**COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ), Texas Railroad Commission, and Texas Public Utilities Commission REGARDING THE proposed Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units (80 *Federal Register* 75025 (December 1, 2015))**

**EPA DOCKET ID NO. EPA–HQ–OAR–2009–0234**

**TCEQ recommends that EPA start over and perform a formal cost-benefit analysis to justify that it is “appropriate and necessary” to regulate HAP emissions from EGUs under Section 112.**

The proposed EPA rule makes numerous assertions about how the costs were considered and weighed against the benefits in determining that it is “appropriate and necessary” to regulate HAPS from EGUs. However, the proposed rule offers little reasoning or explanation as to the specific weight given each variable or even how they were considered relative to other variables. The absence of explanation of the consideration and weight given in the proposed rule is precisely why formal cost-benefit analyses have historically been required. EPA asserts in the proposed rule that cost of controls have decreased over time, further implying that the cost-benefit ratio is tilted in the decision to regulate EGUs, yet EPA fails to take into consideration decreases in associated benefits that they claim to have considered in the Regulatory Impact Analysis (RIA). EPA projects that 4.7 gigawatts of additional coal-fired capacity was projected to retire by 2015 as a result of the MATS rule. EPA further observes that, “units that were projected to retire under MATS are on average, older, smaller in terms of capacity, and less frequently used …” 80 Fed. Reg. at 75036. It also stands to reason that these units would be some of the first units that would also be affected by other EPA regulations, let alone MATS. EPA states in the proposal, “Because the co-benefits are a direct consequence of actions to reduce HAP emissions, are consistent with economic guidance documents, and are consistent with statutory requirements in CAA Section 112(n)(1)(A), it would **be unreasonable for the EPA to ignore co-benefits** in the comparison of monetized benefits to monetized costs for MATS.” 80 Fed. Reg. at 75041. Although EPA claims it would be unreasonable to ignore co-benefits, it makes no such claim about double counting reductions that are going to occur as a result of another rule, for example shutdowns due to the Cross State Air Pollution Rule (CSAPR). Additionally, EPA claims in the proposal that it was unable to quantify all benefits resulting from HAP reductions, “Although data and methodological limitations did not allow the EPA to calculate all of the benefits that would result from reducing HAP emissions, the benefits (monetized and non-monetized) of MATS are substantial and far outweigh the costs, thus the benefit-cost analysis presented in the RIA for MATS fully and independently...” 80 Fed. Reg. at 75041.

The existing administrative and judicial record is packed with conflicting and ambiguous assertions by EPA. EPA simply needs to conduct a formal cost-benefit analysis and make available to the public all of the information that it relied upon for that analysis. EPA should be afforded the opportunity to thoroughly articulate those costs and benefits related to HAP reductions and to identify on the record the precise costs and benefits that can and cannot be monetarized, in addition to the basis, consideration, and weight given each variable in determining whether it is “appropriate and necessary” to regulate HAP emissions from EGUs. Additionally, such an analysis must be conducted without the consideration of factors unrelated to the actual HAP emissions, such as potential benefits of ancillary reductions of other pollutants such as PM2.5 and SO2 that are regulated under other portions of the FCAA. Without such an analysis, as required before EPA can lawfully make a decision if the regulation of HAPs from EGUs is appropriate and necessary, the imposition of such a regulation by EPA is arbitrary, capricious, and an abuse of EPA’s authority under the FCAA.

**TCEQ disagrees with EPA’s inclusion of, and reliance on, co-benefits from other pollutants not regulated under Section 112 in the formal cost-benefit analysis as a basis for the final Mercury Air Toxics Standard (MATS) RIA. (80 FR 75039)**

Federal Clean Air Act (FCAA) Section 112 regulates a specific list of air pollutants, defined as hazardous air pollutants or HAPs. This list of HAPs specified under Section 112(b) does not include pollutants such as particulate matter (PM) or sulfur dioxide (SO2). Rather, pollutants such as PM and SO2 are regulated under other sections of the Act. EPA acknowledges this in the preamble by stating that “the purpose of [Section 112] is to achieve prompt, permanent, and ongoing reductions in *HAP emissions* from stationary sources.” 80 Fed. Reg. at 75030 (emphasis added). Therefore, it is only logical that when determining whether it is appropriate and necessary to regulate HAPs from a particular source, in this case EGUs, the cost-benefit analysis should be limited solely to those costs and benefits associated with reductions in HAP emissions. EPA appears to agree with this view when it states that, “because section 112(n)(1)(A) is a listing provision, the EPA must focus on whether HAP emissions from EGUs collectively should be regulated . . .” 80 Fed. Reg. at 75030.

