

BEFORE ANDREW WHEELER, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN RE PETITION FOR RECONSIDERATION)
National Emission Standards for Hazardous)
Air Pollutants: Taconite Iron Ore Processing)
Residual Risk and Technology Review)
85 Fed. Reg. 45,476 (July 28, 2020))

Submitted by Minnesota Pollution Control Agency and Michigan
Department of Environment, Great Lakes, and Energy

Pursuant to Section 307(d)(7)(B) of the Clean Air Act (“CAA” or the “Act”) and Section 553 of the Administrative Procedure Act (the “APA”), the Minnesota Pollution Control Agency, and the Michigan Department of Environment, Great Lakes, and Energy, (“Petitioners”) petition the Administrator of the U.S. Environmental Protection Agency (“EPA” or the “Agency”) to convene a proceeding to reconsider its final rule entitled National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing Residual Risk and Technology Review, 85 Fed. Reg. 45,476 (July 28, 2020) (the “Final Rule”).

This petition raises objections that are of central relevance to the Final Rule that arose after the public comment period closed and before the period for judicial review expired, or that could not be made during the comment period because of a lack of public notice. Accordingly, the Administrator “shall convene a proceeding for reconsideration” of the Final Rule. 42 U.S.C. § 7607(d)(7)(B). This petition demonstrates that two separate bases for reconsideration exist.

First, after the close of the public comment period, the D.C. Circuit Court issued an opinion remanding a rule very similar to the one at issue here. In that case, the Court determined that “EPA’s section 112(d)(6) review of a source category’s emission standard must address all listed air toxics the source category emits.” *LEAN v. EPA*, 955 F. 3d. 1088, 1091 (D.C. Cir. 2020). Petitioners object, based on this case law, that EPA was required to establish a limit for mercury when it promulgated the Final Rule. Whether the Final Rule was promulgated in accordance with section 112 of the Act is unquestionably centrally relevant. On this basis alone, EPA shall reconsider the Final Rule.

Second, the Final Rule provides new rationales not present in the Proposed Rule. These rationales include a purported assessment of mercury control technologies’ costs and scalability and lack of time to conduct an assessment of mercury control technologies. These rationales were not logical outgrowths of the Proposed Rule because EPA did not consider mercury control technology at all. Because the Proposed Rule does not discuss mercury controls, the public was not on notice that EPA’s new rationales would appear in the Final Rule. Technological assessment of how HAPS can be controlled is a matter of central importance. The presence of these new and changing rationales is also sufficient for EPA to reconsider the Final Rule.

Under section 307 of the CAA, EPA “shall” grant this petition for reconsideration and convene a proceeding to obtain the information necessary to develop appropriate standards to regulate mercury emissions from taconite ore processing.

I. Background

Taconite ore mining and processing occurs only in the two undersigned states, Minnesota and Michigan. The end products, however, are used in steel, iron, and cement foundries nationwide. Both states have substantial interests in the economic activity associated with generating iron ore, as well as the health of their residents, and the natural environment of their

states, including the health of the biome and the quality of Great Lakes waters. Taconite ore mining has an important and storied history in each state. The well-known and ill-fated Edmund Fitzgerald was carrying taconite iron ore from Minnesota to Michigan when she sank in the waters of Lake Superior in a November storm. Portions of each state are named for their relation to taconite ore processing – Minnesota’s Mesabi Iron Range and the Marquette Iron Range in Michigan. The taconite industry is a vital component of the states’ economies, and indeed, their very identity.

Congress established that EPA must act to establish emissions limits for a number of hazardous air pollutants (HAPs), including mercury.¹ Both the federal government and the states have an obligation to regulate emissions from taconite ore processing. The industry is regulated by a federally-promulgated National Emissions Standard for Hazardous Air Pollutants (NESHAP), as well as state regulations relating to limiting pollution. These regulations are developed in cooperation with the industry and with other stakeholders such as the public and Indian tribes. Minnesota and Michigan have also developed EPA-approved total maximum daily load (TMDL) plans. As part of the TMDL effort in Minnesota, the taconite ore processing industry submitted plans that detail how certain operations can achieve reductions consistent with state TMDL goals. The Final Rule undermines state efforts to regulate this industry because the absence of federal standards, at the very least, erroneously suggests that mercury emissions do not warrant regulation.

