

United States Environmental Protection Agency
Docket A-92-55
401 M St., SW
Washington, DC 20460

Re: EPA Decision to Regulate Hazardous Air Pollutants (HAPs) from Electric Utility Generating Units under Section 112 of the Clean Air Act on or before December 15, 2000.

Dear Administrator Browner:

Midwest Environmental Advocates thanks the United States Environmental Protection Agency for the opportunity to comment on whether the EPA should regulate by Hazardous Air Pollutants (HAPs) from coal burning utilities.

Midwest Environmental Advocates is an environmental law center that represents community groups fighting for environmental justice. We file the following comments on behalf of the Indigenous Environmental Network, a national, grassroots organization that empowers Indigenous communities towards sustainable livelihoods, environmental protection of lands, water, air, and maintaining the Sacred Fire of Indigenous traditions.

The Indigenous Environmental Network Supports Regulations to Eliminate Mercury from Coal-Burning Utilities. The EPA has extensively documented the contamination caused by HAPs from the electric utility industry and it is now past the time for action. The Indigenous Environmental Network calls on the EPA to honor its trust responsibility to tribes and regulate HAPs. At a minimum, the EPA must consult with tribes before deciding whether to regulate these emissions.

Whether as Indigenous Americans or First Nations, those who are indigenous to the lands of North America have collective rights within the hundreds of tribes that exist today. They have inherent rights to their traditional lands – without which they would not be able to maintain their culture and spiritual beliefs. Throughout the world, Indigenous Peoples' ways of life are built on aged-old traditions and deep ties to and interdependence with the ecosystems where they live. Indigenous Peoples are particularly vulnerable to the changes in ecosystems caused by toxic contamination and development. They maintain an intimate socio-economic relationship and deep spiritual connection to their traditional homeland, and depend on it for their collective well-being. Harm to the ecosystem and the food web reverberates in the livelihood and culture of the local Indigenous tribes and groups, provoking crisis and life and death situations.

Poverty also increases Indigenous peoples' consumption of fish and other wild foods. Within the Chippewa nations, 34.3% of a total of 105,988 people are living below the poverty level.¹ For many people, eating fish is a necessity born out of economic scarcity.

HAPs contaminate the traditional food web and ecosystem where Indigenous Peoples reside, leading to the degradation of health and limiting their right to maintain their heritage and culture. HAPs threaten the very existence of Indigenous Peoples.

¹ Bureau of Indian Affairs, Social and Economic Characteristics of American Indian Population: 1990.

The reservation lands and ceded territory on which indigenous people retain the right to fish and hunt sustain the members of the Indigenous Environmental Network and all Indigenous Peoples. When these lands, waters, and fish are contaminated by HAPs, such as mercury, indigenous people suffer the most.

Electric utilities, which are the largest source of atmospheric mercury emissions, have been operating without regulation for far too long. The Indigenous Environmental Network not only supports stringent regulations of HAPs from electric utilities, but also supports fundamental changes that will increase energy conservation and the use of alternative energy sources. We support eliminating the multiple negative impacts caused by coal-burning electric utilities, from the exploitation of Indigenous lands where coal is mined to the deposition of HAPs into waters and fish – degrading Indigenous livelihoods, health, and survival.

The Indigenous Environmental Network strongly requests that the EPA create regulations to control HAPs and eventually eliminate mercury emissions from electric utilities.

I. Indigenous People Live With a Disproportionate Risk of Mercury Contamination.

Indigenous Peoples consume more fish than non-indigenous populations due to their economic constraints, as well as their cultural and spiritual relationship to traditional foods. Those who follow a traditional lifestyle and eat fish from lakes and streams in the Great Lakes region are exposed to high levels of methylmercury contamination.

A. Indigenous People Consume More Fish than the “Average” 6.5 g/d that is Used to Calculate Health Advisories.

- A study of 89 Ojibwa tribal members showed that 34.8% ate fish from Lake Superior once or twice a week, while 18.2% ate fish from inland lakes once or twice a week. The highest consumption was during spring and early summer.²
- A study of the Columbia River tribes showed that they consume around 60 g/d of fish.³
- EPA calculates that subsistence fishers consume about 140 g/d of fish.⁴

B. Indigenous People Have High Levels of Mercury in their Systems Already.

- Tests of members of five Chippewa tribes in Wisconsin showed highly elevated levels of mercury in their blood during traditional spear fishing season. Tribal members who had eaten more than 8 meals in the previous two months had levels of mercury up to 15 times above the reference dose used to produce Wisconsin’s health advisory for

² Gerstenberger et al., “Concentrations of Blood and Hair Mercury and Serum PCBs in an Ojibwa Population That Consumes Great Lakes Region Fish,” 35(4) *Clinical Toxicology* 377, 380 (1997).

³ Comments of Daniel Kusnierz, Penobscot Indian Nation, for the 1997 American Fisheries Society Forum on Contaminants in Fish, at 34 (December 1997).

