

**Proposed Supplemental Finding That It Is Appropriate And
Necessary To Regulate Hazardous Air Pollutants From
Coal- And Oil-Fired Electric Utility Steam Generating Units**

Docket ID No. EPA-HQ-OAR-2009-0234

**Comments of the States of Michigan, Alabama, Arizona,
Arkansas, Kansas, Nebraska, North Dakota, Ohio, Oklahoma,
South Carolina, and West Virginia**

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Submitted electronically at <http://www.regulations.gov>

On December 1, 2015, the U.S. Environmental Protection Agency published a proposed supplemental finding for the Mercury and Air Toxics Standards (“MATS Rule” or “Rule”). 80 Fed. Reg. 75,025 (Dec. 1, 2015). EPA proposed to find that consideration of costs does not alter the agency’s previous conclusion that it is appropriate to regulate coal- and oil-fired electric utility steam generating units under section 112 of the Clean Air Act, 42 U.S.C. § 7412. EPA’s proposal suffers from two principal legal defects.

First, EPA attempts to justify regulating hazardous air pollutants from power plants under § 7412 based on the benefits from addressing a different environmental problem (emissions of fine particulate matter, or PM_{2.5}). Any benefit from reducing fine particulate matter is not relevant for deciding whether regulating hazardous air pollutants is appropriate under § 7412. When the legally irrelevant co-benefit of reducing fine particulate matter is, as it must be, excluded from EPA’s analysis, the costs of the Rule substantially outweigh its benefits. That revised analysis demonstrates that regulation of hazardous air pollutants from power plants is *not* appropriate.

Second, although EPA claims the Rule’s benefits “outweigh” its costs, 80 Fed. Reg. at 75,039, the agency never engages in any weighing or balancing of costs and benefits. Instead, EPA only identifies the benefits from the Rule and the annual compliance costs of \$9.6 billion. The Supreme Court, in *Michigan v. EPA*, 135 S.Ct. 2699 (2015), required that EPA compare and weigh the costs and benefits, not

simply identify them. EPA failed to do that. As a result, the proposed supplemental finding lacks a lawful basis.

EPA's task is to (1) identify the relevant costs and benefits; (2) weigh and balance them to determine whether there are any positive net benefits; and (3) make a finding as to whether regulation of hazardous air pollutants from power plants is "appropriate." As discussed below, EPA has not performed the first two steps.

I. EPA failed to identify the relevant benefits

In order to weigh the Rule's costs and benefits and determine whether regulation is "appropriate," EPA must first identify which costs and benefits are relevant for that determination. In § 7412(n)(1)(A), Congress addressed a specific problem (the emission of hazardous air pollutants from power plants) and directed EPA to decide whether regulation is "appropriate" to address *that* problem. The statute requires that EPA perform a study of the hazards to public health from emissions by power plants of "pollutants listed under subsection (b) of this section" (i.e., the hazardous air pollutants listed in § 7412(b)) after imposition of the requirements of the Clean Air Act. Section 7412(n)(1)(A) further provides that EPA shall regulate power plants under § 7412 if it finds "such regulation is appropriate and necessary" after considering the results of the study. The plain language of § 7412(n)(1)(A) therefore establishes that a finding of whether regulation is "appropriate" must be based on the costs and benefits of regulating hazardous air pollutants, not other pollutants like fine particulate matter.

EPA's *Guidelines for Preparing Economic Analyses* confirm that EPA must base its "appropriate" finding on the costs and benefits of regulating hazardous air pollutants. The guidelines state that EPA must identify the "relevant economic variables" based on the "environmental problem the regulation addresses." U.S. EPA, *Guidelines for Preparing Economic Analyses*, 5-3 (updated May 2014). Here, the environmental problem that Congress instructed EPA to address is the emission of hazardous air pollutants (not fine particulate matter) from power plants.

As EPA notes, the guidelines also state "[a]n economic analysis of regulation or policy options should present all identifiable costs and benefits that are incremental to the regulation or policy under consideration," including "'ancillary (or co-) benefits and costs.'" 80 Fed. Reg. at 75,041, n. 58. That statement, however, applies to economic analyses generally. The *specific* economic analysis EPA must perform here is for an "appropriate" finding under § 7412(n)(1)(A). The guidelines (and § 7412(n)(1)(A) itself) establish that the "relevant economic variables" for an "appropriate" finding are the costs and benefits of regulating hazardous air pollutants (not fine particulate matter) from power plants.

Further, it makes no difference whether such reductions in fine particulate matter are a "direct consequence" of the Rule's use of particulate matter as a surrogate for non-mercury metal hazardous air pollutants. 80 Fed. Reg. at 75,041. Reductions in fine particulate matter are not relevant for, and cannot form the basis of, an "appropriate" finding.

The legal irrelevance of fine particulate matter as a benefit is reinforced by the fact that Congress enacted another program to specifically address those emissions – the national ambient air quality standards (“NAAQS”) under § 7409. EPA sets NAAQS for particulate matter and the five other “criteria” pollutants (ozone, nitrogen oxides, carbon monoxide, sulfur dioxide, and lead) that EPA has determined are harmful to public health and welfare. The standards establish maximum concentrations with an “adequate margin of safety” to protect public health. § 7409(b)(1). Every five years EPA must review the standards and update them when needed to ensure they provide adequate health protection based on current scientific information. § 7409(d)(1).