When EPA convenes a proceeding to reconsider the Final Rule, as it must, state regulators, the taconite industry, and the public will be able to provide EPA with the necessary information to develop cost-effective controls that protect human health and the environment.

A. The Act requires EPA to set NESHAPs.

In 1963, Congress enacted the Clean Air Act “to protect and enhance the quality of the Nation’s resources so as to promote the public health and welfare and the productive capacity of its citizens.”² But after EPA “had failed to regulate enough HAPs,” Congress issued a sweeping set of amendments in 1990 to spur more meaningful action.³ These amendments require EPA to establish national emission standards for all major sources of HAPs.⁴ The Act lists mercury as a HAP and taconite processing is a major source category that emits mercury.⁵ Reading these two

¹ 42 U.S.C. §§ 7412(c), 7412(d).

² 42 U.S.C. § 7401, *et seq.*

³ The 1990 Clean Air Act Amendments were strongly bipartisan. They passed the Senate 89 to 11, and George H. W. Bush signed them into law. *See* Clean Air Act Amendments of 1990, U.S. Congress, <http://www.congress.gov/bill/101st-congress/senate-bill/1630>. *See Nat’l Lime Ass’n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000); *Sierra Club v. Johnson*, 444 F.Supp.2d 46, 48 (D.D.C. 2006) (noting that the bipartisan 1990 amendments were designed to correct a lack of regulation).

⁴ 42 U.S.C. § 7412(d).

⁵ 42 U.S.C. §§ 7412(b), (c)(1)

provisions together, the Administrator “shall” set a standard for mercury emissions from taconite processing facilities.⁶

EPA does not have any discretion to decide which of the HAPs it will regulate for a given source category; the Act requires the agency to promulgate an emission standard for each recognized HAP from every listed source category.⁷ Under the 1990 CAA amendments, EPA had to issue emissions standards for all HAPs from major sources by November 2000 at the latest.⁸

Congress established certain threshold or minimum requirements for those emission standards. The standards must require source categories to achieve the maximum degree of emission reduction that EPA determines to be achievable, considering cost, health effects, environmental impacts, and energy requirements, referred to as setting the “floor” requirement.⁹ In addition to setting a floor, the emissions standards need to be at least as stringent as the best performing sources in the category (referred to as “beyond the floor” requirements).¹⁰

The Act also requires EPA to periodically review and revise the standards that it sets based on changes in conditions and technology—to be done no later than eight years after they are initially promulgated.¹¹ In addition, EPA must promulgate additional “residual risk” standards within eight years.¹² EPA typically performs both together in a single rulemaking called a Risk and Technology Review (“RTR”).

Even when a source category is known to emit a HAP, EPA has sometimes failed to regulate emissions of that HAP when it set initial standards. In that scenario, EPA has historically used the RTR process to revise the standard to fill in the missing limits. The D.C. Circuit Court of Appeals recently explained that failing to do so is contrary to law.¹³

B. EPA never set a mercury emissions limit for the taconite processing source category despite being required to under the Act as well as a 2005 Court Order.

Even though EPA has a clear statutory obligation to set emission standards for each listed HAP, it did not act to set a mercury limit by November 2000 as required.¹⁴ Even in 2003, when

⁶ 42 U.S.C. § 7412(c)(2).

⁷ *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000).

⁸ 42 U.S.C. § 7412(e)(1).

⁹ 42 U.S.C. § 7412(d)(2).

¹⁰ 42 U.S.C. § 7412(d)(3).