⁴ Id.

- mercury. The results showed a direct correlation between blood levels of mercury and the number of walleye meals eaten.⁵
- The hair samples from a group of Ojibwa tribal members showed that 47% had levels of mercury above the detection limit.⁶
 - In the early 1970s the Indigenous community of Grassy Narrows in Canada was consuming fish that contained up to 24 ug/g of mercury, resulting in high mercury levels in blood – up to 660ppb.⁷
 - In the early 1970s a high level of mercury was found in the blood of Cree people in Northwest Quebec.⁸
 - A 20-year retrospective analysis of data about mercury levels in Indigenous people across Canada showed that 23% of 38,571 Indigenous people had mercury in their systems above 20 ppb, and 67 people had over 200 ppb. A fetal exposure analysis of 2,405 individuals showed similarly that 21.8% had levels of mercury above 20 ppb.⁹ This study also identified seasonal exposure, with a peak in blood levels of mercury in early fall.¹⁰

⁵ “Fish Consumption Patterns and Blood Mercury Levels in Wisconsin Chippewa Indians,” Wisconsin Department of Health and Social Services (1994).

⁶ For those with levels above the detection limit, they ate an average of 37 fish meals per year. Gerstenberger et al., “Concentrations of Blood and Hair Mercury and Serum PCBs in an Ojibwa Population That Consumes Great Lakes Region Fish,” 35(4) *Clinical Toxicology* 377, 380 (1997).

⁷ Brian Wheatley and Sylvain Paradis, “Balancing Human Exposure, Risk and Reality: Questions Raised by the Canadian Aboriginal Methylmercury Program,” 17(1) *Neuro Toxicology* 241 (1996).

⁸ Id.

⁹ Id. 242-243.

¹⁰ Id. at 244-245.

II. Health Advisories are Not the Answer. The EPA Needs to Stop Mercury at its Source.

Indigenous people are losing their culture due to mercury contamination of fish. Although health advisories are necessary, advisories about health risks may lead to people discontinuing their traditional fishing practices. This loss of livelihood and culture is unacceptable.

The amount of consumption that is recommended by the health advisories is often far below what many Indigenous people are entitled to under treaty rights. For instance, the Great Lakes Indian Fish and Wildlife Commission warns that if mercury levels are below 0.50 ppm, pregnant women should limit consumption to only one meal of fish per month, and if mercury levels are above 0.50 ppm, pregnant or breast-feeding women, women who plan to have children, and children under 15 years of age should not eat any of these fish.¹¹ That agency also produced detailed maps showing tribal members which waterbodies contained contaminated fish.

A 1993 survey of 69 tribal spear fishers in the Great Lakes indicated that concern about mercury levels in fish was altering the exercise of treaty rights to spear fish. "Mercury was a concern to 90% of the respondents. Some spearmen were modifying their behavior. Over half (64%) avoided spearing lakes where walleye were believed to be unsafe to eat because of high mercury levels. About half (49%) avoided taking a walleye or chose only the 'safer to eat' small walleye."¹²

On one hand, these behavioral changes show that the health advisories are succeeding in changing behavior. On the other, these changes must be seen for what they are to Indigenous people who are forced to refrain from exercising their treaty rights: a band-aid solution to a long-term problem. The EPA has the power and the responsibility to stop mercury at its source and cannot rely on using warnings to solve this contamination problem.

III. Mercury Contamination Impairs Treaty Rights.

Indigenous People have a unique legal relationship with natural resources and the federal government. Numerous treaties over the past 200 years have influenced this relationship. As settlers moved into the Western Great Lakes region in search of timber and minerals, the United States government bought land from the Ojibweg through cession treaties. Many of the treaties between the U.S. government and the Great Lakes tribes reserved the right for Indigenous Peoples to hunt, fish and gather in traditional reservation or "ceded" lands. Through treaties, tribes retained the right to obtain food and other necessities on ceded land to assure that future generations would always have a source of food and survival. Even today, many families in the Western Great Lakes continue to obtain their livelihoods from semi-subsistence lifestyles that are highly dependent on fishing and gathering wild rice.

¹¹ Great Lakes Indian Fish and Wildlife Commission website, <http://www.glifwc.org>.

¹² Id.

In the past three decades, several court decisions have affirmed treaty rights to fish in areas of the Great Lakes as well as inland lakes.¹³

The rights of Indian people to take fish and game and gather food are, and have historically been, an integral part of their subsistence as well as their culture and religious heritage. In turn they have formed a foundation for their trade and commerce. These rights were widely recognized in treaty negotiations and have been found by the courts to exist even where not specifically reserved in treaties.¹⁴

In order to exercise these treaty rights, regulators must maintain the quality and quantity of water resources and fish. Treaty rights are not the right to take a chance that one will occasionally catch an uncontaminated fish; rather, treaty rights assure Indigenous People that there will be an adequate and uncontaminated supply of fish.¹⁵ Treaty rights to fish create an implied right to environmental conditions necessary to fully exercise those rights.¹⁶

Mercury contamination of fish in the Western Great Lakes region and elsewhere is impairing Indigenous Peoples' rights to fish. This is evident in accounts by Indigenous People who have stopped fishing due to concerns about contamination, as well as blood tests showing high levels of mercury in those who continue to exercise treaty rights. It is an unacceptable state of existence when tribal members in the Western Great Lakes region who exercise their treaty rights and keep their traditions alive must do so at the risk of having blood levels of mercury 15 times higher than the level associated with adverse developmental and neurological effects.

