National Emissions Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units-Reconsideration of Supplemental Finding and Residual Risk and Technology Review

Proposed Rule

84 Fed. Reg. 2670 (February 7, 2019)

EPA–HQ–OAR–2018–0794

COMMENTS OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL ("ELCON")

Submitted by:

Devin Hartman
President and CEO
Email: dhartman@elcon.org

ELECTRICITY CONSUMERS RESOURCE COUNCIL
1101 K Street, NW, Suite 700
Washington, DC 20005
Phone: (202) 682-1390

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INTRODUCTION

The Electricity Consumers Resource Council ("ELCON") appreciates the opportunity to submit the following comments on the Environmental Protection Agency's ("EPA's") proposed rule in Docket ID No. EPA–HQ–OAR–2018–0794, 84 Fed. Reg. 2670 (February 7, 2019).

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Reliable and reasonably priced electricity supply is essential to our members' operations.

ELCON represents both companies that generate electricity and companies that are reliant upon affordable and reliable energy to produce products critical to the success and growth of the American economy. ELCON has a strong interest in further implementation of EPA's Mercury and Air Toxics Standard ("MATS") and on future regulatory programs that impact electricity generation based on the principles established in the MATS.

The key aspect of EPA's current proposed rule of interest to ELCON is EPA's recalculation of the benefits attributable to the MATS as originally promulgated. As part of the proposed rule, EPA issued a proposed revised Supplemental Cost Finding concluding that the revised quantifiable benefits ($4-$6 million annually) of the MATS compare very unfavorably to the cost of the MATS rule ($7.4-$9.6 billion annually). The original quantified benefits included the incidental "co-benefits" of particulate matter ("PM") reduction estimated at $36-$89 billion, far exceeding both the costs and "core benefits" estimates. *See* 84 Fed. Reg. at 2676. Thus, co-benefits swing the cost-benefit analysis in either direction, and by eliminating co-benefits from consideration, the current proposed rule concludes that the original MATS is clearly not cost justified and therefore is not "appropriate and necessary" under Section 112 of the Clean Air Act.

There also are several other aspects to the current proposal rule, including EPA completion of the "risk and technology review" for covered power plants – as required by the Clean Air Act – concluding that no new standards are appropriate. ELCON's comments, however, address only EPA's proposed reconsideration of the cost justification for the MATS.

ELCON supports EPA's proposed revised Supplemental Cost Finding for the MATS. All regulations should have to pass a cost-benefit test, with costs and benefits properly calculated and allocated. In the MATS as originally promulgated, the benefits analysis was flawed in a way that resulted in regulatory overreach. The key pollutant driving benefits estimates that EPA used to justify the original MATS rule, PM, is already covered under the National Ambient Air Quality Standards ("NAAQS"). In the MATS final rule (released in December 2011), EPA's original analysis overstated the benefits of the MATS by attributing to it the PM2.5 benefits from the soon-to-be released 2012 NAAQS for PM.

ELCON believes that that the MATS and other technology-based standards for Hazardous Air Pollutants ("HAPs") under Section 112 of the Clean Air Act should only account for *incremental* co-benefits that are not being addressed under regulatory alternatives such as

criteria pollutants covered under NAAQS. The decision to regulate HAP emissions should be driven primarily by the benefits from reductions in HAP emissions.

Reconsidering the cost justification for the MATS could fundamentally change the approach to accounting for costs and benefits in regulatory decisions. This would help establish a lasting framework to prevent regulatory overreach justified by creative benefits accounting. Considering the exposure of the U.S. power generation fleet to additional regulation Section 112 of the Clean Air Act, avoiding future regulations similar to the MATS has the potential for billions in annual cost avoidance for consumers.

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The original justification for the MATS largely was premised on an asserted reduction in co-pollutants that are directly regulated under other provisions of the Clean Air Act. In particular, the original MATS analysis overstated co-benefits attributable to PM, as PM is already covered under a separate EPA regulation, the NAAQS, which is implemented by the states. In fact, the focus of the MATS and other EPA regulation under Section 112 of the Clean Air Act is HAPs, and not on the criteria pollutants such as PM that are regulated under the NAAQS. Reductions in PM from under the MATS frees up states already in NAAQS attainment to relax regulations on other PM sources, which would offset the effect of MATS on PM (i.e., other areas could reduce stringency on new sources). Thus, there would be dramatically lower total incremental PM reductions from the MATS than were asserted by EPA in the original MATS rule, which therefore vastly overstated the "benefits" attributable to the MATS.