¹¹ 42 U.S.C. § 7412(d)(6).

¹² 42 U.S.C. § 7412(f)(2).

¹³ *E.g., LEAN*, 955 F.3d at 1090 (the plain language of Section 112(d)(6) requires EPA to fill any missing HAP standards).

¹⁴ *Nat'l Wildlife Fed'n v. Leavitt*, No. 03-1458, Order, 2005 WL 80958 (D.C. Cir. Jan. 13, 2005) (“NWF Order”).

EPA finally issued the required NESHAP rule for the taconite ore processing source category, it failed to set a mercury limit.¹⁵

At the time of the 2003 Rule, EPA claimed that it could not determine an achievable floor for mercury emissions. First, EPA cited the feedstock, including differences in ore deposits causing variable mercury content, differences in processes across plants, and even batch-to-batch variability.¹⁶ Second, EPA dismissed a number of potential control technologies (magnetite dust handling, flue gas desulfurization, baghouses, activated carbon injection, activated carbon/baghouse system, corona discharge, electro-catalytic oxidation, and injection of copper-coated magnetic taconite concentrate). EPA concluded that a beyond-the-floor limit was not warranted.¹⁷ It chose to set the maximum achievable control technology (MACT) level as requiring no emissions reduction for both existing and new sources.¹⁸

National Wildlife Federation, Minnesota Conservation Federation, and Save Lake Superior Association challenged the 2003 Rule, claiming that EPA violated the Act by not setting any standards for mercury emissions from the taconite ore processing source category.¹⁹ They sought an order compelling EPA to propose a final rule concerning mercury emissions from taconite iron ore processing facilities, and that it be ordered to complete the rule within 6 months. In granting EPA's motion for voluntary remand without a mandatory timetable, the D.C. Circuit Court of Appeals took note of an existing consent decree from another matter,²⁰ and accepted EPA's representation that it would "act with all due speed to propose, take comment on, and issue a final rule, setting a standard for mercury emissions from taconite iron ore processing facilities."²¹

That was in 2005. Despite that court order, EPA never set a mercury emissions standard. In fact, over a decade later, after EPA passed the statutory deadline for the 8-year RTR of its initial round of several NESHAP standards, EPA had still not acted to set an emissions limit for mercury emitted by the taconite ore processing source category.²² Another group of non-governmental organizations²³ challenged EPA's failure to act, noting that those RTRs were long

¹⁵ National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing, 68 Fed. Reg. 61,868 (October 30, 2003) (the 2003 Rule).

¹⁶ *Id.* at 61,879.

¹⁷ *Id.* at 61,880 (stating, "we were unable to identify any viable control technologies or operating practices for achieving reductions in mercury emissions from taconite iron ore plants").

¹⁸ *Id.*

¹⁹ NWF Order at 1.

²⁰ While the NWF litigation extended into early 2005, EPA was under a separate 2003 consent decree to promulgate NESHAP standards for the taconite processing industry by February 27, 2004, at the latest. Revised Partial Consent Decree, *Sierra Club v. Whitman*, No. 1:01CV01537 (D.D.C. May 22, 2003).

²¹ NWF Order at 1 (emphasis added).

²² 42 U.S.C. §§ 7412(d)(6), 7412(f)(2).

²³ Blue Ridge Environmental Defense League, Clean Wisconsin, Midwest Environmental Defense Center, and Sierra Club.

overdue.²⁴ There was no dispute that EPA failed to complete the required RTR rulemakings, so the court ordered a remedial schedule for the RTRs to be completed by 2018 and 2020.²⁵

C. The Proposed Rule did not set a mercury limit; it did not provide an explicit rationale supporting that decision.

Pursuant to the order in *Blue Ridge*, EPA issued the taconite ore processing RTR in the second wave of overdue RTRs. In September 2019, it issued a notice of proposed rulemaking maintaining the existing HAP emissions limits for the taconite ore processing source category.²⁶

