August 11, 2025

Environmental Protection Agency: National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units
Notice of Proposed Rulemaking
25 Fed. Reg. 25,535 (June 17, 2025)

Comments of the Competitive Enterprise Institute

I. SUMMARY

The 2024 final rule tightening the Environmental Protection Agency's 2012 provisions addressing mercury emissions from coal-fired power plants would provide no discernable human health or environmental benefits but would further jeopardize electricity affordability and reliability. For these reasons, the 2024 rule was unreasonable, arbitrary and capricious, and an abuse of agency discretion. This proposed rule repealing these unlawful provisions should be finalized, and EPA should also reconsider its 2012 rule establishing such regulations in the first place.

II. ARGUMENT

1. EPA's 2012 and 2024 Rules Exceeded their Authority under Section 112 of the 1990 Amendments to the Clean Air Act.

The Competitive Enterprise Institute (CEI) is a policy and analysis organization committed to advancing the principles of free markets and limited government. Our primary focus is on federal regulations, including Clean Air Act regulatory programs such as the one at issue here. We thank EPA for the opportunity to submit these comments.

The U.S. is not the largest global emitter of anthropogenic mercury, nor is coal combustion the largest industrial source.[1] Furthermore, American mercury emissions from all sources have been declining for several decades, a trend predating the regulations at issue here.[2]

[1] United Nations, "Technical Background Report for the Global Mercury Assessment 2018," https://www.amap.no/documents/doc/technical-background-report-for-the-global-mercury-assessment-2018/1815.
[2] U.S. Geological Survey, "North American and European Atmospheric Mercury Declines Explained by Local and Regional Emission Reductions," January 13, 2026, https://www.usgs.gov/programs/environmental-health-program/science/north-american-and-european-atmospheric-mercury; Thomas Greib et al., "An Assessment of Temporal Trends in Mercury Concentrations in Fish," Ecotoxicology, September 19, 2019, https://par.nsf.gov/servlets/purl/10130153.

Nonetheless, in 2012 the Obama Administration chose to exercise authority in the Clean Air Act to impose first-ever controls on mercury from power plants.

Specifically, EPA invoked Sections 111 and 112 of the 1990 Amendments to the Clean Air Act to impose emissions limits on mercury and other designated hazardous air pollutants from coal and oil-fired electric generating units.[3] For purposes of this comment, we will focus on mercury emissions from coal-fired power plants, which was and is the main thrust of the regulations.

Section 112 requires that any such control measures be determined by the administrator to be "appropriate and necessary."[4] It is in this statutory context that the flaws of the agency's regulatory justification can best be understood. As CEI explained at the time, the agency's action fails any reasonable application of the appropriate and necessary requirement.[5]

By EPA's own admission, the mercury reduction benefits from the rule are negligible. Even with its highly dubious analysis assuming a population of child-bearing age women consuming vast quantities of self-caught fish contaminated with unusually high levels of methyl mercury, the agency strained to come up with $4 to $6 million dollars in damage, largely from a hypothetical decline in IQ of 0.00209 points among a subgroup of children deemed most at risk.[6]

To its credit, the agency was much more realistic about the costs to the electricity sector and ultimately to ratepayers, pegging them at up to $9.6 billion dollars annually.[7] Thus, this rule was one of the most expensive in the agency's history and one in which costs exceed direct benefits by a factor of a thousand or more. Nonetheless, EPA went ahead with this lopsided rule.

CEI noted at the time that it is poor policy to ignore costs in setting public health rules, especially when they are this exorbitant.[8] In such cases, any benefits are likely outweighed by the public health harm that comes from the resultant economic damage, including lower incomes, job losses, and higher energy bills and other living expenses. And, from a legal standpoint, it strains credulity that a rule whose intended benefits are so outweighed by costs could rationally be considered appropriate and necessary.[9] Indeed, in 2015 the U.S. Supreme Court struck down the rule largely on the grounds that it failed to adequately consider costs, remanding it to the

