18-2121 (L)

18-2670 (Con)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., and STATE OF VERMONT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, in his capacity as Acting Administrator of the U.S. Environmental Protection Agency,

Respondents.

On Administrative Appeal of Final Agency Action from the United States Environmental Protection Agency

PAGE PROOF BRIEF OF PETITIONER STATE OF VERMONT

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December 7, 2018

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JURISDICTIONAL STATEMENT

This is an original proceeding in which Petitioner State of Vermont challenges Respondent Environmental Protection Agency's (EPA or the Agency) final rule, *Mercury; Reporting Requirements for the TSCA Mercury Inventory* (the Mercury Rule), which was published on June 27, 2018, and issued for judicial review July 11, 2018. *See* 83 Fed. Reg. 30,054; 40 C.F.R. § 713.

Pursuant to § 2618(a)(1) of the Toxic Substances Control Act (TSCA), 15 U.S.C. Chapter 53, § 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702, and Rule 15 of the Federal Rules of Appellate Procedure, this Court has jurisdiction to review final rules issued by EPA. *See* 15 U.S.C. § 2618(a)(1)(A); *see also Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 687 (5th Cir. 2000).

The TSCA allows 60 days from the date of promulgation of an agency rule for filing petitions for review. 15 U.S.C. § 2618(a)(1)(A). Pursuant to 40 C.F.R. § 23.5 the effective date for purposes of review of the Mercury Rule was two weeks from publication, on July 11, 2018. The State of Vermont timely filed its petition within 60 days, on September 10, 2018.

Venue is proper because petitioner State of Vermont is located within this Circuit. 15 U.S.C. § 2618(a)(1)(A).

The State of Vermont has standing to challenge the Mercury Rule for the reasons described below. *See infra* pp. 18-23.

ISSUES PRESENTED FOR REVIEW

1. Is EPA's decision to exempt certain entities from the reporting requirements under the Mercury Rule contrary to Congress's intent to create a detailed and complete inventory of the relevant mercury activities involving mercury supply, use, and trade under the TSCA?

2. Is EPA's decision to exempt manufacturers and importers of "a product that contains a component that is a mercury-added product" from federal reporting requirements in the Mercury Rule, 40 C.F.R. § 713.7(b)(1)-(2), arbitrary and capricious?

3. Is EPA's decision to exempt reporting of mercury in amounts greater than or equal to 2,500 pounds for elemental mercury or greater than or equal to 25,000 pounds for mercury compounds during a specific reporting year in the Mercury Rule, 40 C.F.R. § 713.9(a), arbitrary and capricious?

STATEMENT OF THE CASE

I. Background

Mercury is a deadly neurotoxin, ranked by the U.S. Department of Health and Human Services as the third most toxic element or substance on the planet, behind only arsenic and lead.[1] And yet, mercury continues to be dumped into our waterways and soil, spilled into our atmosphere, and consumed in food and water. Human activities have nearly tripled the amount of mercury in the atmosphere and the atmospheric burden is increasing at 1.5 percent per year.[2] Almost all people have at least trace amounts of mercury in their tissues, reflecting its pervasive presence in the environment.[3]

Soil or water contaminated by mercury can enter the food chain through plant and livestock.[4] Once in the food chain, mercury can bio-accumulate, causing adverse effects to human health.[5] Some communities eat significantly more fish than the general population, and thus may be exposed to greater mercury contamination. More than 75,000 newborns in the United States each year may

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[1] Clifton JC., 2nd Mercury exposure and public health. Pediatr Clin North Am. 2007;54(2):237–269.

[2] *Id.*

[3] *Id.*

[4] Davidson PW, Myers GJ, Weiss B. Mercury exposure and child development outcomes. Pediatrics. 2004;113(4 Suppl):1023–1029.

[5] *Id.*

have increased risk of learning disabilities associated with in-utero exposure to mercury.[6] Like other states, Vermont has a mercury-related fish consumption advisory for lakes and reservoirs.[7] Fish in these water bodies contain high levels of mercury that, if frequently consumed, pose a human health risk. This risk is most acute for fetuses and young children.[8]

II. Federal Statutory and Regulatory Framework

EPA has listed mercury as a Hazardous Air Pollutant (HAP). HAPs, also known as toxic air pollutants, are known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental effects. 40 C.F.R. § 61.50.[9]

A. Frank R. Lautenberg Act Chemical Safety for the 21st Century Act Amendments

Through the 2016 Frank R. Lautenberg Chemical Safety for the 21st

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[6] USEPA, *Mercury Emissions: The Global Context*, https://www.epa.gov/international-cooperation/mercury-emissions-global-context (last visited Dec. 5, 2018).

