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NATIVE AMERICANS CONFRONT MERCURY THREAT TO HEALTH, CULTURE

by Abigail Okrent*

Methylmercury is a potent neurotoxin that can cause serious neurological and developmental damage.¹ Emissions from coal-burning plants are the main source of mercury pollution in the United States.² When mercury emissions deposit into water, they bioaccumulate as methylmercury in the tissue of fish, exposing fish consumers to high magnitudes of mercury.³ The U.S. Environmental Protection Agency (“EPA”) notes that some Native Americans are among the highest risk groups for mercury contamination due to their heavy fish consumption.⁴

Four Maine Indian tribes are parties in a series of legal challenges filed against the EPA and consolidated in *New Jersey v. EPA* in December 2005.⁵ The lawsuits are a response to two new mercury rules announced by the agency in March 2005.⁶ The tribes, along with some environmental groups and states, allege that these rules weaken emissions regulations, threaten human health, and permit three times as much mer-



Penobscot children fishing.

cury pollution as would occur in full compliance with the Clean Air Act (“CAA”).⁷ For the tribes opposing the new regulations, reducing mercury pollution is about more than health. The Penobscot nation hopes that by eliminating mercury contamination they can “salvage a cultural identity.”⁸ “Fishing is one of the social and cultural ties that bind our tribal communities together,” explains the Houlton Band of Maliseet’s chief, “[and] that link has been stretched very thin because of mercury contamination.”⁹

The two rules issued on March 15, 2005 fall under the CAA. The first rule, passed pursuant to CAA section 112(c),¹⁰ removes mercury from the list of the most stringently regulated chemicals.¹¹ Essentially it reclassifies mercury as non-toxic.¹² Called the “Section 112 rule” by the EPA and “delisting” by opponents, this provision is an essential precursor to the cap-and-trade system proposed by the second regulation,

the Clean Air Mercury Rule (“CAMR”).¹³ The cap-and-trade approach, which falls under CAA section 111,¹⁴ allows power plants to purchase emissions credits rather than reduce their own emissions.¹⁵

The National Tribal Environmental Council, one of many groups to submit comments on the cap-and-trade provision, expressed concern that it will create hot spots of mercury depositions.¹⁶ EPA’s Children’s Health Protection Advisory Committee noted that the proposed rule may create new hot spots and fail to address existing ones.¹⁷ The EPA recently opened the delisting rule for reconsideration after receiving two petitions, from over a dozen states, environmental groups, and Indian tribes,¹⁸ and hopes to have a decision on the final rule by May 2006.¹⁹ EPA is also reconsidering the CAMR cap-and-trade.²⁰ Both provisions are pending review in the case before the D.C. Circuit.²¹

If mercury output is not curtailed, the burden shifts to consumers to protect themselves from contamination by avoiding fish consumption. Currently, 45 states have issued fish consumption advisories,²² which cover 35 percent of all lakes and 24 percent of all river miles nationwide.²³ For an Indian tribe whose members may eat up to ten times as much fish as the average American,²⁴ fish advisories create “a harsh choice: either risk the health of tribal members by continuing a now dangerous cultural tradition, with all the language, behavior, and spiritual connections that go with it, or heed the warnings and see centuries-old components of culture and religion slip away.”



ENDNOTES:

¹ Cleanairnow.org, No More Mercury: Latest News: EPA Proposes to Weaken Mercury Rules (Dec. 2, 2003), <http://cleanairnow.org/cleanairnow.asp?id2=11551&id3=cleanairnow&> (last visited Mar. 22, 2006).

² See e.g., Janet Larsen, EARTH POLICY INSTITUTE, *Coal Takes Heavy Human Toll, Some 25,100 U.S. Deaths from Coal Use Largely Preventable*, (Aug. 24, 2004), <http://www.earth-policy.org/Updates/Update42.htm> (last visited Mar. 17, 2006).

³ U.S. ENVIRONMENTAL PROTECTION AGENCY (“EPA”), MERCURY WHITE PAPER, available at <http://www.epa.gov/ttn/atw/combust/utiltox/hgwt1212.html> (last visited Feb. 10, 2006.)

⁴ EPA, *id.*

⁵ *State of New Jersey, et al., v. Environmental Protection Agency*, No. 05-1097, 2005 U.S. App. LEXIS 26926 (D.C. Cir. Dec. 8, 2005.) [hereinafter *New Jersey v. EPA*]; see also Missy Edgecombe, *Maine Indians join EPA challenge*, BANGOR DAILY NEWS, June 15, 2005, at B6, available at <http://www.penobscotnation.org/DNR/Air%20news/challenge.htm> (last visited Mar. 22, 2006).