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[3] Environmental Protection Agency, "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," 77 Fed. Reg. 9,304 (February 16, 2012), https://www.govinfo.gov/content/pkg/FR-2012-02-16/pdf/2012-806.pdf.
[4] Clean Air Act, 42 U.S.C. § 7412(n)(1)(A)).
[5] Marlo Lewis, William Yeatman, and David Bier, "All Pain and No Gain: The Illusory Benefits of the Utility MACT," Competitive Enterprise Institute, June 12, 2012, https://cei.org/wp-content/uploads/2012/06/Marlo-Lewis-William-Yeatman-and-David-Bier-All-Pain-and-No-Gain.pdf.(All Pain and No Gain).
[6] Id., p. 14.
[7] Id., p. 13.
[8] Id., p. 13-15.
[9] Competitive Enterprise Institute, "Modernizing the EPA: A Blueprint for Congress," Competitive Enterprise Institute, 2025, pp. 93-94, 122-124. https://cei.org/wp-content/uploads/2025/03/ModernizingtheEPA_v5.pdf. (Modernizing the EPA).

agency for further consideration.[10] In the Court's words, "[o]ne 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."[11]

In the absence of any appreciable direct benefits from its rule targeting mercury and other hazardous air pollutants from coal-fired power plants, EPA relied on the incidental benefits claimed from estimated reductions in fine particulate matter. Indeed, the 2012 mercury rule is one of many EPA rules promulgated during the Obama and Biden administrations in which the calculated ancillary or co-benefits of fine particulate matter reductions are greater than the benefits attributed to the pollutant that was the ostensible reason for the rule.[12] Many of these, including the mercury rule, targeted coal-fired power plants and appear to be an effort to impose climate change policy using Clean Air Act provisions devoid of any such authority. Here, it is likely legally unacceptable to use Section 112 for regulatory purposes other than those set out in Section 112.[13]

In this case, these co-benefits were calculated to be $33 to $89 billion dollars annually, which, if taken at face value, would justify the costs of the rule. In 2016, these estimates were used by EPA to justify the rule upon remand from the Supreme Court.[14] However, CEI and others have documented the many flaws with these hypothetical fine particulate matter reduction benefits derived from weak statistical correlations and concluded that the actual benefits may be much closer to zero.[15]

Notwithstanding debates over the quantification of fine particulate matter benefits, it is important to recognize that they are the subject of direct regulation under another Clean Air Act provision, namely the National Ambient Air Quality Standards (NAAQS). The NAAQS for fine particulate matter comprehensively covers all sources of these emissions, including electric generating units. Indeed, EPA's NAAQS for fine particulate matter, which predate the mercury regulations at issue here and have been periodically tightened, are required by law to protect public health allowing for "an adequate margin of safety."[16] In other words, fine particulate matter is already comprehensively and strictly regulated under the Clean Air Act, including emissions from power plants. Thus, there likely is no credible argument that indirectly regulating fine particulate matter via ostensible mercury regulations is also allowed under Section 112.

The inappropriateness of including fine particulate matter co-benefits already impacted by the NAAQS (as well as other Clean Air Act regulations targeting coal-fired power plants) is

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[10] Michigan v. Environmental Protection Agency, 576 U.S. 743 (2015), https://supreme.justia.com/cases/federal/us/576/743/.
[11] Id.
[12] Modernizing the EPA, pp. 122-124
[13] Modernizing the EPA, pp. 123-124.
[14] Environmental Protection Agency, "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units," 81 Fed. Reg. 24,420 (April 25, 2016), https://www.govinfo.gov/content/pkg/FR-2016-04-25/pdf/2016-09429.pdf.
[15] All Pain and No Gain, pp. 15-19; S. Stanley Young et al., Shifting Sands Report #1: Keeping Count of Government Science: P-Value Plotting, P-Hacking, and PM2.5 Regulation (New York: National Associations of Scholars, 2021), pp. 29, 30, https://www.nas.org/reports/shifting-sands-report-i/full-report.
[16] Clean Air Act, 42 U.S.C. §109(b).

further underscored by the statutory language in Section 112 directing the agency to focus only on the value added from a hazardous air pollutants regulation. Specifically, the agency is required, before deciding whether to regulate, to study the risks "of pollutants listed under subsection (b) after imposition of the requirements of this chapter."[17] The EPA's defense of the rule was not limited to pollutants listed in under subsection (b) of Section 112 and ignored the imposition of the requirements elsewhere in the chapter.

