

ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1127 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MURRAY ENERGY CORPORATION, *et al.*
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*
Respondents.

On Petitions for Review of a Final Rule of the
United States Environmental Protection Agency

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN
INDIANS, GREAT LAKES INDIAN FISH AND WILDLIFE
COMMISSION, BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA
INDIANS, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA,
GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,
LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA
INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,
LITTLE RIVER BAND OF OTTAWA INDIANS, AND ST. CROIX
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to Circuit Rule 28(a)(1):

(A) Parties and Amicus

All parties, intervenors, and amici are listed in the brief of Respondent Environmental Protection Agency, except for amici curiae the National Congress of American Indians, Great Lakes Indian Fish and Wildlife Commission, Bad River Band of Lake Superior Chippewa Indians, Fond du Lac Band of Lake Superior Chippewa, Grand Traverse Band of Ottawa and Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, and St. Croix Chippewa Indians of Wisconsin (collectively, “Tribal Amici”).

(B) Rulings Under Review

Petitioners challenge the *Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal-and Oil-Fired Electric Utility Steam Generating Units*, 81 Fed. Reg. 24,420 (Apr. 25, 2016).

(C) Related Cases

Tribal Amici adopt the statement of related cases set forth in the Brief of Respondent United States Environmental Protection Agency.

Dated: January 25, 2017

/s/ Jane G. Steadman
Jane G. Steadman

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Tribal Amici make the following disclosures.

National Congress of American Indians, a non-profit organization dedicated to advocating for the rights of American Indians and Alaska Natives, certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

Great Lakes Indian Fish and Wildlife Commission, an intertribal organization dedicated to implementing off-reservation treaty rights on behalf of eleven Ojibwe member tribes, certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

Bad River Band of Lake Superior Chippewa Indians, a federally recognized tribe, certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

Fond du Lac Band of Lake Superior Chippewa, a federally recognized tribe, certifies that it has not issued shares to the public; that it has no parent company,

subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

Grand Traverse Band of Ottawa and Chippewa Indians, a federally recognized tribe, certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, a federally recognized tribe, certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

Little River Band of Ottawa Indians, a federally recognized tribe, certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

Little Traverse Bay Bands of Odawa Indians, a federally recognized tribe, certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

St. Croix Chippewa Indians of Wisconsin, a federally recognized tribe, certifies that it has not issued shares to the public; that it has no parent company,

subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

Dated: January 25, 2017

/s/ Jane G. Steadman
Jane G. Steadman

SEPARATE AMICUS CURIAE BRIEF

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel certifies that a separate brief is necessary for presentation of the arguments of Tribal Amici to this Court. As federally recognized Indian tribes and nonpartisan inter-tribal organizations that are committed to protecting tribal members and tribal natural and cultural resources, the National Congress of American Indians, Great Lakes Indian Fish and Wildlife Commission, Band River Band of Lake Superior Chippewa Indians, Fond du Lac Band of Lake Superior Chippewa, Grand Traverse Band of Ottawa and Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, and St. Croix Chippewa Indians of Wisconsin are uniquely situated to provide information to the Court regarding the benefits of the Mercury and Air Toxics Standards Rule, as well as the appropriateness of the analysis undertaken by the Environmental Protection Agency in its Supplemental Finding. Tribal Amici are aware of no other amicus curiae that intends to interpret or address the impact of the Supplemental Finding in the same manner as Tribal Amici. Accordingly, Tribal Amici, through undersigned counsel, certify that filing a joint brief would not be practicable.

Dated: January 25, 2017

/s/ Jane G. Steadman
Jane G. Steadman

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GLOSSARY OF TERMS

CAA or Act	Clean Air Act
EGU, power plant, or electric generating units	Coal- and oil-fired electric utility steam generating units
EPA or Agency	United States Environmental Protection Agency
HAP	Hazardous Air Pollutant
MATS Rule or Rule	Mercury and Air Toxics Standards Rule, 77 Fed. Reg. 9,304 (Feb. 16, 2012)
Supplemental Finding	Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal-and Oil-Fired Electric Utility Steam Generating Units; Final Rule, 81 Fed. Reg. 24,420 (Apr. 25, 2016)

INTERESTS OF TRIBAL AMICI¹

Tribal Amici are federally recognized Indian tribes and inter-tribal organizations that are committed to protecting tribal members and tribal natural and cultural resources. Amici have a strong interest in the impact on American Indians and fisheries of the mercury emissions regulated by the Rule and the Supplemental Finding on the Rule at issue in this case.

The National Congress of American Indians (NCAI) is the oldest and largest national organization addressing American Indian interests. Founded in 1944, NCAI represents more than 250 federally recognized Indian tribes and Alaska Native villages. NCAI and its members are dedicated to protecting the health and traditional lifeways of American Indians and tribes, as well as the fisheries and other natural resources on which tribes depend.

