



They Fought the Law

Big Utilities Sue the EPA and Lobby the Senate to Stop Public Health Protection

Daniel J. Weiss and Jackie Weidman June 2012

Two essential Environmental Protection Agency, or EPA, regulations to protect children, seniors, the infirm, and others from air pollution are under attack from the coal industry and many utilities.

Last year the EPA issued two rules that would reduce smog, acid rain, and airborne toxic chemicals: the [Cross-State Air Pollution Rule](#) and the [Mercury and Air Toxics Standards](#).

On [July 6, 2011](#), the EPA finalized the Cross-State Air Pollution Rule to reduce sulfur dioxide and nitrogen oxide pollution—two of the main ingredients in acid rain and smog—from power plants in upwind states that were polluting downwind states. [An interactive EPA map](#) demonstrates that pollution doesn't stop at state borders.

Then, on [December 16, 2011](#), the EPA finalized the first standards to reduce mercury, arsenic, lead, and other toxic air pollution 21 years after controls on such pollution became law.

Today more than 130 coal companies, electric utilities, trade associations, other polluting industries, and states are suing the EPA in federal court to obliterate, undermine, or delay these essential health protection standards. A parallel effort is underway to block the mercury reduction rule in the Senate, which is [scheduled to vote on it this week](#). **This CAP investigation found that these utilities were responsible for 33,000 pounds of mercury and 6.5 billion pounds of smog and acid rain pollution in 2010 alone.**

TABLE 1
Opposed to cleaner air

Breakdown of companies and organization suing EPA over pollution rules

States and state agencies	36
Publicly owned private power companies	34
Privately owned power companies	11
Municipally owned power plants and cooperatives	11
Coal companies (miners, trade associations, and coalitions)	16
Paper/chemical companies, food processors, manufacturers	5
Trade associations and political advocacy groups	19
Total	132

Source: Public Access to Court Electronic Records website

This brief takes a closer look at these utilities' lawsuits against the EPA. The paper explains the public health and economic benefits of the rules and utility companies' efforts to block them. We also look at how heavily these companies are spending to convince lawmakers to block the rules. The courts and Congress should support public health protections and "just say no" to these dirty efforts.

Two clean air rules will prevent up to 45,000 premature deaths annually

Our reliance on coal to generate electricity inflicts huge, hidden health costs on American families and the economy. These externalities come from the emissions produced when coal is burned for power. The emissions contain known human hazards such as mercury, lead, arsenic, acid gases, sulfur dioxide, and nitrogen oxides. Exposure to or inhalation of these contaminants or the smog or acid rain that they form can cause premature deaths, asthma attacks, birth defects, learning disabilities, and other serious health problems.

Those on the receiving end of these pollutants bear the health and economic costs instead of the companies that generate the electricity. The [National Research Council](#) estimates that "[nonclimate] external damages from sulfur dioxide, nitrogen oxides, and particulate matter created by burning coal at 406 coal-fired power plants ... [cost] \$62 billion" annually.

Fortunately, [the Clean Air Act of 1990](#) gives the Environmental Protection Agency the tools to protect Americans from these deadly air pollutants—namely issuing rules requiring polluting companies to reduce them.

The [Cross-State Air Pollution Rule](#) is designed to protect downwind states from acid rain and smog pollution from upwind states. It requires cuts in sulfur dioxide and nitrogen oxide pollution—the main ingredients of acid rain and smog. This rule will prevent

up to 34,000 premature deaths and avoid 858,000 other health problems annually, including 400,000 cases of aggravated asthma. And these air quality improvements will result in up to \$280 billion in annual net benefits.

The Mercury and Air Toxics Standards would require steep reductions of mercury, lead, arsenic, and other toxic pollutants. Coal-fired power plants are the “largest human-caused source of mercury emissions in the United States,” according to Senate testimony by Dr. Jerome Paulson of the American Academy of Pediatrics. These contaminants are linked to birth defects, brain damage, learning disabilities, cancer, and other serious ailments.

Mercury is so toxic that small amounts found in fish can pass through women that eat them, harming their children. Forty-eight states have issued fish consumption advisories warning pregnant women, nursing mothers, children, and women of a childbearing age to limit or avoid consumption of certain fish species that are prone to mercury contamination.