The Proposed Rule did not assess mercury controls nor include any effort to identify mercury-controlling technologies, their cost, or their efficacy.²⁷ The lack of discussion is glaringly apparent considering that the 2003 Rule, which discussed mercury control technologies, was voluntarily remanded in 2005 for the express purpose of EPA “setting a standard for mercury emissions.”²⁸ The Draft Technology Review for the Taconite Iron Ore Processing Source Category, posted on the docket with the Proposed Rule, does not discuss mercury either.²⁹

Numerous commenters noted that the Proposed Rule failed to address mercury. A review of the comments reveals that the operative understanding of the public, across the board, was that EPA’s proposed rule simply failed to address mercury. No comment indicates that any member of the public understood that EPA had made a deliberative decision not to regulate mercury, or that it had assessed or rejected any technology for doing so.

II. Bases for Reconsideration

The EPA should convene a proceeding to reconsider the Final Rule. First, the Final Rule is arbitrary, capricious, and contrary to Section 112(d) of the Act. The *LEAN* decision confirms that the plain language of Section 112(d)(6) requires EPA to set an emissions limit for all HAP emissions, even those not previously subject to a NESHAP limit.³⁰ The Final Rule is therefore arbitrary and capricious and contrary to law, and must be set aside.³¹ Second, in the Final Rule, EPA provided new supporting rationales for which commenters had no notice and that were not a logical outgrowth of the proposed rule. Thus, the public did not have adequate notice of the

²⁴ *Blue Ridge Env’tl. Def. League v. Pruitt*, 261 F. Supp. 3d 53 (D.D.C. 2017).

²⁵ *Id.* at 57, 61.

²⁶ National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing Residual Risk and Technology Review 84 Fed. Reg. 50,660 (Sept. 25, 2019) (“The Proposed Rule”).

²⁷ This section discusses using PM limits as a surrogate for metallic HAP, but unlike other metallic HAP, mercury in its vapor phase is not emitted as fine PM. *See* 68 Fed. Reg. at 61,885

²⁸ NWF Order at 1.

²⁹ Docket Item No. EPA–HQ–OAR–2017– 0664–0103.

³⁰ *LEAN*, 955 F. 3d. at 1088.

³¹ 5 U.S.C. §§ 553(b) (agency must have legal authority for its proposed rule), 42 U.S.C. §§ 7607(d)(1)(C), 7607(d)(3) (adequacy of notice).

EPA's bases and rationale for the rule and was unable to submit detailed comments regarding this centrally relevant aspect of the Final Rule.³²

A. The Final Rule is arbitrary and capricious and contrary to law for failure to set a mercury emissions limit.

EPA's RTR of a source category's emission standard must address all listed HAPs the source category emits, including those for which it failed to set limits when it promulgated earlier standards.³³ Failure to set an emissions limit for any HAP that a source category is known to emit is contrary to law. *Id.*

In its response to comments, EPA erroneously stated that it had no obligation to revisit missing HAP limits during a Section 112(d)(6) RTR of existing NESHAP limits, and that it did not even consider the submitted material supporting a mercury emissions standard in this rulemaking.³⁴ The Final Rule declares that "EPA reads CAA section 112(d)(6) as a limited provision requiring the Agency to review the emission standards already promulgated in the NESHAP . . ."³⁵ The recent decision from the D.C. Circuit Court of Appeals in *LEAN* explains that this reading was incorrect as a matter of law.³⁶ Yet this erroneous reading of the law was the basis for EPA's decision not to consider mercury controls. Indeed, EPA explicitly confirmed that neither "the proposed rule nor the technology review memorandum . . . addressed potential controls for mercury emissions."³⁷

The Final Rule acknowledges that given the holding in *LEAN*, EPA did not have a legal basis for failing to include a mercury emissions limit in the RTR.³⁸ The D.C. Circuit held that "the EPA has an obligation to set standards for unregulated pollutants as part of technology reviews under CAA section 112(d)(6)."³⁹ The Final Rule is thus contrary to law because EPA did not set a standard for mercury, a HAP emitted by the taconite processing source category. To

