



EPA's Failure to Regulate Mercury Pollution

An overview of the federal regulations

After years of foot-dragging by the EPA, Congress identified 189 hazardous air pollutants (HAPs) in the 1990 Amendments to the Clean Air Act. Mercury is one of those Congressionally-listed air toxics.³⁹ Today, the primary way that the U.S. EPA regulates air toxics such as mercury is through Maximum Achievable Control Technology (MACT) standards.⁴⁰

The Clean Air Act requires EPA to identify categories of facilities that are major sources of these air toxics and to set emission standards for each category, such as cement kilns.⁴¹

When EPA issues MACT standards for an industrial category, such as cement kilns, it must set standards for each hazardous air pollutant that category emits.⁴² For each HAP, these standards must require the maximum reduction in emissions that is achievable considering cost and other factors.⁴³ Well aware of

EPA's tendency to cave to industry pressure and issue weak environmental standards, Congress also included absolute minimum stringency ("floor") provisions in the Clean Air Act that apply without regard to cost or EPA's views about what is achievable.⁴⁴ For the existing plants in any category, EPA's standards may not be less stringent than the average emission level achieved by the 12 percent of sources with the lowest emission levels.⁴⁵ For new plants, standards may not be less stringent than the emission level achieved by the single lowest emitting source.⁴⁶

Congress enacted this law in 1990, and required EPA to complete its MACT standards for cement kilns no later than 1997. In direct violation of this law — and in defiance of repeated federal

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court orders, EPA has yet to set any mercury standards for existing cement kilns. Thanks to EPA's recalcitrance and neglect, uncontrolled emissions from cement kilns, have continued unabated for the last decade, at a rate of approximately 23,000 pounds a year.

Years of EPA delay

Three times in the last ten years, federal courts have ordered EPA to set emission standards to control cement kilns' mercury emissions. But EPA has ignored these orders or sought to evade them.

In 1990 Congress amended the Federal Clean Air Act to require EPA to set

standards for the emissions of air toxics from cement kilns. The standards were due in 1997, but EPA failed to act, and in 1998 Earthjustice filed suit on behalf of the Sierra Club to force EPA into action.

In 1999 EPA did adopt a rule regulating toxics from cement kilns, but in that rule EPA failed to set a limit for mercury.⁴⁷ EPA wrongly claimed that because it found no cement plants using control technologies specifically for mercury, it did not have to set a mercury limit.

EPA's cement kiln regulations were unlawful.⁴⁸ In particular, the D.C. Court of Appeals found that EPA's failure to set emission standards for mercury flatly violated the federal Clean Air Act.

FIGURE 4. TIMELINE OF EARTHJUSTICE ACTIVITY

1990	1997	1998	JUN 1999	AUG 1999
Congress amends the Clean Air Act to require industrial pollution sources to clean up their emissions of toxic air pollutants, including mercury from cement kilns	Cement kiln standards due, EPA fails to act	Earthjustice files deadline suit on behalf of Sierra Club; EPA settles; proposes cement kiln rule. Earthjustice submits comments	EPA publishes final cement kiln rule, but fails to set any limit on kilns' emissions of mercury, hydrochloric acid, and toxic hydrocarbons	On behalf of Sierra Club, Earthjustice challenges EPA's rule in U.S. Court of Appeals for the D.C. Circuit
DEC 2005	FEB 2006	FEB 2006	DEC 2006	FEB 16 2007
EPA publishes proposed response to <i>National Lime Ass'n</i> ; proposed rule again fails to establish emission standards for mercury, hydrochloric acid or toxic hydrocarbons	Earthjustice files comments on behalf of 13 other organizations and individuals on cement kiln rule; online activists generate 12,000 additional comments for stronger protections	Earthjustice and the Sierra Club gave EPA an extension of the consent decree deadline until December 2006	EPA publishes final rule in response to 2000 Court order; the new rule contains no emission standards for mercury, hydrochloric acid or toxic hydrocarbons	On behalf of six environmental groups, Earthjustice challenges new rule in 4th D.C. Circuit lawsuit; EPA requests that the case be stayed for one year while it reconsiders the new rule