The Bad River Band of Lake Superior Chippewa Indians, the Fond du Lac Band of Lake Superior Chippewa, the Grand Traverse Band of Ottawa and Chippewa Indians, the Lac Courte Oreille Band of Lake Superior Chippewa Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, and the St. Croix Chippewa Indians of Wisconsin are federally recognized Indian tribes. The tribes' reservations are located in northern

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Minnesota, Wisconsin, and Michigan. Under various treaties, the tribes ceded land to the United States and reserved rights to fish, hunt, and gather in the ceded territories. The tribes manage fisheries resources to ensure safe and abundant supplies of fish for tribal members.

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC) is a natural resource agency of eleven Chippewa (or Ojibwe) tribes, all of which ceded land to the United States under various treaties. The treaty-ceded territories encompass portions of east-central Minnesota, the northern third of Wisconsin, and the Upper and Lower Peninsulas of Michigan. GLIFWC's mission is to assist its member tribes in the recognition and implementation of their treaty-reserved, off-reservation hunting, fishing, and gathering rights. Part of GLIFWC's mission includes ecosystem protection, and helping to ensure that natural resources are healthy and abundant throughout the ceded territories. GLIFWC provides comprehensive natural resource management services to its member tribes, including fisheries management, and has tested mercury levels in fish since 1989.

ARGUMENT

Many American Indian tribes throughout the United States are fishing tribes whose members catch fish for their livelihoods and for their family's daily sustenance. In doing so, they maintain unbroken ties to the culture their ancestors practiced since time immemorial and ensure that culture may be passed down to future generations. Mercury emissions from coal- and oil-fired electric utility steam generating units (EGUs or power plants) threaten these traditions because methylmercury contamination bioaccumulates in the fish American Indians catch and serve their communities. In turn, this contamination can result in devastating neurological disorders and other diseases, which can lead American Indians to abandon their traditions and their subsistence practices.

By reducing mercury emissions, the Mercury and Air Toxics Standards (MATS) Rule will help tribal members avoid the dilemma of whether to continue sustenance fishing and imperil their health, or to forgo sustenance fishing and imperil their culture and livelihoods. Although impossible to quantify or monetize, these benefits of the Rule are real for American Indians, and the Environmental Protection Agency's (EPA's) Supplemental Finding that it is "appropriate and necessary" to regulate hazardous air pollutants from EGUs accounted for them. This was consistent with the Supreme Court's decision in *Michigan v. EPA* and the

Clean Air Act, as well as the Federal government's longstanding obligations to protect tribal resources as trustee for the tribes.

I. The MATS Rule Will Benefit American Indians by Reducing Mercury Emissions that Endanger Their Health, Culture, and Economies

In response to the U.S. Supreme Court's decision in *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699 (2015), EPA issued a Supplemental Finding that it is "appropriate and necessary" to regulate hazardous air pollutants from power plants. 81 Fed. Reg. 24,420 (Apr. 25, 2016). The Supplemental Finding considered and weighed the cost of complying with the MATS Rule against the public health and other benefits of the Rule, upholding EPA's prior determination that regulation of hazardous air pollutant emissions from EGUs under section 112 of the Clean Air Act is appropriate and necessary. Tribal Amici support EPA's Supplemental Finding because it accounts for the benefits of reducing mercury exposure to at risk, sensitive populations, including American Indians.

Mercury pollution poses risks for the population at large, but certain racial and socioeconomic groups bear those risks disproportionately. 80 Fed. Reg. 75,025, 75,029, 75,040 (Dec. 1, 2015).² American Indians, in particular, are at

² Throughout this brief, Tribal Amici make reference to EPA's Proposed Supplemental Finding, 80 Fed. Reg. 75,025 (Dec. 1, 2015). This is appropriate because EPA, in the Final Supplemental Finding, "continues to rely on the

especially high risk of mercury exposure because many consume fish at far higher rates than the general public (in some instances, up to 4 or 5 times as high). *See* 81 Fed. Reg. at 24,442; EPA, Mercury Study Report to Congress, Vol. 4 at 7-2, EPA-452/R-97-006 (Dec. 1997), EPA-HQ-OAR-2009-0234-3054. Because fish consumption is the primary pathway for human exposure to methylmercury, 76 Fed. Reg. 24,976, 24,999 (May 3, 2011), American Indians have suffered disproportionate health, cultural, and economic consequences from the historic failure to regulate mercury emissions from power plants. Indian tribes and their members will accordingly experience substantial benefits from the MATS Rule, just as they have experienced substantial costs from mercury and other toxic air pollution in the Rule's absence.