[7] Vermont's Advisory Committee on Mercury Pollution, *Getting Mercury Out of Vermont's Environment*, (January 2001), https://dec.vermont.gov/sites/dec/files/wmp/SolidWaste/Documents/ACMP_Report_2001.pdf (last visited Dec. 5, 2018).

[8] Vermont Agency of Natural Resources, *Human Exposure to Mercury Due to Fish Consumption,* https://dec.vermont.gov/waste-management/solid/product-stewardship/mercury/fish (last visited Dec. 5, 2018).

[9] *See* USEPA, *What are Hazardous Air Pollutants?*, https://www.epa.gov/haps/what-are-hazardous-air-pollutants (last visited Dec. 5, 2018).

Century Act (Lautenberg Act) amendments to the TSCA, Congress required the EPA to adopt new mercury reporting rules for the purpose of developing and publishing "an inventory of mercury supply, use, and trade in the United States" every three years. 15 U.S.C. § 2607(b)(10)(B).[10]

The core component of the Lautenberg Act is the new federal inventory. The inventory's purpose is to improve the availability of information to combat the growing concern about the risks that mercury used in commerce pose to public health and the environment. *See* 15 U.S.C. § 2601(b)(3) ("the primary purpose of [the TSCA] is to assure that . . . innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment."). In passing the Lautenberg Act, Congress described the inventory to correct "the lack of data [which] has impacted our ability to reduce health risks from mercury exposure." Deferred Joint Appendix (JA) ___ (Vol. 162, No. 82 Cong. Record S3523 (daily ed. June 7, 2016) (Statement of Sen. Leahy); *see also* JA __ (*id.* at Cong. Record H3026 (May 24, 2016) (Statement of Rep. Pallone) (TSCA amendments are "about: [1] preventing injuries and saving lives . . . [2] protecting vulnerable populations . . . that are disproportionately exposed to toxic chemicals; [and 3] "getting dangerous chemicals like lead, mercury, and

[10] Mercury is defined as "elemental mercury" and "a mercury compound." 15 U.S.C. § 2607(b)(10)(A).

asbestos out of our consumer products . . . and our environment.”).

To prepare the new inventory, EPA must gather “periodic reports” from “any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a manufacturing process.” 15 U.S.C. § 2607(b)(10)(D)(i). “Intentional” is not defined by the TSCA. As explained further below, “intentional” is a catch-all phrase simply to exclude the inadvertent use of mercury. Any manufacturing process that physically uses mercury is “intentional” and subject to the reporting requirement. *See* 83 Fed. Reg. 30,062 (discussing intentional use of mercury in a manufacturing process); *id.* at 30,061 (“intentional” means the addition of mercury where mercury remains present in the final product); *id.* at 30,060 (“intentional” is any use of mercury for a “specific purpose”); *see also* JA __ (162 Cong. Rec. S3523 (anyone “using mercury or mercury compounds will be required to report”).

Once the inventory is compiled, EPA must recommend further actions, including proposed revisions of federal laws or regulations, “to achieve further reductions in mercury use.” 15 U.S.C. § 2607(b)(10)(C)(ii).

B. EPA’s Mercury Reporting Rulemaking

In response to the Lautenberg Act, EPA prepared an initial inventory report for mercury supply, use, and trade in the United States. The report, released on March 29, 2017, showed that:

- elemental mercury was still being supplied through either metal mining (and processing as a byproduct) or recovery from treatment of waste;
- mercury was used in a range of products, most prominently in switches and relays as well as dental amalgams; and
- mercury was also used in the manufacturing process of the chlor-alkali chemical industry.

See 82 Fed. Reg. 15,522 (Mar. 29, 2017).

Following production of the initial inventory, EPA promulgated its proposed rule for notice and comment on October 26, 2017. 82 Fed. Reg. 49,564 (Proposed Rule).