The EPA predicts that the mercury and air toxics reductions—which don’t take effect until 2015, with a possible extension to 2016—will save 11,000 lives annually and prevent more than 100,000 asthma and heart attacks yearly. These health improvements will provide net economic benefits of up to \$80 billion annually.

On top of these benefits, investments in the manufacturing, installation, and operation of pollution-control equipment to clean up these pollutants will create jobs. An analysis from the Economic Policy Institute, or EPI, found that the Mercury and Air Toxics Rule will have a “positive net impact on overall employment” by creating 49,500 direct jobs by 2015. EPI concluded that “by balancing benefits to health against costs of compliance—the toxics rule is a clear win for Americans.”

FIGURE 2

How the rules will benefit Americans

Annual health effects avoided after implementing the Cross State and Mercury and Air Toxics pollution reductions

Health effect	Number of cases avoided annually
Premature death	45,000
Acute and chronic bronchitis	21,800
Heart attacks	19,700
Aggravated asthma	530,000
Hospital and emergency room visits	24,700
Restricted activity days (missing work, school)	5,000,000

Source: EPA Cross-State and Mercury Rule Fact Sheets

Companies sue to block Cross-State Air Pollution Rule

In response to a [lawsuit](#) initiated by EME Homer City Generation, L.P. and joined by other companies, the [U.S. Court of Appeals](#) issued a “stay” to temporarily block the implementation of the Cross-State Air Pollution Rule on December 30, 2011, just two days before it was scheduled to take effect. Additional [briefs](#) challenging the rules were filed, [which said](#) that:

... the accelerated timing and radically altered emissions allocations mandated by [the rule] do not permit the lead time needed to respond to this sudden regulatory shift.

In April 2012 the [court](#) heard [oral arguments](#) over challenges to the rules. The case is on an expedited schedule, meaning a decision is expected sometime this summer. This stay will remain in effect at least until this court rules on the case.

Challenges to the Mercury and Air Toxics Standards

Between February and May of 2012, a number of companies and interest groups filed petitions to block the [Mercury and Air Toxics Standards](#). Oral arguments are not yet scheduled in the case, [White Stallion Energy Center v. EPA](#). Unlike the Cross-State Air Pollution Rule, no stay was issued for the mercury rule. The pollution-reduction requirements for the mercury rule do not take effect until 2015, so it poses no imminent threat to the companies.

Another challenge to mercury and air toxic pollution reductions is underway in the Senate. [Sen. James Inhofe](#) (R-OK) filed a Congressional Review Act, or CRA, resolution, [S. J. Res. 37](#), to block the mercury and air toxics standards. The Congressional Review Act allows Congress to overturn a major regulation by passing such a resolution,

though the president must sign it into law. A CRA resolution can be brought to the floor of the Senate for debate and vote without threat of filibuster if 30 senators co-sponsor it.

Inhofe has ignored the [Natural Resources Defense Council's](#) request to expose the “dirty thirty” senators who signed S. J. Res 37 so it could be brought to the Senate floor for debate and vote. Keeping these senators secret makes it impossible to hold them accountable for attempting to undo protection from mercury and air toxic pollution.

Meanwhile, polluters are escalating their lobbying in favor of the Inhofe resolution. The National Association of Manufacturers and over 200 other companies and trade associations wrote to and met with senators promoting Inhofe's Congressional Review Act. And [Americans for Prosperity](#) and a new sister super PAC, [American Commitment](#)—funded by oil moguls Charles and David Koch—announced a similar multimillion-dollar campaign to push the CRA through state office visits, phone calls, and [television ads](#) targeting specific senators.

The [Chamber of Commerce](#), [National Association of Manufacturers](#), the [United Mine Workers of America](#), and other organizations sympathetic to the polluters have joined these efforts to block reductions of mercury, lead, and millions of pounds of other airborne toxic chemicals.

A broad coalition of public health and civic organizations oppose the Inhofe CRA and support the mercury regulations, including the [American Lung Association](#), the Natural Resources Defense Council, the [Garden Club of America](#), [NAACP](#), and other public-interest organizations.