A. Mercury Emissions Harm Indian Health.

Coal- and oil-fired power plants are by far the largest anthropogenic sources of mercury emissions in the United States. 76 Fed. Reg. at 24,977. EPA estimates the Rule will result in an annual reduction in mercury emissions from large, coal-fired EGUs of 75%. 80 Fed. Reg. at 75,033. Although the mercury already emitted into the environment will continue to pose hazards to public health and the environment well into the future, 80 Fed. Reg. at 75,038 n.45, significant

analyses contained in the proposed supplemental finding.” 81 Fed. Reg. 24,420, 24,425 (Apr. 25, 2016).

reductions in additional future pollution will improve the quality of life for many American Indians.

Mercury emissions pose a serious public health threat. 80 Fed. Reg. at 75,029, 75,040. The basic pathway for human exposure to mercury from power plants is well understood: Mercury is a persistent, bioaccumulative toxic metal that is released into the environment when fossil fuels are burned to fire EGUs. *Id.* After circulating in the atmosphere, mercury eventually deposits to water or land, where it can be transformed into methylmercury through microbial action. *Id.* It is then ingested by aquatic organisms and can bioaccumulate in the aquatic food web. *Id.* Larger predatory fish may have concentrations “many times higher than, typically on the order of 1 million times, that of the concentrations in the freshwater body in which they live.” *Id.* “The predominant exposure pathway by which humans are affected by [methylmercury] . . . is by ingestion of fish containing it.” 76 Fed. Reg. at 24,999.

Mercury emissions harm Indian health disproportionately because many American Indians rely much more heavily on locally caught fish for their daily sustenance than the general public. EPA has determined that many American Indians’ “average exposures to methylmercury may be more than two-times greater than those experienced by the average population.” Mercury Study Report, Vol. 4 at 7-2; *id.* at Vol. 7 at 2-2 (“[S]ome Native American populations report fish

consumption rates far in excess of the general population.”). Indeed, for many tribes, fish consumption rates are so high that EPA’s estimate of two-times greater exposure may be a gross underestimate. “Some indigenous subpopulations eat 4 to 5 times the amount of fish assumed in EPA models that determined fish consumption advisories.” Amy Roe, *Fishing for Identity: Mercury Contamination and Fish Consumption Among Indigenous Groups in the United States*, 23 BULL. OF SCI., TECH. & SOC’Y 368, 370 (2003); 80 Fed. Reg. 55,063, 55,066 n.18 and accompanying text (Sept. 14, 2015) (citing numerous fish consumption surveys).

Perhaps not surprisingly then, blood mercury levels of American Indians are among the highest of any racial or ethnic group in the United States. *See* Jane M. Hightower et. al., *Blood Mercury Reporting in NHANES: Identifying Asian, Pacific Islander, Native American, and Multiracial Groups*, 114 ENVTL. HEALTH PERSP. 173, 174 (2006). American Indians are therefore at unusually high risk for neurodevelopmental disorders, cardiovascular disease, autoimmune disorders, infertility, and other adverse health effects from methylmercury exposure. *See, e.g.*, 80 Fed. Reg. at 75,029, 75,040; 76 Fed. Reg. at 24,978, 24,983, 25,080-81.

Women of child-bearing age are a subpopulation of especially great concern, due to the potential for adverse effects on children exposed to methylmercury *in utero* through maternal fish consumption. 76 Fed. Reg. at 24,978, 24,983. A highly potent neurotoxin, methylmercury “targets the brain of developing

organisms, [and] is linked to neurobehavioral testing disorders including deficits in attention span, fine motor function, language, visual-spatial ability and memory even at low exposure levels.” Sandra W. Kuntz et al., *Methylmercury Risk and Awareness Among American Indian Women of Childbearing Age Living on an Inland Northwest Reservation*, 109 ENVTL. RES. 753, 753 (2009). In its proposed Supplemental Finding, EPA concludes that the “the population at highest risk is the children of women who consumed large amounts of fish and seafood during pregnancy and that the risk to that population is likely to be sufficient to result in an increase in the number of children who have to struggle to keep up in school.” 80 Fed. Reg. at 75,029. Unfortunately, research suggests that some children in Great Lakes tribal populations suffer IQ losses ranging from 6.2 to 7.2 points due to methylmercury exposure. Catherine O’Neill, *Environmental Justice in the Tribal Context: A Madness to EPA’s Method*, 38 ENVTL. L. 495, 531 (2008). In turn, public schools, families, and the affected children themselves bear real financial costs for mercury exposure, such as the need for extra help in school, additional medical care, and lost future income.