³² 5 U.S.C. § 553(b)(3) (agency must provide notice of its decisions); 42 U.S.C. §7607(d)(7)(B) (reconsideration appropriate where public did not have the ability to comment); *Chesapeake Climate Action Network v. EPA*, 952 F.3d 310, 320-22 (D.C. Cir. 2020) (Petitioners are not given the opportunity to comment on, propose revisions to, or otherwise challenge the rulemaking process when EPA first unveils its analysis in a final rule).

³³ *LEAN*, 955 F.3d at 1091.

³⁴ 85 Fed. Reg. at 45,485.

³⁵ *Id.* at fn2 ("On April 21, 2020, as the Agency was preparing the final rule for signature, a decision was issued in *LEAN v. EPA*, 955 F. 3d. 1088 (D.C. Cir. 2020) in which the Court held that the EPA has an obligation to set standards for unregulated pollutants as part of technology reviews under CAA section 112(d)(6).").

³⁶ *LEAN*, 955 F.3d at 1091.

³⁷ 85 Fed. Reg. at 45,485.

³⁸ *Id.* at fn2.

³⁹ *LEAN*, 955 F.3d at 1091.

comply with *LEAN*, EPA must develop a limit for mercury emissions. The Final Rule is also contrary to law because it does not comply with the NWF Order from 2005.

Because case law issued outside of the public comment period conclusively explains that the Final Rule is arbitrary and capricious and contrary to law, EPA must grant this petition for reconsideration. Upon reconsideration, EPA should assess and establish a mercury limit to comply with the law, Section 112(d)(6), as recently explained in *LEAN*.

B. EPA’s unlawful decision not to regulate mercury emissions or consider mercury controls was not a logical outgrowth of the Proposed Rule.

A final rule cannot lawfully include a provision for which the notice of proposed rulemaking did not clearly provide notice to the public. The public notice must include “the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁴⁰ A proposed rule that does not give public notice of the final rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. An agency’s proposed rule and its final rule may differ only insofar as the latter is a “logical outgrowth” of the former.⁴¹ The logical outgrowth doctrine does not extend to a final rule that finds no roots in the agency’s proposal, nor does it apply where interested parties would have had to “divine the agency’s unspoken thoughts.”⁴²

Here, the Proposed Rule and Technology Review were silent on technological controls for mercury emissions. And the Final Rule confirms that they were not considered at all. Therefore, the Proposed Rule could not have revealed that EPA would not assess cost or scalability of mercury control technologies in this rulemaking. Nor did the Proposed Rule disclose that EPA would not collect or consider information about mercury-controlling technologies, much less that without such information, EPA would be unable to determine the best-performing sources or set a MACT. Setting a standard for a HAP (or deciding not to) is centrally relevant to a final rule establishing standards for HAP emissions from a source category, as is the technical basis for arriving at that standard. Because EPA did not disclose any technological assessment of mercury-control technologies—much less their cost, scalability, or an investigation into them—it was impracticable for commenters to address this objection during the public comment period.

1. The public was not on notice that it should comment on the cost or scalability of mercury control technologies or practices.

In the Final Rule, EPA first stated that specific mercury control technologies it did actually review were either unproven or too expensive.⁴³

⁴⁰ 5 U.S.C. § 553; 42 U.S.C. § 7607(d)(3).

⁴¹ *Chesapeake Climate Action Network*, 952 F.3d at 320-22.

⁴² *Env’tl. Integrity Project v. E.P.A.*, 425 F.3d 992, 996 (D.C. Cir. 2005).

⁴³ 85 Fed. Reg. at 45,485.