On June 12 [mayors](#) from more than 90 U.S. cities, including New York City Mayor Michael Bloomberg, wrote a letter supporting the EPA's mercury regulations, stating “this long overdue safeguard will reap tremendous benefits for our communities.”

A vote on the mercury CRA could occur as soon as the week of June 18. Sen. Inhofe's fevered push for this resolution is no coincidence since he has received \$688,417 in total [contributions](#) from electric utilities and mining companies during his congressional tenure.

Last fall Sen. Rand Paul (R-KY) attempted to pass a similar Congressional Review Act resolution blocking the Cross-State Air Pollution Rule, but it [failed in the Senate by a vote of 41-56](#).

Bogus industry claims about the mercury rule

Many [utility industry representatives](#) claim that the 2015 compliance deadline for the mercury standard is too soon and will therefore cause electricity price hikes and job

losses. The Edison Electric Institute—the lobbying arm of the electric utility sector—has echoed these concerns:

The [EPA] is underestimating the complexity and implementing this rule in such a short period of time, which can create reliability challenges and even higher costs to customers.

Independent experts, however, determined that the mercury safeguards will have little impact on electricity reliability. The “2011 Long-Term Reliability Assessment” report from the North American Electric Reliability Corporation, an international regulatory authority established to evaluate reliability of the bulk power system in North America, contradicted this claim in a report last November. Business Wire summed up the report’s findings:

*The NERC report makes clear that EPA’s proposed regulation of mercury and other toxic air emissions from power plants will have manageable impacts on the nation’s electric grid **and will not jeopardize reliability.***

On December 1, 2011 the Department of Energy released its own comprehensive study about reliability concerns from implementation of pollution reductions. DOE deliberately analyzed a worst-case scenario admittedly more severe than what is anticipated for the EPA rules. DOE found that even in the worst-case scenario:

... the overall supply-demand balance for electric power in each region examined would be adequate ... mechanisms exist to address such reliability concerns ... on a plant-specific or more local basis.

What’s more, the coal and utility industries have known for two decades that reductions of mercury and other air toxics would be required at some point because of provisions in the Clean Air Act in 1990 signed into law by President George H.W. Bush. In 2000 the EPA made the determination that it was “appropriate and necessary” to regulate mercury and air toxics from coal fired power plants. The EPA concluded:

... that coal- and oil-fired electric utility steam generating units are significant emitters of HAP [Hazardous Air Pollutants], including mercury which is emitted from coal-fired units, and which EPA identified as the HAP of greatest concern to public health from the industry.

The Administrator finds that regulation of HAP emissions from coal- and oil-fired electric utility steam generating units ... is appropriate and necessary.

The EPA was to propose reduction requirements by December 15, 2003. The George W. Bush administration eventually issued its final mercury reductions rule in 2005, but a federal appeals court unanimously struck down the rules in 2008. The New York Times reported that the court overturned the mercury rule because the EPA “had ignored its

legal obligation to require the strictest possible controls on the toxic metal or to justify an alternative approach.”

After the court decision it fell to the new Obama administration to comply with the Clean Air Act of 1990 by establishing pollution-reduction standards for mercury and other toxic air pollutants. It issued its proposed rules on March 16, 2011, and finally completed the process with final rules taking effect on February 16, 2012. The Clean Air Act requires compliance with reduction standards for hazardous pollutants such as mercury no “later than 3 years after the effective date of such standard.” This establishes an effective February 2015 deadline for compliance with the mercury and air toxics standards.

Many of the utilities attempting to block these rules in court argue that this is inadequate time to install pollution controls to comply with the public health standards. But EPA gave ample time to reduce these dangerous pollutants.

First the EPA noted that the proposed rule “was mostly unchanged from [the] proposal,” which means that companies had a nearly a year head start beginning with the rules’ proposal in March 2011 to comply with the new standards in 2015, providing nearly four years to comply with them.

More importantly, the Clean Air Act allows utilities to seek an additional year to comply if they need more time for “installation of [pollution] controls,” and the EPA or the states administering the law are likely to grant that extra time.