EPA considered and weighed the benefits the MATS Rule will afford the public, including sensitive subpopulations, in its Supplemental Finding. However, because the benefits to human health are not easily reduced to dollar figures, most of them were considered on a qualitative basis rather than a quantitative one. 80

Fed. Reg. at 75,040. For instance, “for neurodevelopmental effects, EPA was only able to quantify and monetize IQ loss among a small subset of recreational fishers.” *Id.* That analysis estimated a value of \$4-6 million annually for the beneficial reduction in IQ loss associated with changes in mercury exposure for “typical recreational fishers” who consume fish during pregnancy from the freshwater watersheds where EPA had fish tissue data. *Id.* That figure, as EPA acknowledged, was a gross underestimate of the Rule’s public health benefits, especially since IQ loss is not even the “most potentially significant health effect associated with mercury exposure [compared to] other neurobehavioral effects, such as language, memory, attention, and other developmental indices, that are more responsive to mercury exposure.” *Id.* Moreover, that quantification did not account for the far greater fish consumption of subsistence fishers, and EPA concluded that it was “a *substantial underestimate* of the total mercury impacts among affected populations.” *Id.* (emphasis added).

The ubiquity of fish consumption warnings demonstrates how the nation has been forced to adapt to pervasive methylmercury contamination. In some states, all (or nearly all) of the waters are contaminated with mercury and accordingly are subject to mercury-related fish consumption advisories. *See, e.g.,* Statewide Mich. Mercury Total Maximum Daily Load: Public Review Draft (2013) at 9, *available at* http://www.michigan.gov/documents/deq/wrd-swas-hgtmdl-draft_415360_7.pdf

(all inland Michigan lakes and several hundred river miles subject to mercury fish advisories). Tribes and inter-tribal organizations have acted to protect individuals against methylmercury exposure by partnering with states to develop fish consumption advisories, sharing and interpreting fish data, administering surveys on fishing and fish consumption, and developing educational materials. In addition, they issue mercury fish advisories of their own to tribal members. *See, e.g.,* Comments of National Congress of American Indians et. al. on EPA’s Proposed Supplemental Finding, Attachment B (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20537 [hereinafter “NCAI Comments”].

For American Indians who know of and rely on fish consumption advisories, the task of avoiding overexposure to methylmercury can be dizzyingly complex. The Bad River Advisory submitted by Tribal Amici during the public comment period illustrates the challenge of creating a simple, easy-to-follow guide for fish consumption, even where the relevant information itself has been presented as clearly as possible. NCAI Comments at Attachment B. The Advisory contains:

1. Two different maps and two different sets of instructions (one for higher-risk and one for lower-risk subpopulations);
2. Different advisories for different lakes (dozens in total);
3. Lake-by-lake recommendations on the maximum number of *ogaa* (walleye) meals to consume per month;

4. A warning to adjust the number of *ogaa* meals per month depending on the size of the portions consumed; and
5. A suggestion to bag and label *ogaa*, before freezing, according to size and lake of origin.

The Advisory illustrates how many American Indians must navigate complexities that most Americans cannot even imagine contending with in their daily lives simply to avoid methylmercury exposure from a primary food source.

Mercury fish advisories, moreover, are not an adequate or appropriate substitute for eliminating mercury contamination in the first place. For many tribal members, adhering to fish advisories for health reasons necessarily entails a drastic and unacceptable curtailment of their traditional reliance on fisheries. Many American Indians catch and consume fish because it is central to their tribal identity and often is essential for their survival. Indians who rely on fish as a mainstay of their culture and diet do not have an easy option of eating less fish and switching to other food sources. Compliance with fish advisories can thus result in profound cultural loss and dietary impact, discussed in greater detail below.

B. Mercury Emissions Harm Indian Culture.

Throughout the MATS Rule public process, including in regard to the Supplemental Finding, tribes expressed significant concern over the “cultural

impact of impaired water quality.” 76 Fed. Reg. at 25,087. Indian cultural activities “are often dependent on the purity of waters . . . , many of which have become tainted by mercury exposure.” Comments of National Tribal Air Association on EPA’s Proposed Rule at 2 (Aug. 17, 2011), EPA-HQ-OAR-2009-0234-19686. *See also* NCAI Comments at 8-10; Comments of Fond du Lac Band of Lake Superior Chippewa on EPA’s Proposed Rule at 2 (July 27, 2011), EPA-HQ-OAR-2009-0234-17846 (describing deleterious effect of mercury deposition on the Tribe’s “water based culture”). EPA accordingly considered and weighed the qualitative value of the MATS Rule in allowing the perpetuation of tribal culture. 81 Fed. Reg. at 24,429 n.18.

Methylmercury contamination threatens traditional Indian lifeways, including longstanding traditions of fishing and fish consumption that are central to many tribes’ cultural identity and that make individual tribes distinct as people. For many tribes, fishing and fish consumption are critical social practices, handed down from generation to generation.

[T]he Ojibwe peoples understand themselves to have a *responsibility* to continue to fish and to consume fish Fishing and fish consumption are integral components of the traditional and ceremonial activities at the heart of Ojibwe culture [and] provide important occasions for the intergenerational transfer of knowledge (including ecological, historical, and social knowledge) that forms a central part of the inheritance of each succeeding generation.