IV. The EPA has a Trust Responsibility to Tribes to Reduce HAPs Emissions from Electric Utilities.

Treaty rights and the trust responsibility of the federal government are two sides of the same coin. "Tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights."¹⁷

The EPA has a trust responsibility to federally-recognized Indian tribes that has grown out of treaties, federal statutes and Executive Orders.¹⁸ The EPA was the first federal agency to

¹³ Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Lac Courte Oreilles Band, et. al. v. Voigt, 700 F.2d 341 (7th Cir. 1983); United States v. Michigan, 653 F.2d 277 (6th Cir. 1981); State v. Gurnoe, 53 Wis. 2d 390, 192 N.W. 2d 892 (Wis. 1972); People v. Jondreau, 384 Mich. 539, 185 N.W. 2d 375 (Mich. 1971).

¹⁴ American Indian Policy Review, Commission of the United States Congress, 1977.

¹⁵ See e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979); see also United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980), rev'd on other procedural grounds by United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (*en banc*); see also United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982) (implying a right to maintain water temperature as part of treaty rights to water resources).

¹⁶ See e.g., United States v. Washington, 506 F. Supp. at 205 (holding that the fishing clause of the treaties at issue in the case impliedly reserved water of sufficient quality to sustain the fishery), rev'd on other procedural grounds by United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (*en banc*).

¹⁷ Parravano v. Masten, 70 F.3d 539, 547 (9th Cir. 1995).

¹⁸ The federal government is the trustee of the Tribes' fishing rights. This responsibility attaches to the federal government as a whole, and not just the Interior Department. Parravano v. Masten, 70 F.3d 539, 546 (9th Cir. 1995); Nance v. EPA, 645 F.2d 701, 711 (9th Cir.), *cert. denied*, Crow Tribe v. EPA, 454 U.S. 1081 (1981) (holding EPA must act in accordance with trust responsibility when taking actions that affect tribes).

adopt a formal Indian policy in 1984, and EPA has worked to enhance and strengthen tribal operations. The EPA's Indian Policy contains nine principles to guide agency action. At least two of these principles are relevant here. Principle five states that the agency, "in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments."¹⁹ Principle nine states that the agency will incorporate its Indian policy goals into "policy and regulation development processes."²⁰

The trust responsibility requires the EPA to ensure that its actions are consistent with the protection of tribal rights, such as treaty rights to fish and hunt. At a minimum, the EPA has a duty to consult with tribes before taking final action that affects treaty rights.²¹ Executive Order 13084 on "Consultation and Coordination with Indian Tribal Governments" directs the EPA to include tribal input in the development of regulations and should use "consensual mechanisms" for developing regulations that impact trust resources.²²

The Indigenous Environmental Network reminds the EPA that it must consult with tribes about whether to regulate HAPs from electric utilities. This decision impacts the future of tribal members to obtain a healthy livelihood from wild fish, as well as maintain spiritual and cultural traditions.

Electric utilities are the largest source of atmospheric mercury contaminating water and fish resources in the United States. There is evidence that this contamination is endangering the health and cultural survival of Indigenous people. Like the non-Indian settlers of old who interfered with Indian water rights by damming the Milk River upstream from the Fort Belknap Reservation in Montana, non-Indian electric utilities are producing HAPs that are impairing Tribes' water resources and interfering with treaty rights. In the Fort Belknap situation, the United States government brought suit to enjoin the non-Indian settlers. The Indigenous Environmental Network calls on the EPA to likewise take action to stop the impairment of trust resources by non-Indian electric utilities.

The EPA has a duty to take action to regulate activities that adversely affect treaty rights.²³ Every day the EPA delays in regulating HAPs from electric utilities, the agency undermines its federal trust responsibility to tribes.

Sincerely,

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On Behalf of the Indigenous Environmental Network

¹⁹ EPA Indian Policy (1984), reaffirmed by Administrator Browner (March 1994).

²⁰ Id.

²¹ Presidential Memorandum, "Government-to-Government Relations with Native American Tribal Governments" 2 (April 29, 1994).

²² Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments," (May 14, 1998). Executive Orders have the same force as treaties and must be interpreted "as the Indians would have understood them. . ." Parravano v. Masten, 70 F.3d 539, 544 (9th Cir. 1995).

²³ See e.g., Parravano v. Masten, 70 F.3d at 543.