The rules state:¹

If an existing source is unable, despite best efforts, to comply within 3 years, a permitting authority has the discretion to grant such a source up to a 1-year extension, on a case-by case basis, if such additional time is necessary for the installation of controls.

Situations in which installation schedules may take more than 3 years including: staggering installations for reliability reasons or other site-specific challenges that may arise related to source-specific construction, permitting, or labor, procurement or resource challenges.

The EPA determined that most power plants will be able to meet the mercury and air toxics protection standards given the extra year for compliance, thereby ensuring electricity reliability:

The EPA believes that there are likely to be few, if any, cases in which it is not possible to mitigate a reliability issues within four years.

There may still be a few limited situations where power plants need even more time to comply with the mercury standards to avoid electricity reliability issues. These facilities

can receive an additional fifth year to install pollution controls. But such extensions should be sparingly granted to avoid continued pollution and health hazards for Americans.

The bottom line is that the mercury-standards-setting process began nearly a dozen years ago. Power companies had ample notice that the EPA would eventually establish reduction requirements after a lengthy process of researching, developing, proposing, adjusting, and finalizing these rules. Polluting companies' request for still *more* time ignores the 12 years of this process during which billions of pounds of airborne toxic pollution were shot into our skies and damage from these pollutants harmed our children, parents, and other vulnerable people.

Companies are fighting to continue emitting 33,000 pounds of mercury and billions of pounds of acid rain and smog ingredients

The companies joining one or both of these lawsuits are some of the biggest polluters in the nation. Blocking these pollution controls in the courts or in Congress could save them millions of dollars by avoiding installation of pollution controls. Meanwhile, Americans pay the price of this pollution.

Thirty-eight utility companies are plaintiffs or belong to an organization that is a plaintiff in one or both suits. (see table) These companies own a total of 219 coal-fired power plants. A CAP analysis based on the EPA's annual emissions reports calculated that **these plants spew more than 33,000 pounds of mercury into the atmosphere every year**, which is 61 percent of all mercury emissions from power plants. **These plants also emit almost 6.5 billion pounds of sulfur dioxide and nitrogen oxides annually**—nearly 22 pounds for every man, woman, and child in the United States.

On June 7 the [Environmental Integrity Project](#) released a startling [report](#) concluding that 51 of the dirtiest U.S. coal-fired power plants cause up to 5,700 deaths a year. The study found that 18 of these 51 plants pollute so much that the health damages from the pollution cost more than the value of the electricity that the plants produce. All 18 of those plants are owned by companies suing the EPA over the cross-state and mercury air toxics rules.

FIGURE 3

The plaintiffs and their pollution

Mercury and other toxics from utilities suing EPA

Company name	Number of power plants owned	Annual mercury emissions (2010*, in lbs)	Annual NOx and SOx emissions (2011, in millions of lbs)	Cross state plaintiff	Mercury and air toxics plaintiff (or member of coalition that is a plaintiff)
Alcoa	2	235	3	X	X
Allegheny Energy/FirstEnergy	17	1,557	348	X	X
Ameren Corporation	11	1,947	284	X	X
American Electric Power	21	4,268	852	X	X
Consumers Energy (CMS energy)	5	352	102	X	X
Dayton Power & Light	3	268	27	X	X
Dominion	12	926	271	X	X
Calypso Energy Holdings	2	2	-		X
Detroit Edison (DTE)	6	1,394	185	X	X
Duke Energy Corp.	17	2,124	459	X	X
East Kentucky Power Cooperative	3	148	63	X	
Edison International	8	801	273	X	
Energy Future Holdings	5	1,491	388	X	X
Entergy Corporation	3	1,039	78	X	
GenOn Energy	15	1,811	383	X	X
Kansas City Power & Light Co.	2	76	4	X	X
Louisville Gas & Electric and Kentucky Utilities	7	554	172	X	X
Madison Gas & Electric Co.	2	478	28	X	X
Minnesota Power Co./ALLETE	3	298	21	X	X
NiSource Inc.	4	237	68		
Northern States Power Company (owned by Xcel)	6	538	73	X	
Ohio Valley Electric Corp.	2	488	299	X	X
Otter Tail Power Co.	3	637	82	X	X
Pinnacle West/Arizona Public Service	3	570	128	X	X
Public Service Company of New Mexico (PNM)	1	8	21	X	X
Progress Energy Inc.	9	872	186	X	X
Salt River Project	2	583	42	X	X
South Carolina Electric and Gas Co.	5	102	66	X	X
South Mississippi Electric Power Association	1	N/A	13	X	
Southern Company	21	4,237	734	X	X
Southwestern Public Service Co.	2	252	46	X	