O'Neill, *supra*, at 510; *see also* Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 CLEVELAND ST. L. REV. 273, 333-41 (2010) (discussing fishing and other subsistence activities as “bridges” between tribal members and across generations and time).

Methylmercury contamination of fish consequently threatens to disrupt time-honored practices that define many tribes' cultures. “[T]he Tribe and its members are left with a Hobson's choice of ingesting materials that may ultimately injure Tribal members' health, or [forgoing] cultural practices that are essential to our individual and Tribal spiritual well-being and way of life.” Comments of Forest County Potawatomi Community on EPA's Proposed Rule at 5 (June 27, 2011), EPA-HQ-OAR-2009-0234-16122. Where tribal families prioritize their health over their cultural fishing practices, fishing traditions are not passed down to new generations of tribal members, leading to permanent cultural loss. O'Neill, *supra*, at 497 (“The loss of our cultural ceremonies, language, and songs associated with fishing represents a significant impact on our Tribe, and results in permanent loss of culture which defines our Tribe.”). Conversely, where they prioritize their culture, they risk subjecting themselves to the health consequences described in the prior section.

Furthermore, many tribes are connected to particular waters for cultural, spiritual, or other reasons (and others' fishing rights are limited to certain grounds

by treaty), so tribal members cannot simply move their fishing to another location to avoid mercury contamination. *E.g.*, NCAI Comments, Attachment A at 8. (“Equitable distribution of fishery values is of great importance to the Northwest Indian fisheries, which are location bound”); Comments of Forest County Potawatomi Community on EPA’s Proposed Rule at 5 (June 27, 2011), EPA-HQ-OAR-2009-0234-16122 (“Devil’s Lake has special significance both culturally and spiritually to FCPC and its membership For centuries, the Tribe has used Devil’s Lake for fishing . . . to fulfill responsibilities in the natural world.”). And many tribes’ cultural concerns extend not only to fish and places, but to fish-eating birds and mammals, whose health is also adversely impacted by methylmercury and whose well-being is a matter of cultural significance for many Indians. *E.g.*, Comments of Little River Band of Ottawa Indians on EPA’s Proposed Rule at 157 (May 23, 2011), EPA-HQ-OAR-2009-0234-12462.; *see also* 80 Fed. Reg. at 75,029 (“[Q]ualitative analyses on ecosystem effects found that mercury emissions from U.S. EGUs contribute to adverse impacts on fish-eating birds and mammals.”); 77 Fed. Reg. 9,304, 9,424 (Feb. 16, 2012) (acknowledging benefit of Rule to fish-eating birds and mammals).

EPA has long recognized the importance to tribes of environmental quality sufficient to support these tribal resources and uses. For instance, in discussing the Clean Water Act, the agency concluded:

Tribes require clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons . . . [C]lean water is a crucial resource that plays a central role in Tribal culture. Because clean water has a direct effect on the . . . health and welfare of . . . Tribes that is serious and substantial, . . . Tribes have a strong interest in regulating on-reservation water quality.

EPA, Memorandum in Support of Motion for Summary Judgment at 16, *Montana v. EPA*, 941 F. Supp. 945 (D. Mont. 1996); *see also Montana v. EPA*, 941 F. Supp. 945, 958 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir. 1998) (affirming EPA's decision based on these findings). EPA has also recognized the importance of pollution prevention to tribal self-preservation. EPA, *EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* at 2 (July 1991) ("Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to the preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation . . .").

Here, too, EPA recognized that the MATS Rule would benefit American Indians by allowing them to safely engage in, and thereby, perpetuate their culture. 81 Fed. Reg. at 24,429 n.18. EPA correctly declined, however, to attempt to

monetize these benefits of the Rule in its cost analysis.³ *Id.* (“[C]ultural impacts to tribes and the furtherance of the United States’ treaty obligations to tribes—are an example of the type of societal value that cannot be monetized.”).

C. Mercury Emissions Harm Indian Subsistence & Fishing Economies.

Mercury emissions likewise cause significant harm to Indian subsistence and fishing economies, contaminating food sources that many tribal members depend on for survival. Since time immemorial, Indians in many parts of the country have been a fishing people: fish has been a “great staple of their diet and livelihood.”

Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 665 n.6 (1979). Treaties with the United States reserved tribes’ aboriginal

³ Even economists that have attempted to place a value on subsistence fishing have acknowledged that such valuation cannot capture the social and cultural aspects of subsistence fishing. For instance, while taking no position on the accuracy of the analysis, Tribal Amici note this statement by the Army Corps of Engineers: “It is recognized that the household decision to participate in subsistence activities has a number of components beyond the provision of food. There are also social elements to subsistence, including education and cultural elements, the expression of ethics and values, tribal identity, spirituality and ideology, and traditional knowledge and language, in addition to health benefits. . . . [I]t is not possible to determine how much of the total valuation of subsistence activity comes from the provision of food, and how much comes from the expression of social and cultural values. Production cost is, therefore, only a partial proxy for total subsistence value, and does not measure the social and cultural aspects of subsistence.” U.S. Army Corps Engineers, Great Lakes and Mississippi River Interbasin Study Team, *Treaty Rights and Subsistence Fishing in the U.S. Waters of the Great Lakes, Upper Mississippi River, and Ohio River Basins* (June 2012) at 61, available at http://glmris.anl.gov/documents/docs/Subsistence_Fishing_Report.pdf (emphasis added).

rights to take fish throughout their fishing areas. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999). The exercise of these age-old fishing rights was “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *United States v. Winans*, 198 U.S. 371, 381 (1905). Courts have continued to uphold the vitality of Indian fishing rights to this day. *See, e.g., Mille Lacs Band*, 526 U.S. at 200; *Grand Traverse Band of Ottawa & Chippewa Indians v. Mich. Dep’t of Natural Res.*, 141 F.3d 635, 639 (6th Cir. 1998); *Lac Courte Oreille Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 365 (7th Cir. 1983); *United States v. Adair*, 723 F.2d 1394, 1409-10, 1414 (9th Cir. 1983) (treaty-reserved right to take fish impliedly reserves water necessary to fulfill that purpose).

Today, as in the past, fishing is often critical for tribal members’ survival. *See, e.g.,* Comments of Great Lakes Indian Fish and Wildlife Commission on EPA’s Proposed Rule at 2 (June 27, 2011), EPA-HQ-OAR-2009-0234-15182 (“*Ogaa* [walleye] and other fish represent a significant subsistence food for tribal communities. During the 2011 spring spearing and netting season alone, GLIFWC member tribes harvested nearly 70,000 *ogaa* (approximately 135,000 pounds) from inland lakes”); *United States v. Washington*, 384 F. Supp. 312, 406-07 (W.D. Wash. 1974) (“The taking of anadromous fish from usual and accustomed places . . . constituted both the means of economic livelihood and the foundation of native

culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life”).

Tribal members are often located in remote areas where economic opportunities are limited, but where fish is a cheap and plentiful source of protein. O'Neill, *supra*, at 510 n.71 and accompanying text. In turn, reliance on subsistence harvests (when methylmercury or other toxic contamination is not an issue) allows for a more healthful traditional diet that guards against such maladies as diabetes and heart disease. *Id.* at 496, 535. Many tribal members engaged in subsistence activities are already under severe economic distress, so methylmercury contamination only adds to their struggles by removing self-caught fish as a safe option for nourishment. *See, e.g., id.* at 535; *United States v. Washington*, 873 F. Supp. 1422, 1446 (W.D. Wash. 1994) (“Tribes lag significantly behind other residents . . . in their overall standard of living. For example, approximately one in three Tribal members live below the poverty level.”); U.S. Census Bureau News, Profile America Facts for Features (Nov. 12, 2014), *available at* http://www.census.gov/content/dam/Census/newsroom/facts-for-features/2014/cb14ff-26_aian_heritage_month.pdf (American Indian poverty level was 29.2% nationally in 2013).

Fishing and tourism by non-Indians can also be an important aspect of tribal economies in these remote areas, and methylmercury contamination can deprive

tribes of that revenue where tourists are deterred from fishing. 76 Fed. Reg. at 25,087; EPA, Response to Comments for Proposed Rule, Vol. 2 at 652, (Dec. 16, 2011), EPA-HQ-OAR-2009-0234-20126; Comments of Forest County Potawatomi Community on EPA's Proposed Rule at 6 (June 27, 2011), EPA-HQ-OAR-2009-0234-16122; O'Neill, *supra*, at 510. Furthermore, many tribes' treaty fishing rights also protect commercial harvest, which can be undermined by fishing advisories, the public's concern regarding methylmercury contamination, and harvest limits. *See, e.g. United States v. Washington*, 384 F. Supp. at 357 (Finding of Fact 27) (reserved treaty fishing rights include commercial harvest). EPA's methodology allows for a full range of qualitative benefits, like these, to be considered.

II. EPA's Methodology for Analyzing Cost Satisfies the Requirements of *Michigan v. EPA* and the Clean Air Act

Appellants and amicus The Cato Institute would like the Court to disregard entirely the detrimental effects of methylmercury pollution, and the benefits of the Rule, on American Indians and other sensitive populations. Rather, they choose to pretend that these peoples do not exist and then deride EPA for weighing the benefits of the rule for, what they term, "hypothetical populations." *See, e.g.*, Cato Institute Brief at 20 (Dkt. 1647667) (questioning EPA's verification of the "very existence" of at-risk populations); Petitioners' Brief at 80 (Dkt. 1647029) (calling

the benefits to tribes “empty generalities and speculative claims”). Their indifference toward the very people who are most harmed by the pollution power plants cause is as cruel as it is insulting. And their more than decade-long effort to delay and thwart regulation that would limit mercury emissions—all the while endangering the health, culture, and well-being of American Indians and other at-risk communities—should not be rewarded.

