir. 2002) (“an analysis cannot treat an identified environmental concern in a vacuum.”). Even by that measure, however, EPA’s finding that EGU emissions, alone, cause significant numbers of RfD exceedances, 77 Fed. Reg. 9355/3, defeats Petitioners’ claim that regulation of EGU emissions is not “appropriate and necessary.”

II. MACT STANDARDS UNDER §112(d) ARE REQUIRED FOR EGUs.

Petitioners argue that EPA erred in interpreting §112(n)(1)(A) to mandate regulation of EGU hazardous air pollutant emissions through §112(d) MACT standards. Joint Br. 36-38. Under the plain language of the Act, however, once EPA determined that regulation of EGU hazardous air pollutants was “appropriate and necessary,” the statute required it to adopt such MACT standards for EGUs. 42 U.S.C. §7412(n)(1)(A) (directing EPA to issue regulations “under this section”); *New Jersey*, 517 F.3d at 582 (once EPA lists EGUs as a source category under §112, EGUs are subject to full requirements of the section); EPA Br. 56-58 (Petitioners’ approach foreclosed under step one of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)).

At a minimum, EPA's interpretation is permissible under *Chevron* step two. 467 U.S. at 843. In the 1990 amendments, Congress mandated comprehensive regulation of hazardous air pollutant emissions from listed major sources through the application of MACT standards. EPA Br. 5; *Amici* Br. 24. EPA has already adopted §112(d) MACT standards regulating mercury emissions from other combustion-related sources, *e.g.* industrial, commercial, and institutional boilers and process heaters, 75 Fed. Reg. 32,005 (June 4, 2010), and stationary combustion turbines, 69 Fed. Reg. 10,512 (Mar. 5, 2004). It defies logic that Congress would not have intended to subject the largest source of mercury and other hazardous air pollutants to the same strict controls, once EPA made its well-supported finding that EGU regulation is "appropriate and necessary."

III. EPA REASONABLY DECLINED TO ISSUE A BLANKET ONE-YEAR COMPLIANCE EXTENSION TO PUBLIC POWER AUTHORITIES.

EPA correctly refrained from issuing a one-year blanket extension to public power authorities, reasonably opting, instead, to rely on permitting authorities to issue "up to a 1-year extension, on a case-by-case basis," if additional time is actually necessary. *See* 77 Fed. Reg. 9409/3. Not only is EPA's approach consistent with the language of §112(i)(3) and this Court's decisions, EPA Br. 101-03, it promotes the overarching health-protection and pollution-reduction purposes of §112. To grant a blanket extension applicable to sources that *could* comply

within three years²² would contradict Congress's instruction to EPA to implement comprehensive and expeditious reductions in hazardous air pollutant emissions. *See* EPA Br. 4-5; *Amici* Br. 24. This is particularly true for mercury because it persists in the environment, 76 Fed. Reg. 24,999, so that any such additional delay would increase the risk of harm to public health and the environment for an even longer time.

²² Petitioners' own comments confirm that not all public power authorities will need an extension. *See e.g.*, American Public Power Association, Comments, Proposed MATS Rule, at 26, EPA-HQ-OAR-2009-0234-17836 (JA __) ("About one-fourth [of survey respondents] were moving forward with plans based on the notice of proposed rule"; conceding that bidding procedures, financing and regulatory approval processes differ considerably by state and local laws and geography, and not all will necessarily be feasibility-constrained.).

CONCLUSION

For all the reasons set forth above, the MATS Rule should be upheld.

Respectfully submitted,

MARTHA COAKLEY
ATTORNEY GENERAL

TRACY TRIPLETT
CAROL IANCU
Assistant Attorneys General
MELISSA HOFFER
Assistant Attorney General, Chief
Environmental Protection Division

/s/ Tracy L. Triplett

Tracy L. Triplett

KAMALA D. HARRIS
ATTORNEY GENERAL

SALLY MAGNANI
Senior Assistant Attorney General
JANILL RICHARDS
Supervising Deputy Attorney General
SUSAN L. DURBIN
Deputy Attorney General

Dated: February 21, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and the Court's Order dated August 24, 2012, I hereby certify that the foregoing brief is in 14-point, proportionately spaced, Times New Roman typeface and contains 3065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word processing software used to prepare this brief was Microsoft Word 2010.

/s/ Tracy L. Triplett

Tracy L. Triplett

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for State and Local Government Intervenors-Respondent in Support of EPA has been served through the Court's CM/ECF system on all registered counsel this 21st day of February, 2013.

DATED: February 21, 2013

/s/ Tracy L. Triplett

Tracy L. Triplett