Company name	Number of power plants owned	Annual mercury emissions (2010*, in lbs)	Annual NOx and SOx emissions (2011, in millions of lbs)	Cross state plaintiff	Mercury and air toxics plaintiff (or member of coalition that is a plaintiff)
Sunbury Generation (Corona Power LLC)	1	37	32	X	
Sunflower Electric Power Corp.	1	130	6		X
Tennessee Valley Authority (TVA)	11	1,936	546		
Tucson Electric Co.	1	365	23	X	X
Westar Energy Inc.	4	980	75	X	
Western Farmers Electric Cooperative	1	95	19	X	
Wisconsin Electric Power Company (We Energies)	6	966	109	X	
Wisconsin Public Service Corporation	2	182	25	X	
Total	230	32,984	6,532		

*2010 is most recent year available for mercury emissions
Source: Environmental Protection Agency's Clean Air Markets and Toxic Regulatory Index Data

Interestingly, some of the biggest power-plant-owning companies individually filed petitions against the cross-state rule but not against the mercury standards. Instead, two industry coalitions that many of these companies belong to filed a brief on their behalf in opposition to the mercury standards. These two big associations—the [Midwest Ozone Group](#) and the [Utility Air Regulatory Group](#)—have 27 and 35 utility and coal-company members, respectively, although many utilities belong to both organizations.

The Midwest Ozone Group's membership includes the [American Coalition for Clean Coal Electricity](#), or [ACCCE](#), which itself is a coalition leading the charge to block mercury and air toxics reduction standards. ACCCE's members include major utilities as well as [Peabody Energy](#), the world's largest coal company. ACCCE spent [\\$35 million](#) in the fall of 2011 on misleading [television ads](#) attempting to convince Americans to oppose these health safeguards. ACCCE has committed to spending an additional [\\$40 million](#) this year on [anti-clean-air advertisements](#).

The Utility Air Regulatory Group is somewhat secretive. We could not identify a website or other public information for a current list of its members. But in 2006 the group included a membership list when it submitted [comments](#) to the EPA on the proposed revision of [National Ambient Air Quality Standards for Particulate Matter](#). The Center for American Progress updated this list of members based on industry sources.²

The utility companies suing the EPA collectively earn billions of dollars each year. CAP conducted an analysis of [Securities and Exchange Commission](#) reports of the 43 publicly traded utility and coal companies' financial statements. We found that the 43 companies directly suing the EPA or participating in a suit through a coalition earned \$27 billion last year.³ These companies also hold \$21 billion in cash reserves as of January 2012.

TABLE 4
Coalitions with utility members file brief against mercury rule

Utility Air Regulatory Group and Midwest Ozone Group members

Utility Air Regulatory Group members*	
American Electric Power	National Mining Association
Allegheny Energy	National Rural Electric Cooperative Association
Ameren	NiSource Inc.
American Coalition for Clean Coal Electricity	Oglethorpe Power Corp.
American Public Power Association	Ohio Valley Electric Corp.
Consumers Energy	Otter Tail Power Co.
Dayton Power	Pinnacle West/Arizona Public Service
Detroit Edison Energy Co.	Progress Energy Inc.
Dominion	Public Service Company of New Mexico
Duke Energy Corp.	Salt River Project
Dynegy Inc.	South Carolina Elec & Gas Co.
Edison Electric Institute	Southern Company Services
FirstEnergy/Allegheny	Tennessee Valley Authority
GenOn Energy, Inc	Tri-State Generation & Transmission
Kansas City Power & Light Co.	Tucson Electric Co.
Louisville Gas & Electric and Kentucky Utilities	Wabash Valley Power Association
Luminant	WeEnergies
Minnesota Power Co.	
Midwest Ozone Group members	
Alcoa	Duke Energy
Alliance Resource Partners	Energy Future Holdings
Alpha Natural Resources	First Energy
Ameren Corporation	Joy Global Inc.
American Coalition for Clean Coal Electricity	LG&E and KU Energy LLC
American Electric Power	Natural Resource Partners
Arch Coal, Inc.	Norfolk Southern
BNSF Railway	Oglethorpe Power
Caterpillar	Peabody Energy
Consol Energy	Southern Company
Consumers Energy	Springfield City Water, Light & Power
CSX	Tri-State
Dayton Power & Light	Union Pacific
DTE Energy	Western Fuels Association