EPA argues that the co-benefits that will result from the installation of controls to reduce HAP emissions, specifically reductions in the emissions of PM2.5 and SO2, should be considered when determining whether the benefits of regulating HAPs from EGUs outweighs the costs. 80 Fed. Reg. at 75041. In justifying their inclusion of co-benefits in the formal cost-benefits analysis, EPA relies in large part on OMB guidance documents that detail how to conduct a cost-benefit analysis for purposes of satisfying the RIAs required by Executive Orders 12866 and 13563. However, EPA’s reliance on these OMB guidance documents is misplaced because the RIA cost-benefit analysis seeks to achieve a different purpose than is required for determining whether regulating HAPS from EGUs is appropriate. EPA expressly states that the foundation of the RIA cost-benefit analysis is to determine whether “a policy’s overall net benefits to society are positive.” 80 Fed. Reg. at 75039. With such a broad objective, it would be appropriate to consider any co-benefits of a policy because those co-benefits would qualify as a benefit for society.

However, when analyzing whether to list HAP emissions from EGUs under Section 112, the analysis should be limited to only whether the benefits of regulating *HAPs* outweigh the costs (emphasis added). As stated above, the specified lists of HAPs does not include PM2.5 and SO2. Thus, any benefits associated with reducing PM2.5 and SO2 would be irrelevant for purposes of Section 112 because they would not result in a reduction in HAPs. Further, if co-benefits could be included, the EPA would be able to double count the benefits of reducing criteria pollutants such as PM2.5 and SO2, which are properly regulated under Section 109. This is especially concerning in the current situation because the majority of the benefits associated with the rule result not from the reduction in HAPs, but rather from reduction in PM2.5. Therefore, while reducing PM2.5 and SO2 is beneficial for society and correctly included in the RIA’s cost-benefit analysis, it is arbitrary and capricious of EPA to include such benefits when conducting a cost-benefit analysis specifically geared towards determining whether regulation of HAPs from EGUs is appropriate under Section 112.

The TCEQ does not believe the existing MATS RIA can be used to justify that it is “appropriate and necessary” to regulate EGUs, since benefits associated with the reduction of the criteria pollutants PM2.5 and SO2 were included in that analysis. EPA could not have relied upon reduction from criteria pollutants in its cost benefit analysis as a basis for regulating HAPS under Section 112 from EGUs, because the CAA unambiguously precludes the regulation of criteria pollutants regulated under Section 108(a) to be regulated under Section 112. If EPA knowingly relies upon, quantifies, and includes benefits from the reduction of criteria pollutants regulated under Section 108(a) as a basis for determining whether it is “appropriate and necessary” to regulate HAP emissions from EGUs under Section 112, then EPA would violate the CAA to justify regulation of EGUs. EPA asserts, “While these reductions (from co-benefit pollutants) are not the objective of the MATS rule, the reductions are, in fact, a **direct consequence** of regulating HAP emissions from EGUs. Consideration of known and quantifiable co-benefits such as these in a benefit-cost analyses fully consistent with economic principles and is directed by guidance documents for conducting benefit-cost analyses of federal regulations from the EPA and OMB.” 80 Fed. Reg. at 75041. It is irrelevant to the decision about whether or not to regulate EGUs that co-benefit reductions are a direct consequence, indirect consequence, or by mere chance related to HAP reductions.

**The TCEQ disagrees with the use of cost absorption as basis for EPA’s conclusion it is appropriate and necessary to regulate HAPs under FCAA Section 112(n)(1).**

EPA concludes that the most appropriate way to account for costs in determining whether it is appropriate and necessary to regulate HAP emissions from EGUs is to focus on “whether the power sector can reasonably absorb the cost of compliance with MATS.” 80 Fed. Reg. at 75030. By considering costs in this manner, EPA is arbitrarily placing emphasis on the economic well-being of the power industry rather than on whether the costs of compliance are appropriate when comparing them to the benefits achieved from reducing HAPs. By considering costs in this arbitrary manner, the EPA can justify what would otherwise be unreasonable compliance costs when compared to the health benefits achieved, simply because the costs of compliance are a small percentage of the $349.6 billion in revenues generated from retail electric sales. 80 Fed. Reg. at 75033. Following through on EPA’s logic, an industry that was financially strained would not be subject to regulation, regardless of the human health and environmental risks posed from HAP emissions from those sources, merely because the costs of compliance would constitute too high a percentage of the industry’s revenue. This approach is inconsistent with the objective of Section 112, which is to protect the public from the risks posed by HAPs. Accordingly, the EPA’s determination on whether to regulate a source of HAPs should focus instead on whether the benefits, such as a reduction in health risks, which can occur as a result of reductions in HAP emissions from EGUs justify the costs of compliance.