Five years after the D.C. Court of Appeals found EPA's failure to regulate mercury emissions from cement kilns a clear violation of the Clean Air Act, and despite a 2005 court order requiring EPA to propose rules, EPA yet again refused to set regulations to control mercury emissions from this country's existing kilns.⁴⁹

EPA's scofflaw approach to toxic emissions from cement kilns has drawn increasing attention from states that are grappling with their mercury pollution and from citizen groups whose members are affected by this pollution. Eight states and seven environmental groups combined to challenge EPA's most recent refusal to set mercury standards in a 2007 lawsuit before the United States Court of Appeals for the D.C. Circuit.⁵⁰

Under intense pressure from states and local and national environmental and public health groups, the U.S. Environmental Protection Agency finally indicated that it would set mercury emission standards, as stated in papers filed on February 20, 2008, in a fourth case brought by Earthjustice on behalf of Sierra Club, Downwinders at Risk (TX), Friends of Hudson (NY), Montanans Against Toxic Burning, Desert Citizens Against Pollution (CA), and the Huron Environmental Activist League (MI). The States of Michigan, New Jersey, Pennsylvania — DEP, New York, Connecticut, Delaware, Illinois, Maryland and Massachusetts also filed suit. EPA's announcement marks a dramatic shift in EPA policy which, until now, had been to resist requiring mercury controls for cement kilns.

DEC 2000

D.C. Circuit finds that EPA's rule violated plain statutory requirement to set standards for each hazardous air pollutant that cement kilns emit, and orders EPA to set the missing standards (case referred to as *National Lime Ass'n v. EPA*)

DEC 2000 TO OCT 2004

EPA ignores Court's order

OCT 2004

On behalf of Sierra Club, Earthjustice files second suit in D.C. Circuit to compel EPA to respond to Court's 2000 order in *National Lime Ass'n*

OCT 2005

EPA agrees to Court-ordered deadline requiring it to respond to Court's 2000 order by May 26, 2006

MAR 2007

In separate Earthjustice lawsuit on brick kilns, D.C. Circuit confirms that EPA has plain statutory duty to set emission standards for each hazardous air pollutant that an industry emits

DEC 2007

EPA fails to meet one-year deadline, requests further stay of litigation

MAR 2008

EPA requests further stay of litigation, representing to the Court that it will set mercury standards for cement kilns in 2009

JUL 2008

Earthjustice and Environmental Integrity Project release "Cementing a Toxic Legacy?" documenting mercury emissions from cement kilns across the country



Recommendations and Opportunities

EPA must follow through on its commitments. In a recent court document, EPA stated that it would release a proposal for a cement kiln mercury standard.⁵¹ This is the first time that EPA has publically acknowledged that it will finally abide by court orders requiring it to set a cement kiln standard for mercury and that it will comply with the Clean Air Act. EPA must now follow through on this proposal and release a final rule in 2009. EPA's proposal must not repeat its past litany of complaints as to why such regulation is too complicated. It is not.

States should require specific testing for mercury emissions. Even once a standard is set by EPA, it is incumbent that states implementing permitting programs across the country have access to up-to-date information. Source tests will benefit both the public and permitting authorities. Neighboring residents will be better informed of health risks. Permitting authorities (the states) will have better

information with which to set permit limits and take enforcement actions.

Monitoring must be added. Continuous Emissions Monitoring Systems (CEMS) should be required for mercury on all kilns. CEMS will provide real-time data on emissions at the cement kilns. This technology should be promptly installed at kilns nation-wide.

Pollution controls must also be added. State regulatory agencies should not wait for EPA to set standards, but should immediately require the kilns within their jurisdiction to install pollution control devices specifically designed to capture mercury, such as activated carbon injection.

EPA claims that it will propose a standard to limit mercury emissions from cement kilns in 2008. Any failure to issue such standards must be viewed critically by the public and prompt public officials to ask why we must continue to be exposed to this toxic pollution.