*ACCCE members indicated in bold
 Source: Midwest Ozone Group, "Member Companies," available at <http://midwestozonegroup.com/membercomp.html>.

Instead of spending this money to use the courts or pressure Congress to block or delay these safeguards, the companies could spend it investing in pollution-reduction technology to protect Americans. According to data from the [Center for Responsive Politics](#), in 2011 the companies and organizations suing the EPA to overturn the cross state and mercury rules spent \$86 million lobbying Congress. Their associated political action committees raised \$20 million so far in the 2011-2012 election cycle.

Some utilities are investing in clean technology

Some companies that belong to the Utility Air Regulatory Group are implementing compliance measures to reduce their pollution. For instance, [ALLETE/Minnesota Power](#) announced that it will invest \$350 million to \$400 million over the next few years to reduce air pollution from its largest coal-fired facility, Boswell Energy Center in Cohasset, Minnesota. [ALLETE](#) Chairman, President, and CEO Al Hodnik told shareholders on May 8, 2012:

We can use cost-effective technology to greatly reduce emissions and keep our largest and newest base-load plants operating for many more years. This will allow us to serve the growing energy needs of our customers economically and reliably, while meeting our environmental responsibilities.

Other utilities companies strongly support the EPA's clean air rules. [Exelon Corporation](#), whose nearly 30,000 employees serve more than 6.6 million customers, is the largest competitive U.S. power generator. Exelon [testified](#) before the Federal Energy Regulatory Commission in favor of both the cross-state smog and mercury pollution standards. Kathleen Barron, vice president for federal and regulatory affairs, said in her testimony:

The electric industry has known about these rules for many years; what it needs now is for the rules to be finalized so it will have the certainty needed to begin implementation.

The rules will be the driving force to modernize and improve the efficiency of our aging electric system so that Americans can continue to have a safe and reliable electric system to support our nation's economic growth.

Senators should say "no" to polluter interests

The Senate is expected to soon debate and vote on Sen. Inhofe's Congressional Review Act resolution to block the mercury and air toxics standards. Senators should reject it to support the health and well being of the Americans they represent. Air pollution is a

problem that won't go away by relying on utilities to voluntarily decide whether, when, and how much to reduce their pollution. The mercury rules provide the regulatory certainty so that companies can invest in clean up technology knowing that the standards will be enforced.

Conclusion

The cross-state and mercury and air toxics rules are essential to protect children, seniors, the infirm, and others from smog, acid rain, mercury, lead, and other toxic air pollutants. When fully implemented, they will protect the health of Americans by avoiding up to *45,000 premature deaths annually*.

The companies using the courts and the Senate to prevent or delay these safeguards make billions of dollars in profits and spend tens of millions of dollars on misleading ads, campaign contributions, and lobbying Congress in a multilateral battle against public health.

It's time for public officials and candidates for office to repudiate these stalling tactics and encourage big utilities to comply with the law rather than fight it.

Thanks to John Walke, clean air director and senior attorney for the Natural Resources Defense Council; the American Lung Association; and Celine Ramstein, former intern with the Center for American Progress Energy Policy Team.

Endnotes

- 1 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," *Federal Register* 77 (32) (2012): 9409-9410, available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf>.
- 2 Companies identified as UARG members were contacted by CAP about their membership, and were provided with an opportunity to comment about it or their position on MATS. None of them elected to provide comments. A copy of the letter to companies is attached.
- 3 Only 43 of the companies suing have publicly available financial information.