Vermont's Department of Environmental Conservation (DEC), along with other members of the Interstate Mercury Education and Reduction Clearinghouse, submitted formal comments stating that some aspects of the Proposed Rule would compromise state laws aimed at protecting human health and the environment from mercury contamination.[11]

Following the notice and comment period, EPA published the final Mercury Rule on June 27, 2018. *Mercury; Reporting Requirements for the TSCA Mercury*

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[11] *See Comments on "Mercury; Reporting Requirements for the TSCA Mercury Inventory,"* Docket ID No. EPA-HQ-OPPT-2017-0421-0096, *available at,* https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0421-0096

Inventory, 83 Fed. Reg. 30,054.

The final Mercury Rule primarily covers three groups of reporting entities: (i) manufacturers and importers of mercury; (ii) manufacturers and importers of mercury-added products; and (iii) other intentional use of mercury in a manufacturing process. 40 C.F.R. § 713.7. EPA chose to exempt certain groups of entities from reporting their mercury use under the Rule, including two important categories.

First, the Rule exempts manufacturers or importers of products that contain components that are mercury-added products. This category is particularly broad because mercury products are frequently used as components in larger products. This includes: (i) switches or relays, which can be used in a variety of products or devices such as pumps, appliances, or industrial machinery; (ii) batteries used in watches, toys, cameras, and other products; and (iii) mercury lamps, which can include high intensity discharge (HID) lamps in car headlights and street lighting, fluorescent lamps used in commercial lighting and appliances, ultraviolet lamps in tanning beds and in medical and scientific equipment, and neon signs. Thus, this category includes an importer of a toy containing a battery that may contain mercury, or an electrical product that contains mercury in a switch or relay. *See* 40 C.F.R. §§ 713.9(c)-(d), 713.11(b), 713.13(c)-(d), 713.17(a)-(b); *see also* 82 Fed. Reg. at 49,575 (the battery importer vs. the toy importer). For these products,

mercury may represent a substantial ingredient, even as a component of a component part.

Second, the Rule exempts certain entities that handle large-scale amounts of mercury. Manufacturers or importers of more than 2,500 pounds of elemental mercury or 25,000 pounds of mercury compounds per reporting year do not have to report the amounts of manufactured, imported, or exported mercury or mercury compounds. 40 C.F.R. § 713.9(a).

EPA did not implement the changes recommended by Vermont and other states relating to these exemptions. As a result, Vermont filed its Petition for Review of EPA's final action of issuing the Mercury Rule on September 10, 2018. Vermont's Petition raised three issues, relating to EPA's decisions to:

1. exempt manufacturers and importers of products that contain a component that is itself a mercury-added product, 40 C.F.R. § 713.7(b)(2), (b)(3), despite the TSCA requirement that mandates reporting from any person who manufactures or imports mercury or mercury-added products, or uses mercury in a manufacturing process, *see* 15 U.S.C. § 2607(b)(10)(D)(i);
2. exempt manufacturers and importers of mercury in amounts greater than or equal to 2,500 pounds for elemental mercury or greater than or equal to 25,000 pounds for mercury compounds during a specific reporting

year, 40 C.F.R. § 713.9(a), despite the TSCA requirement that mandates an accurate and comprehensive inventory of all mercury and mercury-added products, *see* 15 U.S.C. § 2607(b)(10)(B); and

3. fail to coordinate the Mercury Rule's reporting schedule with the triennial reporting schedule of IMERC, despite the TSCA requirement to so coordinate, per 15 U.S.C. § 2607(b)(10)(d)(ii).

As to the first issue, Vermont challenges EPA's decision to exempt this category of mercury products in this brief. *See infra* pp. 28-37.

As to the second issue, Vermont challenges this exemption and joins in the arguments put forth by Co-Petitioner Natural Resources Defense Council (NRDC).

As to the third issue, Vermont withdraws this challenge regarding triennial reporting. IMERC has agreed to change its longstanding triennial reporting schedule to follow EPA's schedule put forth in the Mercury Rule, in an attempt to avoid conflict and create a more accurate mercury inventory, as offered in IMERC's comments on the proposed rule.[12]

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[12] *See Comments on "Mercury Reporting Requirements for the TSCA Mercury Inventory,"* Docket ID No. EPA-HQ-OPPT-2017-0421-0063, p 3, *available at,* https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0421-0063 (last visited Dec. 3, 2018).