**The TCEQ disagrees with the EPA’s assertion that the costs of compliance for EGUs are reduced because EGUs can ultimately pass some of the costs of compliance on to consumers.**

The ability to shift the costs of compliance in part onto a third party does not change the actual cost associated with regulations. Rather, it merely shifts who has the financial burden to pay for the costs. The EPA notes in the preamble (80 Fed. Reg. at 75035) that EGUs have the ability to pass on compliance costs to consumers in the form of higher electric prices. Therefore, the EPA argues that the costs of complying with the MATS rule are actually lower than projected. TCEQ disagrees with this approach, and believes that the more appropriate focus should be on the costs of compliance and not necessarily on who pays those costs.

Furthermore, EPA fails to consider the possible consequences and subsequent potential health detriments from passing costs on to consumers. Higher electricity bills can have a disproportionate effect on the most vulnerable members of the public, including the elderly and the economically disadvantaged. This becomes particularly pronounced on the coldest and warmest days, when lack of heat and air conditioning can lead to a number of health problems, up to and including death. (Berko J, Ingram DD, Saha S, Parker JD. 2014. “Deaths attributed to heat, cold, and other weather events in the United States, 2006-2010.” National Health Statistics Reports (76). Medina-Ramon M, Schwartz J. 2007. “Temperature, temperature extremes, and mortality: a study of acclimatisation and effect modification in 50 US cities.” Occup Environ Med 64, 827-833.) EPA fails to consider this possibility as a cost, relying instead on artificially inflated numbers such as fractions of an IQ point spread across the population as a “benefit.”

**EPA’s consideration of costs does not address the deficiencies in reasoning identified by the Supreme Court in *Michigan v. EPA,* 135 S.Ct. 2699 (2015).**

The Supreme Court specifically said, “EPA argues that it need not consider cost when first deciding *whether* to regulate power plants because it can consider cost later when deciding how much to regulate them. The question before us, however, is the meaning of the “appropriate and necessary” standard that governs the initial decision to regulate.”

In this proposal, however, EPA’s considerations of costs are entirely based upon the effects of a given amount of regulation, i.e. how much to regulate, which is an analysis that occurs after the decision has been made to regulate and not an analysis of whether or not it is appropriate to regulate at all. Granted, this type of cost analysis should occur, but absent contemporaneous consideration of the benefits, consideration of these costs is entirely without meaning.

The decision before EPA was to determine whether it was “appropriate and necessary” to regulate *HAP emissions* from EGUs. Any cost benefit analysis must take into consideration existing legal limitations. Additionally, a cost-benefit analysis required by an executive order and the guidance about how to conduct one cannot trump a statutory limitation.

EPA’s proposed rule purports to consider: the total projected cost of the MATS rule to the power sector, projected capital expenditures, projected average retail price increases, and the ability to absorb costs and remain operational. The TCEQ disagrees with EPA’s methodology for considering costs of MATS across the entire power sector, instead of evaluating costs borne by coal-fired and oil-fired EGUs. EPA’s sector approach waters-down the cost of regulation on the portion of the sector having to bear the costs. EPA’s consideration of these costs and its reasoning to justify regulation can be summarized as follows: the claimed cost isn’t too expensive and to the extent that a regulated entity can pass those costs on to their customers and remain in business is proof that the rule is reasonable and therefore justifiable. Again, this reasoning is hardly justification for deeming that regulation is “appropriate and necessary.”

A large portion of the Court’s opinion points out the disparity in the direct costs and benefits associated with HAP emissions as evidence that EPA did not consider the cost of the rule in determining whether it was “appropriate and necessary” to regulate EGUs. Instead of vacating the rule, the Court gives EPA an opportunity to address costs. The Court even acknowledges that the law does not require EPA to conduct a formal cost-benefit analysis and points out to EPA that it is up to the Agency how to decide how to account for cost. EPA responds in the proposed rule by ardently asserting that a cost-benefit analysis is not required, while at the same time claiming to have considered cost and benefits in the RIA. It defies reason that EPA would not simply conduct a cost-benefit analysis to address the specific concerns raised by the Court and to specifically address the disparity between the direct costs and benefits of regulating HAP emissions from EGUs, given that EPA has the discretion in how to account for costs, and given that EPA seems to have no problem conducting a formal cost-benefit analysis as required pursuant to an Executive Order. The TCEQ points out that there is no law precluding EPA from conducting a cost-benefit analysis to justify that it is “appropriate and necessary” to regulate HAPS from EGUs. The TCEQ also points out that cost-benefit analyses have long been accepted by all three branches of the federal government as a reasonable basis for decision making.