Clean Air Task Force • National Wildlife Federation • Natural Resources Council of Maine

Senator Susan Collins
172 Russell Senate Office Building
Washington, D.C. 20510

March 4, 2005

Re: Request for Oversight Hearings of the U.S. EPA's development of the proposed Mercury MACT standard for Electric Utilities

Dear Senator Collins:

We write concerning the findings of the recent EPA Office of Inspector General (OIG) report[2] which confirmed serious irregularities in the process that the U.S. EPA used to develop its proposed emission standards for mercury from electric utility plants – the so-called Mercury MACT rule. As you know, the State of Maine has issued fish consumption advisories for fish from every Maine water body due to mercury contamination. The only unregulated industrial source of mercury air emissions in this country remains electric utilities. The Clean Air Act requires this industry to install Maximum Achievable Control Technology (MACT) to help remedy this problem.

The OIG concluded that the process the EPA used to develop the Mercury MACT rule was compromised, biased and not in accordance with the requirements of the Clean Air Act. Consequently, we believe EPA's current proposal constitutes a waste of the Agency's resources, fraudulent representation of information and abuse of administrative procedures. This proposal, if finalized, would violate the spirit and the letter of the Clean Air Act. But perhaps even more importantly, the deeply flawed process by which this proposal was developed undermines the integrity of the regulatory process of setting MACT standards generally under the Clean Air Act. According to the OIG, EPA failed to perform the required analytic process for setting the standard, despite stating so in the proposal, and simply inserted mercury targets based on the Administration's proposed "Clear Skies" legislation. For the reasons detailed below, we ask that you immediately schedule oversight hearings to request an investigation into these irregularities. EPA currently is under court order to issue a final rule by March 15, 2005. We ask that your hearing schedule consider this deadline.

As you know, in August, 2001, EPA formed an advisory group for the MACT proposal – the Utility MACT Working Group – constituted under the Federal Advisory Committee Act (FACA). The group consisted of industry, state, and environmental community representatives. Both the Clean Air Task Force and National Wildlife Federation were represented in this process. The Working Group held 14 meetings of a period of 18 months. In March 2003, EPA scheduled an April 2003 meeting. The April meeting was abruptly cancelled and was never rescheduled. In fact, although the purpose of the group was to advise EPA as it formulated its proposal, the group never met again prior to the

EPA Administrator signing the proposed rule in December 2003. To date, there has been no explanation for the dissolution of the working group. The OIG found that a formal notice of termination has not been issued to the working group.

Setting a MACT standard involves a fairly involved process of evaluating the feasibility of control technologies, setting a technology "floor" based on deployment of control technologies at existing facilities and evaluating "beyond the floor" control options. The OIG found that EPA did not conduct an unbiased analysis of mercury emissions data and the Agency's MACT floor by design mirrors the dates and caps contained in the Administration's proposed "Clear Skies" legislation. In fact, the OIG found that senior management at EPA instructed staff to develop a MACT standard that expressly resulted in 34 tons of national emissions – the exact cap contained in the Clear Skies Legislation.

In addition, Executive Order 12866 requires that EPA identify and evaluate alternatives, select from among them, and explain why its proposed option is justified. The OIG's review of the proposal and docket materials reveals no effort to comply with this requirement. Furthermore, the OIG concluded that EPA did not adequately address the risks to children's health as required by Executive Order 13045. The OIG found that although the proposed rule states that EPA evaluated health and safety effects pertaining to children, their review of the proposal and docket did not show that EPA performed such analyses in accordance with Executive Order 13045.

EPA's abuse of administrative procedures is documented by the OIG in several areas. First, the intra-agency work group review process followed in this rulemaking varied significantly from past Agency practice. As a result, the intra-Agency work group was not given an opportunity to provide meaningful feedback on the proposed rule. Second, the EPA did not submit relevant analyses to the docket. According the OIG, these analyses consisted of modeling runs that would have demonstrated that a more stringent standard (i.e., tighter than the 34 ton emission rate) was economically feasible. Third, OIG was not provided with several important documents it had requested from the EPA and consequently that information could not be evaluated and included in the OIG's report. Finally, because EPA did not provide the requested information, the OIG was unable to address the issue of the proposed regulation containing entire sections of text that were lifted verbatim from memos prepared for law firms representing industry participants. We have previously documented that EPA used industry language to justify numerous key provisions of the proposed rule including the rationale for subcategories, the exemption of non-mercury hazardous air pollutants from regulation, the global compliance extension and even the section 112(n) cap and trade program. Clearly this constitutes an abuse of administrative procedures on the part of EPA.

In sum, abrupt cancellation without explanation of a public advisory process; results-oriented analysis that the OIG found to have begun with the conclusion ("Clear Skies" dates and caps) and fashioned as a post-hoc justification for the numbers; industry lawyers writing whole portions of a regulatory proposal – these are sure signs of a fraudulent regulatory process.

Of course, we stand ready to challenge in court any final rule that fails to meet the requirements of the law. We have submitted record comments pointing out the legal and policy flaws we see in the proposal. But, the facts as they appear today suggest that EPA is conducting business in such a way as to constitute waste, fraud and abuse. Based on the OIG findings, as Chair of the Senate Governmental Affairs Committee, it is absolutely appropriate for you to initiate committee hearings into this matter. The integrity of the U.S. EPA as the independent agency charged with the primary responsibility in this country for protection of our people from environmental health threats is of paramount importance to us. We are sure you share this concern and will respond appropriately.

Thank you for attention to this important matter. We look forward to hearing from you.

Very truly yours,

Conrad G. Schneider, Clean Air Task Force

Everett B. Carson, Natural Resources Council of Maine

Felice Stadler, National Wildlife Federation

Cc: David Hunter

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[1] Evaluation Report. U.S. EPA Office of the Inspector General. Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities. Report No. 2005-P-00003, February 3, 2005.

[2] Evaluation Report. U.S. EPA Office of the Inspector General. Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities. Report No. 2005-P-00003, February 3, 2005.