III. Vermont's Mercury Regulation and Policies

A. Vermont's Historical Regulation

In 1998, Vermont became the second state in the nation to enact legislation to protect the public and environment against the multitude of harms caused by mercury products pollution. Vermont was the first state to establish a product labeling plan review process when it passed its law requiring the labeling of mercury-added products prior to "sale for use" in the state. Act No. 151, 1998 Vt. Stat. Ann. tit. 10, ch. 159 §§ 6621(a), 6621(d)-(e) (repealed 2001). All submission, review, and communication with manufacturers regarding standard labeling plans occurred through Vermont. Vermont's labeling law included a provision requiring approval of labeling plans prior to sale in Vermont. 2005 Bill Text VT S.B. 84, Vt. Stat. Ann. tit. 10, § 7106(j).

Many of Vermont's mercury laws were a blueprint for other states. Vermont worked with other states to develop their own mercury legislation. Other states rely on Vermont's laws and regulatory actions to inform their own mercury regulation. States collectively worked together until they formed the Interstate Mercury Education and Reduction Clearinghouse (IMERC) (discussed further below).

B. Overview of IMERC

IMERC is an interstate clearinghouse focused on reducing mercury in products and waste. It is a nonprofit, non-partisan organization, and its members

include Connecticut, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, Vermont, and Washington.[13]

A discussion of IMERC is relevant because EPA's new inventory will affect IMERC as well (and Vermont is a member state of IMERC). Through IMERC, states rely on information sharing to enforce their laws. Manufacturers of mercury products also report through IMERC. With the new EPA inventory, IMERC will rely on the new inventory. Manufacturers will continue to report to IMERC but only as directed by EPA. Specifically, EPA's Rule states that any person who reports to IMERC shall continue to do so, except for any "product that contains a component that is a mercury-added product." 40 C.F.R. § 713.15(c).

IMERC currently maintains an interstate reporting system. This system enables companies that manufacture, sell, distribute, or import a mercury-added product to meet the reporting requirements of many IMERC states by filing a single "Mercury-Added Product Notification Form" through a single portal. The reporting requirements via IMERC are intended to inform consumers, recyclers, policy makers, and others about products that contain intentionally-added mercury, the amount of mercury in a specific product, and the total amount of mercury in the

[13] *See* "About IMERC," http://www.newmoa.org/prevention/mercury/imerc/about.cfm (last visited Nov. 27, 2018).

specific products that were sold in the U.S. in a given year. Because the IMERC system provides for uniform reporting across multiple states, it is essential to have accurate and complete information.

C. Vermont's Existing Mercury Laws

Vermont continues to lead the nation in mercury product control with its comprehensive regime to manage mercury. *See* Vt. Stat. Ann. tit. 10, ch. 164 ("Comprehensive Mercury Management"). This regime includes a number of laws that regulate the notification, labeling, sales and use, and disposal of mercury and mercury-added products. These laws are designed to inform consumers and waste disposal entities about mercury content within products sold in Vermont and to prevent the irresponsible disposal and contamination of Vermont's air, waterways, and food systems. These laws will be less effective if, under EPA's new Mercury Rule, manufacturers only report the information required by EPA, because, as explained below, EPA's exemptions create a new gap of information that Vermont otherwise would have relied on for compliance and enforcement of its own laws.

1. Mercury Labeling and Notification Laws

Vermont has labeling and notification laws intended to keep the public informed and aware of the products that contain mercury. The "Labeling of Mercury-Added Products" law states that "no mercury-added product may be offered for final sale, sold at a final sale, or distributed in Vermont . . . unless the

manufacturer or its designated industrial trade group gives prior notification in writing to the [State] or through the multistate clearinghouse" and that both the product and its packaging are labeled in accordance with the statute. Vt. Stat. Ann. tit. 10, §§ 7104(a), 7106(c). Manufacturers and distributors must label products so that mercury content is "visible prior to purchase" both for products sold within the state, as well as for products that are bought and sold over the internet. § 7106(d).[14]

Vermont's labeling statute specifically applies to automobile manufacturers and their mercury-containing components. Vt. Stat. Ann. tit. 10, § 7106(i)(2) (requiring the presence of a driver's side doorpost label to be applied by the manufacturer to every new car sold, listing all mercury-added components present in the vehicle). This doorpost label has become the uniform standard for other states.[15] *See also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 112 (2d Cir. 2001) (noting consistency of Vermont's statute with other states' regimes).