As EPA correctly states in the current proposed rule, 84 Fed. Reg. at 2674, the determination of whether a regulation is "appropriate" under Section 112 of the Clean Air Act requires consideration of its costs and benefits. ELCON supports EPA's updated position that the prior cost-benefit analysis supporting the MATS was fatally flawed by improperly accounting for co-benefits from non-HAP emissions reductions that are outside the scope of Section 112. 84 Fed. Reg. at 2675-75. As EPA stated:

> [S]tatements acknowledging that reductions in HAP can have the collateral benefit of reducing non-HAP emissions and vice versa, provide[] no support for the proposition that any such co-benefits should be the Agency's primary consideration when making a finding under CAA section 112(n)(1)(A). Indeed, it would be highly illogical for the Agency to make a determination that regulation under CAA section 112, which is expressly designed to deal with HAP, is justified principally on the basis of the criteria pollutant impacts of these regulations. That is, if the HAP- related benefits are not at least moderately commensurate with the cost of HAP controls, then no amount of co-benefits can offset this imbalance for purposes of a determination that it is appropriate to regulate under CAA section 112(n)(1)(A). *Cf. Michigan,* 135 S. Ct. at 2707 (''One would not say that it 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.'').

> …
> [T]his action proposes to primarily consider the costs of MATS in comparison with the HAP benefits of the hazardous pollution reductions from MATS. In keeping with CAA section 112(n)(1)(A) and the overall structure of the CAA, we think it is appropriate not to give equal weight to non-HAP co-benefits in this comparison.

84 Fed. Reg. at 2676, 2678.

Although the vast majority of compliance costs for MATS have already been incurred, the proposed reconsidered cost justification for the MATS rule has important future implications for future EPA rulemakings. Correction of the regulatory approach to co-benefits accounting in regulatory decision-making, as the current proposed rule seeks to accomplish, would establish an important precedent that future regulation cannot be justified by inaccurate and flawed accounting for co-benefits. Specifically, the MATS decision could broadly reorient how EPA applies Section 112 of the Clean Air Act to a large array of potential future technology-based standards. Avoiding regulations primarily motivated to indirectly regulate co-pollutants rather than use the proper regulatory apparatuses dedicated to covering those pollutants, such a precedent almost certainly could result in savings of billions of dollars in costs of future regulations that would otherwise satisfy a cost- benefits analysis, considering the potential for future Section 112 regulatory actions.

The current proposed rule makes a strong case that EPA's prior justification for its equal reliance on the co-benefits of non-HAP emissions when setting the MATS standards was based on a flawed interpretation of the statute and its legislative history. *See* 84 Fed. Reg. at 2676-78. EPA's current analysis should prevail, not only as a matter of statutory meaning but as the best policy outcome that is consistent with sound economics. Economists generally agree that proper cost-benefit analysis should only account for the *incremental* co-benefits of a regulatory intervention.[1] Furthermore, a favorable net benefits or benefit-cost ratio alone does not automatically justify intervention. The regulatory decision should consider alternative regulatory actions with more attractive net benefits or benefit-cost ratios. In this case, alternatives are already in place for PM and other criteria pollutants. Executive Orders under prior administrations have emphasized through review by the Office of Management and Budget ("OMB") that regulations are to be driven by net benefits after weighing regulatory alternatives.

[1] Economics is fundamentally concerned with weighing marginal costs and benefits to evaluate the incremental effect of a regulatory decision. Generally, the incremental approach to cost-benefit analysis compares a scenario with a counterfactual baseline, which isolates the costs and benefits attributable to a regulatory intervention.

CONCLUSION

In conclusion, ELCON supports a determination in this proceeding that the MATS and other technology-based standards under Section 112 of the Clean Air Act should account for only incremental co-benefits, and in particular that such benefits should not include those attributable to pollutants already controlled by other regulations such as criteria pollutants covered under NAAQS.

Respectfully submitted,

Devin Hartman
President and CEO
Email: dhartman@elcon.org

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