⁶ See Mercury, U.S. Environmental Protection Agency website, <http://www.epa.gov/mercury> (last visited Mar. 27, 2006).

⁷ Press Release, Natural Resources Defense Council, States Sue EPA Over New Mercury Rule, (Mar. 29, 2005), at <http://www.nrdc.org/bushrecord/>

ENDNOTES: Mercury Threat Continued on page 80

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articles/br_1890.asp?t=t (last visited Mar. 29, 2006.)

⁸ Dieter Bradbury, *Contamination in Fish Weakens Cultural Link for Maine Tribe*, PORTLAND PRESS HERALD, 1997, Special Reports, available at <http://pressherald.maintoday.com/specialrpts/mercury/indians.htm> (last visited Mar. 28, 2006).

⁹ Edgecombe, *supra* note 5.

¹⁰ 70 C.F.R. § 15994 (2005).

¹¹ Press Release, Office of New York State Attorney General Eliot Spitzer, Nine States File Suit Challenging EPA Mercury Rule (Mar. 29, 2005) available at www.oag.state.ny.us/press/2005/mar/mar29c_05.html (last visited Mar. 28, 2006).

¹² Letter from Pearl Capoean-Baller, Chairperson, National Tribal Environmental Council to EPA, Att'n: Docket ID No. OAR-2002-0056, Subject: Comments on the Proposed Utility Mercury Reductions Rule (June 4, 2004), available at http://www.ntec.org/Programs/Air%20Program/Positions_Comments/air_toxins.htm (last visited Feb. 10, 2006) [hereinafter Capoean-Baller].

¹³ National Association of Manufacturers, Comments on Notice of Reconsideration of Final Clean Air Mercury Rule, by the National Assoc. of Manufacturers, Submitted to EPA on Dec. 19, 2005, 3, available at http://www.nam.org/s_nam?bin.asp?CID=43&DID=236339&DOC=FILE.PDF (last visited Mar. 22, 2006).

¹⁴ National Association, *id.* The statute is 70 C.F.R. §28606 (2005).

¹⁵ Press Release, Office of New York State Attorney General Eliot Spitzer, Eleven States Sue EPA to Block Second Mercury Rule (May 18, 2005) available at http://www.oag.state.ny.us/press/2005/may/may18d_05.html (last visited Mar. 29, 2006).

¹⁶ Capoean-Baller, *supra* note 12.

¹⁷ Letter from Children's Health Advisory Protection Committee to Michael Leavitt, Re: EPA's Proposed Action to Reduce Mercury From Coal-Fred Power Plants (Jan. 26, 2004) available at [http://yosemite.epa.gov/ochp/ochpweb.nsf/content/20040126.htm/\\$file/20](http://yosemite.epa.gov/ochp/ochpweb.nsf/content/20040126.htm/$file/20)

040126.pdf, at 2 (last visited Mar. 22, 2006).

¹⁸ Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List: Reconsideration, ENVIRONMENTAL PROTECTION AGENCY, 40 C.F.R. Part 63 (Oct. 21, 2005), at <http://www.epa.gov/air/mercuryrule/pdfs/prop20051021b.pdf>, at 1 (last visited Mar. 28, 2006).

¹⁹ Personal communication from William Maxwell, Re: Clean Air Mercury Regulations, to Abigail Okrent (Feb. 7, 2006) (on file with author).

²⁰ Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units: Reconsideration, ENVIRONMENTAL PROTECTION AGENCY, 40 C.F.R. Parts 60, 72, & 75 (Oct. 21, 2005) <http://www.epa.gov/air/mercuryrule/pdfs/prop20051021a.pdf>, at 1 (last visited Mar. 28, 2006).

²¹ *New Jersey v. EPA*, 2005 U.S. App. LEXIS 26926 (D.C. Cir. Dec. 8, 2005).

²² Cleanairnow.org, New Report Finds 20 States Increased Warnings for Mercury in Fish in 2003, Oct. 14, 2004, at <http://cleanairnow.org/cleanairnow.asp?id2=14602> (last visited Feb. 10, 2006).

²³ Fish Advisories, 2004 National Listing of Fish Advisories Slides, U.S. Environmental Protection Agency website, at http://epa.gov/water-science/fish/advisories/slides2004-1_files/slide2.html, at slide 2, (last visited Mar. 28, 2006).

²⁴ OMB Watch, Mercury Emissions Adversely Affect Minorities, Nov. 2, 2004, at <http://www.ombwatch.org/article/articleview/2508/1/219> (last visited Mar. 28, 2006).

²⁵ Virgil Masayesva, *From the Director*, NATIVE VOICES, Vol. XI, No.1, Spring 2004, at 2, available at <http://www4.nau.edu/itep/about/assets/docs/NVSpring2004.pdf> (last visited Feb. 10, 2006).