In 2019, EPA reopened its 2016 supplemental finding defending the conclusion that the mercury rule was appropriate and necessary.[18] In response, CEI commented that the evidence still showed costs vastly in excess of any likely benefits and no statutorily acceptable justification for the rule.[19] Among other things, it highlighted the complete lack of any real-world evidence of pregnant subsistence fisherwomen eating dangerous levels of mercury-contaminated fish and harming their offspring.[20]

2. EPA's 2024 Rule Tightened the Requirements Despite Disappearing Mercury Reduction Benefits and Shrinking Coal-Fired Generation.

Nothing in the ensuing years has confirmed the merits of EPA's 2012 rule. Quite the contrary, the claimed mercury reduction and other benefits remain completely illusory while the costs have proven quite real and have contributed to coal-fired retirements at a faster pace than initially predicted. Obviously, both disappearing mercury benefits as well as a smaller coal-fired fleet would logically militate against the need to tighten the screws on the remaining facilities.

Nonetheless, the agency in 2024 finalized a rule that made both the emissions limits and testing protocols considerably more stringent.[21] For example, the filterable particulate matter (fPM) emission standard for existing coal-fired plants would be lowered three-fold, from 0.030 pounds per million British thermal units of heat input (lb/MMBtu) to 0.010 lb/MMBtu.[22] Also, regulated power plant owners would have to demonstrate compliance through continuous emission monitoring systems (CEMS), the costliest and most technologically challenging method, rather than the range of compliance options previously available.

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[17] Clean Air Act, 42 U.S.C. § 7412(n)(1)(A).

[18] Environmental Protection Agency, "National Emission 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. 2,670, (February 7, 2019), https://www.govinfo.gov/content/pkg/FR-2019-02-07/pdf/2019-00936.pdf.

[19] Marlo Lewis, Comments of the Competitive Enterprise Institute, National Emission Standards for Hazardous Air Pollutants: Coal-and Oil-Fired Electric Utility Steam Generating Unit – Reconsideration of Supplemental Fining and Residual Risk and Technology Review, April 17, 2019, https://cei.org/sites/default/files/MarloLewisComments04172019.pdf.

[20] Id., p. 8.

[21] Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review," 89 Fed. Reg. 35,508 (May 7, 2024), https://www.govinfo.gov/content/pkg/FR-2024-05-07/pdf/2024-09148.pdf. (2024 EPA Rule).

[22] Environmental Protection Agency, "Fact Sheet: Proposal to Repeal Revisions to the Mercury and Air Toxics Standards for Power Plants," June 11, 2025, https://www.epa.gov/system/files/documents/2025-06/6.11.25-mats-rtr-repeal-proposal-fact-sheet-final.pdf.

In justifying this rule, EPA abandoned the previous pretense of measurable (though small) improvements in public health from mercury reductions. The agency no longer quantified any benefits attributable to IQ losses in children of subsistence fisherwomen. While we appreciate the agency's tacit admission at the time that the claimed mercury benefits cannot be quantified, we strongly object to a rule that irrationally tightens these very requirements. The justification for this rule is further weakened by the shrinking number of such facilities - including a projected 27 Gigawatts of additional coal-fired capacity retirements expected between now and the end of 2028 when the rule's more stringent provisions would be in effect.[23]

3. The 2024 EPA Rule Impermissibly Pursues Climate Policy.

It is no longer plausible to deny that the 2024 rule was part of the Biden administration's "whole of government" agenda targeting coal-fired power plants for their contribution to climate change. Indeed, the analysis supporting the rule includes estimated climate benefits, which, along with the claimed fine particulate matter benefits, provides the justification for tightening these putative mercury provisions that no longer include any quantified mercury benefits.[24] It is worth emphasizing that the Clean Air Act provisions invoked in 2012 to target mercury from power plants contain no authority to regulate them on the basis of climate change.

These claimed climate benefits run counter to the Trump administration's rejection of the use of the social cost of carbon in setting policy. As stated in President Trump's January Executive Order, *Unleashing American Energy*, "[t]he calculation of the 'social cost of carbon' is marked by logical deficiencies, a poor basis in empirical science, politicization, and the absence of a foundation in legislation."[25] CEI concurs with this assessment, concluding that the social cost of carbon is far too speculative, assumption-driven, and bias-prone to be a reliable policy-setting tool.[26]

Most recently, a memorandum from the Office of Management and Budget calls upon all agencies to cease unauthorized reliance on the social cost of carbon and revise past regulations that have impermissibly incorporated it.[27] The use of climate benefits in the agency's 2024 rule is one such example.

