U.S. Chamber of Commerce

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FOR: Statement for the Record on the U.S. Environmental Protection Agency's "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units – Revocation of the 2020 Reconsideration, and Affirmation of the Appropriate and Necessary Supplemental Finding," 87 Fed. Reg. 7624 (Feb. 9, 2022) (Notice of Proposed Rulemaking)

TO: U.S. Environmental Protection Agency
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U.S. Chamber of Commerce Testimony

on

Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units – Revocation of the 2020 Reconsideration, and Affirmation of the Appropriate and Necessary Supplemental Finding; Notice of Proposed Rulemaking

Washington, DC (Virtually Held)

February 24, 2022

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My name is Heath Knakmuhs, and I am Vice President and Policy Counsel for the Global Energy Institute, an affiliate of the U.S. Chamber of Commerce ("Chamber"). The mission of the Global Energy Institute is to unify policymakers, regulators, business leaders, and the American public behind a commonsense energy strategy to help keep America secure, prosperous, and clean. The Chamber appreciates the opportunity to testify today primarily in support of the Environmental Protection Agency's ("EPA") revocation of the 2020 reconsideration and its affirmation of the appropriate and necessary supplemental finding of its Mercury and Air Toxics Standards ("MATS"), applicable to coal- and oil-fired electric utility generating units.

The saga of the EPA's regulation of utility mercury emissions is long and winding, with EPA having first made the initial appropriate and necessary finding in 2000 and finalizing the first iteration of a utility mercury rulemaking in 2005, which was a cap-n-trade program. In 2019, I testified before the EPA that the follow-on 2011 MATS rule then stood as a poster child for the merits of a court-ordered "stay" when a significant regulatory rulemaking requires multi-billion-dollar investment and closure decisions from a regulated industry. Despite litigation challenging the very basis for the MATS rule, the rule was allowed to proceed apace during a lengthy, three-and-a-half year judicial review, which eventually resulted in the Supreme Court's finding that the rule was unlawful in *Michigan v. EPA*.[1] The Court's decision was issued more than two months after the April 16, 2015 deadline for utility compliance with that challenged MATS rule.[2] Thus, while the Court determined that the EPA had acted unreasonably

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[1] *Michigan v. Environmental Protection Agency*, 576 U.S. 743 (2015).

[2] The EPA did provide a one-year compliance extension until April 16, 2016, for plants that required additional time to come into compliance, and also had available a two-year extension for any plants subject to extreme circumstances, such as critical reliability concerns.

when it determined that it did not need to consider the costs of regulation when finding that it was "appropriate and necessary" to regulate, this decision was too late to make a practical difference for the hundreds of generating units already impacted by the rule.

The Chamber then determined that approximately 163 utility generating units across the country had been shuttered due at least in part to the MATS compliance obligations required prior to the Supreme Court's decision in *Michigan v. EPA*. This amounted to the permanent closure of over 50 GW of electric power generation. These circumstances continue to provide a vivid example of the benefits of staying highly-impactful regulatory requirements during judicial review. This thereby ensures that such regulations are legally sound before they are permitted to force widespread retirements of industrial facilities or otherwise significantly impact local and regional economic development opportunities.

The EPA's MATS proposal at issue today represents the third attempt at EPA compliance with the key finding from *Michigan v. EPA* that the costs of compliance are not merely an afterthought to otherwise well-reasoned regulations. Instead, they are an integral foundation underpinning the "appropriate and necessary" prerequisite to regulation under the Clean Air Act. In 2019, the Chamber urged the EPA to take an approach of "do no harm" with respect to its MATS compliance obligations, and the Chamber reiterates that guidance today. At that time, the utility industry had already reduced their mercury emissions by 86 percent and acid gas hazardous air pollutants ("HAP") and non-mercury metal HAP emissions by 96 percent and 81 percent respectively.[3]

The Chamber believes that EPA's rulemaking processes should be adjusted prospectively to ensure that future "appropriate and necessary" determinations under Clean Air Act section 112 comply with *Michigan v. EPA*. The EPA appears to be heading down that road with this newest MATS proposal, subject to the caveats noted herein. Quite simply, EPA's 2020 reversal of the "appropriate and necessary" finding for MATS regulation was the regulatory equivalent to closing the barn door after the horse had long since left. This rescission had the potential to adversely impact the very same entities that had relied upon effective Clean Air Act regulations to guide their power plant investment and retirement decisions. Accordingly, in light of those reliance interests,[4] the Chamber supports the EPA's decision to affirm the 2016 "appropriate and necessary" finding here, because it both retains the currently

[3] 87 Fed. Reg. at 7632.
[4] 87 Fed. Reg. at 7668.

effective MATS regulations and should serve to protect these regulations against future, counterproductive claims challenging their legitimacy. Likewise, the Chamber supports the EPA's proposal to retain coal- and oil-fired electric generating units in the list of affected source categories subject to Clean Air Act Section 112 regulation.

Nevertheless, the Chamber reiterates its position that the co-benefits of a regulation can be estimated, but should be incidental, rather than used as the basis for the EPA's regulatory actions. Quite simply, the agency's "cost reasonableness test" was in fact not reasonable. The anticipated implementation costs for the original MATS rule greatly overshadowed the hazardous air pollutant benefits. The Chamber is concerned that EPA may now be embarking upon an alternative to cost-benefit analysis that could again provide outsized weight to factors aside from the benefits of regulating the statute's targeted pollutants. In particular, EPA's revival and endorsement of a seemingly unconstrained "totality-of-the-circumstances" approach for determining whether regulatory action is "appropriate and necessary" is quite concerning. As the proposed rule itself recognizes, the totality-of-the-circumstances test requires "an exercise in judgment."[5]

Objective environmental regulations and regulatory certainty for industry – along with concomitant long-term investment decisions – cannot find comfort in relying on predictions about future exercises in judgment by the leadership of EPA, which will vary over time due to potentially significant variations in the weighting of different societal interests. This overly subjective test is not sustainable and will necessarily result in a less durable regulatory regime. EPA indicates in the preamble that the "HAP regulation is appropriate even absent consideration of these additional benefits."[6] Accordingly, the Chamber supports the more predictable and quantifiable formal benefit-cost analysis approach focusing on the HAP benefits that is provided as an alternative justification underlying the appropriate and necessary finding for the reaffirmed MATS rule. This formal benefit-cost approach will be more defensible.

The Chamber appreciates the opportunity to provide these comments on EPA's latest efforts to conform its MATS regulation to the Supreme Court's direction in *Michigan v. EPA*. We strongly support the finding by the Court that the EPA's initial failure to consider the costs of the MATS regulation was unlawful, but current circumstances support the EPA's retention of the effective MATS regulations and the reinstatement of the rule's underlying appropriate and necessary finding.

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[5] 87 Fed. Reg. at 7628.

[6] *Id.*