EPA revised the NAAQS for fine particulate matter in both 2006 and 2013 to make it more stringent. 71 Fed. Reg. 61,144 (Oct. 17, 2006); 78 Fed. Reg. 3086 (Jan. 15, 2013). If EPA has information demonstrating the standard is still not sufficiently protective, then it has authority under § 7409 to make additional changes. But EPA cannot claim it is “appropriate” to regulate hazardous air pollutants from power plants under § 7412 based on the benefits from further reductions of fine particulate matter. The text of § 7412(n)(1)(A) and EPA’s own guidelines establish that those ancillary co-benefits are not relevant benefits for an appropriate finding.

The purpose of a benefit-cost analysis is to determine whether a policy’s net benefits are positive. *Guidelines* at 1-4. Here, EPA estimated that nearly all of the Rule’s benefits (\$37 to \$90 billion) are from reduced emissions of fine particulate

matter (\$36 to \$89 billion). 77 Fed. Reg. 9304, 9306 (Feb. 16, 2012). When the legally irrelevant co-benefit associated with fine particulate matter is eliminated from EPA's benefit-cost analysis, the quantified net benefits are overwhelmingly negative. That analysis establishes it is *not* appropriate to regulate hazardous air pollutants from power plants.

II. There is no support for EPA's conclusion that the Rule's benefits outweigh its costs

When deciding whether regulation of hazardous air pollutants is "appropriate" under § 7412(n)(1)(A), EPA must weigh the Rule's advantages and disadvantages and determine whether it results in a positive net benefit. In *Michigan*, the Supreme Court ruled that EPA erred when it "refused to consider whether the costs of regulation outweighed the benefits." 135 S.Ct. at 2706. The Court emphasized: "One would not say that is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.*

EPA's guidelines similarly provide that the "foundation" for a benefit-cost analysis is "that a policy's net benefits to society be positive." *Guidelines* at 1-4. The Supreme Court's decision in *Michigan* and EPA's guidelines therefore establish that EPA must weigh the annual compliance costs of \$9.6 billion against the benefits from reducing hazardous air pollutants and determine whether any positive net benefits support a determination that regulation is appropriate.

In the proposed supplemental finding, EPA acknowledges that its task is to assess whether the Rule's benefits outweigh the costs. 80 Fed. Reg. at 75,028 ("In

this supplemental finding, therefore, the significant hazards to public health and the environment from HAP emitted by EGUs (and the substantial reductions in HAP emissions achieved by MATS that are described in Section IV.B.2 of this document) should be weighed against the costs of compliance.”); *Id.* at 75,031 (“Thus, the advantages of reducing identified hazards to public health and the environment must be considered and weighed against the costs or disadvantages, taking into account the statutory goals.”).

The legal memorandum that accompanies the proposed supplemental finding also states that EPA must weigh and balance the Rule’s benefits and costs. Legal Memorandum at 1 (discussing EPA’s “approach to balancing the costs with the other factors relevant to determining whether regulation of HAP emissions from EGUs is appropriate.”).

Despite the clear and unambiguous requirement that EPA must weigh costs and benefits to determine whether there are any positive net benefits, the agency fails to do so. Instead, EPA’s “preferred approach to incorporating costs in the appropriate finding,” 80 Fed. Reg. at 75,039, is to identify the \$9.6 billion in annual compliance costs, characterize them using different metrics (including costs as a percentage of power sector sales and the impact on generating capacity), and identify benefits (reducing the volume of hazardous-air-pollutant emissions and the risks posed by them). 80 Fed. Reg. at 75,031-38. Based on this review, EPA concludes that the Rule provides a range of benefits and that power plants can “afford” the costs. *Id.*; Legal Memorandum at 19.

That analysis is not sufficient. The central flaw in EPA's evaluation is that the agency never weighs the \$9.6 billion in annual compliance costs against the Rule's benefits to determine whether there are any positive net benefits. EPA's proposed supplemental finding is therefore contrary to the Supreme Court's ruling in *Michigan* for how EPA is to undertake an "appropriate" determination.

The agency nevertheless asserts the Rule's advantages "outweigh" its costs. 80 Fed. Reg. at 75,039. That conclusory statement has no support in the proposed supplemental finding or the accompanying legal memorandum.

To weigh the Rule's benefits and costs, EPA must compare and balance them, not simply identify them. EPA must revise its analysis to weigh the benefits and costs and assess whether there are any positive net benefits. Then, based on that revised evaluation, the agency must determine whether regulation is "appropriate." If, as the available information demonstrates, EPA finds that regulation is not "appropriate," it must rescind the MATS Rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bill Schuette". The signature is written in a cursive, flowing style.

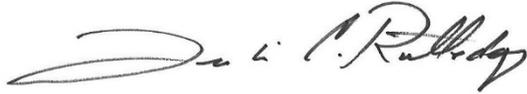
Bill Schuette
Michigan Attorney General



Luther Strange
Alabama Attorney General



Mark Brnovich
Arizona Attorney General



Leslie Rutledge
Arkansas Attorney General



Derek Schmidt
Kansas Attorney General



Douglas Peterson
Nebraska Attorney General



Wayne Stenehjem
North Dakota Attorney General



Mike DeWine
Ohio Attorney General



Scott Pruitt
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General



Patrick Morrisey
West Virginia Attorney General