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[23] U.S. Energy Information Administration, "Today in Energy," July 14, 2025, https://www.eia.gov/todayinenergy/detail.php?id=65744.

[24] 2024 EPA Rule, p. 38,558.

[25] Executive Order 14154, "Unleashing American Energy," January 20, 2025, https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-american-energy

[26] Modernizing the EPA, pp. 73-82; Marlo Lewis, Comments of the Competitive Enterprise Institute, National Emission Standards for Hazardous Air Pollutants: Coal-and Oil-Fired Electric Utility Steam Generating Unit – Reconsideration of Supplemental Fining and Residual Risk and Technology Review, April 17, 2019, pp.12-14, https://cei.org/sites/default/files/MarloLewisComments04172019.pdf.

[27] Office of Management and Budget, "Memorandum for Regulatory Policy Officers at Departments and Agencies and Managing and Executive Directors of Commissions and Boards," May 5, 2025, https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-27-Guidance-Implementing-Section-6-of-Executive-Order-14154-Entitled-Unleashing-American-Energy.pdf.

The mission creep in evidence here raises policy issues as well as legal ones. The most sensible response to a mercury reduction program that no longer has any quantifiable mercury benefits is to initiate the process of winding down that program, not to accelerate it by claiming climate benefits.

4. Even With the Inclusion of Inflated Fine Particulate Matter Benefits, EPA Still Conceded Net Costs Overall.

Under all scenarios presented in the 2024 rule, EPA conceded costs well in excess of the benefits. Depending on the discount rates used, the agency estimated net annual costs ranging from $41 to $ 49 million dollars.[28] The new rule continues to include highly inflated fine particulate matter benefits alongside equally problematic social cost of climate benefits, but it was still not enough to put this rule in the black.

These costs filter down to ratepayers. Retail electricity cost increases have exceeded the rate of inflation in recent years,[29] and the mercury rule and others targeting coal have undoubtedly been a contributor.

The costs could prove higher than the agency's 2024 estimates, as there are a number of unacknowledged warning signs that the supply of electricity - and especially the supply of reliable baseload sources like coal - is struggling to keep up with demand.[30] EPA's cost estimates were narrow in focus, pertaining mainly to the compliance costs for coal-fired facilities that remain in operation. The agency attributed minimal costs to the induced retirements of such facilities (and none to the discouragement of any new coal-fired plants) and asserted that the energy transition to wind and other renewable sources would be taking place regardless of agency actions. In EPA's words, "the power sector is in the midst of an energy generation transition leading to [coal] plant retirements that are independent of EPA regulation." [31] In reality, there is mounting evidence that this is not the case and that regulations like the one at issue here are forcing upon power markets a transition that threatens both capacity and reliability.[32]

III. CONCLUSION

From a legal and policy standpoint, the 2024 rule tightening the Clean Air Act's Section 112 mercury provisions for coal-fired power plants was a step in the wrong direction. The agency's own evidence points away from any mercury-related health benefits, relying instead on questionable claims of ancillary fine particulate matter and climate benefits that stray from any

[28] 2024 Rule, p. 35,561.
[29] Energy Information Administration, "Today in Energy," May 14, 2025, https://www.eia.gov/todayinenergy/detail.php?id=65284.
[30] Paige Lambermont, "How to Keep the Lights On: Nine Principles for Electric Grid Reliability," Competitive Enterprise Institute, July 10, 2024, https://cei.org/wp-content/uploads/2024/07/OnPoint-295-How-to-Keep-the-Lights-On.pdf.
[31] 2024 Rule, p. 35,534.
[32] Paige Lambermont, "Electric Grid Reliability at Elevated Risk, New Report Warns," Competitive Enterprise Institute, December 27, 2024, https://cei.org/blog/electric-grid-reliability-at-elevated-risk-new-report-warns/

legitimate statutory purpose for the rule. While the benefits are questionable, the costs are very real and would continue to contribute to retirements of needed coal-fired electric generation. For these reasons, we believe EPA should move forward with this proposed repeal of these provisions. Furthermore, the agency should consider sunsetting the original 2012 mercury rule as well as placing limits on any such future rulemakings.

Respectfully Submitted,

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