In *Michigan v. EPA*, the Supreme Court held that EPA could not entirely ignore cost, including the cost of compliance, when it made its determination regarding whether regulation of hazardous air pollutant emissions is “appropriate and necessary” under Section 112(n)(1)(A) of the Clean Air Act. 135 S. Ct. at 2711; *see also id.* at 2707 (requiring “at least some attention to cost”). The Court, however, explicitly held that EPA had discretion in determining how to complete that analysis: “[It is] up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.” *Id.* While Appellants and the Cato Institute may not care for the results of EPA’s analysis—and, more importantly, that it confirms the Agency’s “appropriate and necessary” determination—EPA acted well within the broad discretion afforded it by the Clean Air Act and Supreme Court in completing that analysis.⁴

⁴ Tribal Amici concur with but do not repeat the arguments in EPA’s brief (Dkt. 1656539).

The text of Section 112(n)(1)(A) does not speak to cost at all, let alone dictate what methodology should be used in a cost analysis or what weight to assign relevant factors. 42 U.S.C. § 7412(n)(1)(A). Meanwhile, the goal of Section 112 is to achieve “prompt, permanent and ongoing reductions in HAP emissions from stationary sources to reduce the inherent risks associated with exposure to such emissions.” 81 Fed. Reg. at 24,442; Legal Memorandum Accompanying the Proposed Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units (EGUs) at 21, EPA-HQ-OAR-2009-0234-20519. To advance the statutory purpose, a reasonable cost analysis must therefore account for the full panoply of benefits from reducing HAP emissions, and not just the monetary cost to industry of complying with the regulation. EPA’s methodology accomplishes that task. 81 Fed. Reg. at 24,429 (EPA’s methodology allows consideration of the “full range of factors relevant to the appropriate and necessary determination.”).

The problem that Petitioners and the Cato Institute attempt to exploit is that, unlike the easily quantifiable cost of power companies’ purchase and installation of control equipment, the benefits of the Rule to society writ large in terms of public health, environmental, cultural, and other gains are much more difficult, and in some cases impossible, to monetize or quantify. *See, e.g.*, 80 Fed. Reg. at 75,040

(“[EPA is] unable to quantify many of the health effects attributable to [mercury] emission reductions because data and methods available do not currently exist in the scientific literature.”). Nevertheless, the benefits are quite real—in some cases, existential even—and EPA’s methodology accounts for them. 81 Fed. Reg. at 24,429 (indicating analysis “weigh[ed] impacts to society that are not easy, or in some cases are impossible, to quantify or monetize, but are no less real than any other advantage of regulation”). Nothing in *Michigan v. EPA* or the Clean Air Act suggests this is improper.

This holistic approach, moreover, is vital for Tribal Amici and their members because a formalistic reliance on monetized benefits and costs would devalue most of the benefits of the Rule, including those discussed in the preceding section, to at-risk populations. Most of the benefits of the MATS Rule to tribal health, subsistence, fishing rights, and cultural identity defy calculation. *See, e.g.*, Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1380-85 (2014); *United States v. Washington*, 384 F. Supp. at 404 (“[T]he treaty rights . . . are unique and the damages which have been or will be sustained are not susceptible of definite monetary determination.”); NCAI Comments, Attachment A at 11-12 (noting “inherent barriers to effective valuation” and “constraints upon” application of cost-benefit analyses to anadromous fisheries). EPA cannot, for instance, credibly reduce to a dollar figure a tribal member’s ability to continue to

engage in the fishing culture practiced since time immemorial by her ancestors, and to pass those traditions on to her children. 81 Fed. Reg. at 24,442. In other words, EPA cannot put a price tag on tribal identity or establish a fee schedule for avoiding acculturation. But that does not mean that these core values may be excluded from a weighing of the costs and benefits of the Rule.

Even if tribal benefits could be quantified, it is unlikely that a formal national-level cost-benefit analysis could ever properly “account for important distributional effects, such as impacts to the most exposed and most sensitive individuals in a population.” 80 Fed. Reg. at 75,040. Wholly putting aside the inability of economists to place monetary values on Indian cultures and their deeply seated practices and customs, cost-benefit analyses tend to present a “smoothed-out” picture of benefits and costs, where the loss of distributional and qualitative values makes this analysis less informative as its scope increases.⁵ NCAI Comments, Attachment A at 9. Moreover, given that “[t]he most exposed and most sensitive members of a population are almost by definition a small