The taconite industry submitted different mercury reduction plans to the Minnesota Pollution Control Agency disclosing potential mercury-control technologies or processes that could be used in setting a HAP limit for mercury. For at least two plants, these plans will reduce mercury emissions by 72%. No EPA consideration of the plants' mercury reduction plans, including the viability or cost-effectiveness of the technologies in them, appears in the Proposed Rule or anywhere in the docket.⁴⁴

Even though EPA had not assessed any mercury control technologies in the first place (see 112(d)(6) issue above), EPA also claims to have reached the conclusion that “these control technologies remain unproven at commercial scale and the amount of mercury reduction achieved by them remains uncertain.”⁴⁵ EPA does not show how it reached that conclusion, nor does it explain what it would consider sufficient proof of cost-effectiveness or scalability.

EPA's unsupported conclusory determination that control technologies were too expensive or not sufficiently scalable did not appear until the Final Rule. It is a new rationale. The public was deprived of the ability to comment on cost-effective or scalable options for controlling mercury emissions during the comment period. Had EPA discussed any assessment of technologies, their efficacy, their scalability, or their costs in the Proposed Rule or Technology Review, commenters could have submitted information showing the viability of control technologies.

This petition for reconsideration should be granted so that the EPA can take public comment on potential mercury control-technologies, their cost-effectiveness, and their scalability.

2. The public was not on notice that EPA was purportedly unable to investigate available control technologies.

Even though the Final Rule asserts EPA did not have to set a mercury emissions limit (which was contrary to law as explained above), EPA also went on to explain why it could not do so. An initial MACT floor or beyond-the-floor limit for mercury emissions could not be determined because EPA had not collected the information that would allow it to determine the best-performing sources.⁴⁶ EPA claims it did not have sufficient time to submit an Information Collection Request to determine what technologies could be used to control mercury.⁴⁷

The Proposed Rule does not disclose that EPA considered the four-year timeframe to preclude it from engaging in information collection efforts.

⁴⁴ See Draft Technology Review for the Taconite Iron Ore Processing Source Category, Docket Item No. EPA-HQ-OAR-2017-0664-0103 (Technology Review) (no discussion of mercury-control technologies).

⁴⁵ 85 Fed. Reg. at 45,485.

⁴⁶ *Id.* At 45,484; Summary of Public Comments and Responses, EPA-HQ-OAR-2017-0664-0173 at 21-23, 49-50.

⁴⁷ *Id.* at 24.

If EPA had given any indication in the Proposed Rule that it would not collect or consider information on the best available control technology, the public could have commented differently. The LEAN case confirms that a purported lack of time is not a basis for refusing to collect information.⁴⁸ The *Blue Ridge* Order provided EPA four years to finalize the taconite ore processing RTR. And in other RTRs subject to the *Blue Ridge* Order, EPA did have time to collect and receive information along the same timeline as the Final Rule.⁴⁹ Moreover, developing a standard for mercury emissions from the taconite processing source category has been long overdue – EPA has had almost three decades to collect this information. The public could have urged EPA that it did, in fact, have time to collect the information that may have shed light on the technologies that were available. At the very least, the public could have provided information it had already collected for EPA’s consideration. The industry’s own experience in controlling mercury emissions would have shown EPA what technologies, as a matter of fact, are cost effective and scalable.

This petition for reconsideration should be granted so that the EPA can collect the necessary information and receive public comment on it.

Conclusion

For the foregoing reasons, EPA shall institute reconsideration proceedings.

Submitted September 28, 2020 by:

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⁴⁸ 955 F.3d at 1099.

⁴⁹ *E.g.*, National Emission Standards for Hazardous Air Pollutants: Lime Manufacturing Plants Residual Risk and Technology Review (July 24, 2020), Information Request Letter at Docket EPA-HQ-OAR-2017-0015-0016, *and* Industry Responses at EPA-HQ-OAR-2017-0015-0003, EPA-HQ-OAR-2017-0015-0008, EPA-HQ-OAR-2017-0015-0010, EPA-HQ-OAR-2017-0015-0011.