⁵ Petitioners and the Cato Institute contend that, because mercury emissions circulate in the atmosphere globally, they have “little localized impact.” Cato Institute Brief at 27; Petitioners Brief at 35. These statements falsely minimize the harms caused by EGUs’ mercury emissions. The record shows not only that mercury emissions from domestic EGUs have a diffuse, global effect, but also that they cause concentrated, severe harms to at-risk populations in the United States, including American Indians. *See* Section I and cited material therein.

portion of the total population,” the “quantifiable HAP specific benefits are difficult to estimate and potentially small in dollar terms compared to total cost.” Legal Memorandum at 23. As such, too heavy a reliance on quantifiable benefits would have caused the agency to improperly discount the benefit of the Rule to the very people Clean Air Act Section 112 is designed to protect. 80 Fed. Reg. at 75,030-31; NCAI Comments, Attachment A at 6-7 (“Environmental and social legislation is usually based upon a societal decision that health, ecological, cultural or aesthetic values shall be protected, often despite market pressure to the contrary.”).

Appellants and the Cato Institute lack interest in these important details. Instead, they seek to strip EPA’s analysis entirely of the non-quantifiable benefits of the Rule and narrowly focus the Court’s attention on just two numbers: the cost of industry compliance and the measurable economic benefits of reducing IQ loss in a subset of recreational fishers. *See, e.g.*, Petitioners Brief at 45, 81; Cato Institute Brief at 18. Nothing in *Michigan v. EPA* mandates their artificially constrained approach, nor would it account for anywhere near the full measure of the Rule’s benefits. *See, e.g.*, 81 Fed. Reg. at 24,441 (describing seven categories of benefits that could not be quantified or monetized).

To conclude, the benefits of the Rule to American Indians are fundamentally different in kind than the financial costs the rule imposes on the energy industry. If

EPA had relied only on those costs and benefits that are susceptible to quantification and monetization, it would be arbitrary and capricious because it would be an “incomplete quantitative characterization of the positive consequences [that would, in turn,] underestimate the monetary value of the net benefits.” 80 Fed. Reg. at 75,039-40. While Appellants and the Cato Institute may think it appropriate to focus myopically on the bottom lines of regulated entities to the exclusion of the harm those same entities cause to the health, culture, and welfare of the most vulnerable members of our society, that is not at all what the Supreme Court called for in *Michigan*. And it is not what Congress intended when it enacted the Clean Air Act. 42 U.S.C. § 7401(b)(1). (“The purpose [of the Clean Air Act is] to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”).

III. EPA’s Weighing of Non-Quantifiable Benefits of the MATS Rule to Tribal Members Comports with Its Federal Trust Obligations to Tribes

EPA’s cost analysis is also in keeping with its role as trustee to Indian tribes. The United States, including its agencies, owes a trust responsibility to federally recognized tribes. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886). Federal agencies must follow “the most exacting fiduciary standards” in dealing with the tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (“In

carrying out its treaty obligations with the Indian tribes, the Government . . . has charged itself with moral obligations of the highest responsibility and trust.”).

They are obligated to protect Indian health, *see, e.g.*, 25 U.S.C. § 1602, and tribal rights, resources, and traditional ways of life. *See, e.g.*, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 18.02 (2012 ed.) (discussing the variety and scope of treaty-protected fishing rights); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) (describing the “essence” of a treaty as the protection of the tribe’s ability to “maintain . . . their way of life which included hunting and fishing”).

EPA’s role as trustee therefore carries with it the duty and power to protect Indian tribes and tribal members from the negative effects of mercury and air toxics to their health, fishing opportunity, and ability to pass their culture from one generation to the next. In its response to comments, EPA wrote that the agency “is committed to honoring and respecting tribal treaty rights by ensuring that its actions do not conflict with those rights, and by implementing its programs to enhance protection of treaty rights where there is discretion to do so.” 81 Fed. Reg. at 24,442. EPA’s Supplemental Finding that cost considerations do not alter the “necessary and appropriate” determination that EGUs’ mercury emissions must be regulated will help ensure that tribal rights and natural resources are protected. In turn, it will allow American Indians to safely rely on fish for traditional,

ceremonial, subsistence, commercial, cultural, and dietary purposes, helping the United States to fulfill its solemn and perpetual obligations to the tribes. *See id.* (indicating the Rule will protect American Indian subsistence fishing lifeways).

CONCLUSION

For the foregoing reasons, Tribal Amici respectfully request that the Court deny the petitions for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7) because it contains 6,481 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated: January 25, 2017

/s/ Jane G. Steadman
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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2017, a copy of the foregoing Brief of amici curiae National Congress of American Indians, Great Lakes Indian Fish and Wildlife Commission, Bad River Band of Lake Superior Chippewa Indians, Fond du Lac Band of Lake Superior Chippewa, Grand Traverse Band of Ottawa and Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians, and the St. Croix Chippewa Indians of Wisconsin was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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