2. Mercury Sales Bans and Restrictions

Vermont restricts the in-state sale and use of mercury-added products. Vt.

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[14] *See* DEC Mercury-Added Product Manufacturer Requirements, *What are the "Standard Labeling" requirements for mercury-added products,* https://dec.vermont.gov/waste-management/solid/product-stewardship/mercury/manufacturers (last visited Nov. 23, 2018).

[15] *See* NEWMOA, "Mercury Education and Reduction Model Act" (noting that motor vehicle doorpost labeling was "modeled after legislation enacted in Vermont"), *available at,* http://www.newmoa.org/prevention/mercury/final_model_legislation.htm

Stat. Ann. tit. 10, § 7105. Vermont completely bans mercury-containing novelties, fever thermometers, thermostats, elemental mercury, and dairy manometers. *Id.* Other mercury-containing products are also banned, but can be exempted if: (i) a system exists for the proper collection, transportation, and processing of the product at the end of its life; and (ii) the product provides a net benefit to the environment, public health, or public safety when compared to available non-mercury alternatives. § 7105(h)(4)(A-C).

3. Management and Disposal Laws for Mercury-Containing Products

Vermont also manages the disposal of mercury-containing products. For example, mercury-added products may not be disposed of in a landfill or combustor. Vt. Stat. Ann. tit. 10, § 7107(a)(1). In addition, mercury components must be separated from products where feasible, and landfills, transfer stations, and combustion facilities cannot accept mercury-added products for disposal. § 7107(a)(2)-(b).

Vermont also regulates disposal of some of the more common specific mercury-added products, such as motor vehicles and dental amalgams. For motor vehicles—where mercury is used in switches, lighting, and anti-lock brakes—Vermont requires proper removal and recycling of mercury components, and notification to the State. Vt. Stat. Ann. tit. 10, § 7108. For dental procedures, Vermont requires minimizing the use of mercury in dental amalgams and disposing

such amalgams in a separate waste disposal system. Vt. Stat. Ann. tit. 10, § 7110.

Lastly, Vermont's Hazardous Waste Management Regulations include standards to control the waste treatment of all mercury-containing devices. Vt. Haz. Waste Regulations, § 7-907 (regulating all mercury-containing devices as hazardous waste).[16]

4. Federal-Based Notification Laws

Several federal reporting schemes involving mercury apply to Vermont. First, under the Clean Water Act, states are required to develop a total maximum daily load (TMDL) limit for mercury pollution for impaired water bodies. 33 U.S.C. § 1313(d)(2). A TMDL is a calculation of the maximum amount of a pollutant that a water body or group of water bodies can receive and still meet applicable water quality standards (e.g., resulting in fish that are safe to eat). In accordance with § 303(d) of the Clean Water Act and 40 C.F.R. § 130.7, Vermont and a number of other states in the Northeast region received federal approval for a regional TMDL for mercury, indicating that inputs of mercury to the region's freshwater bodies would need to be drastically reduced to restore contaminated fisheries to a point where fish consumption advisories are no longer necessary. *See*

[16] *Available at,* https://dec.vermont.gov/sites/dec/files/wmp/HazWaste/Documents/Regulations/VHWMR_Sub9.pdf

Northeast Regional Mercury Total Maximum Daily Load (Oct. 24, 2007).[17]

Second, under the Clean Air Act, section 112(b), Vermont contributes to a national mandatory air monitoring inventory, the National Emissions Inventory (NEI), every three years. 42 U.S.C. § 7412(b). EPA manages the NEI, which compiles emissions estimates of hazardous air pollutants (HAP) from different sources. 40 C.F.R. § 51.1-25. States are required to submit emissions inventories for certain air pollutants, including mercury. § 51.15. Mercury compounds are among the HAPs inventoried through the NEI that are known to cause cancer or other serious health impacts.[18] States provide a mercury emissions estimate by calculating the end-of-life contribution of mercury-containing products.

To summarize, Vermont continues to maintain extensive laws and regulations intended to prevent unmonitored and irresponsible circulation of mercury products in commerce and, ultimately, protect its citizens and environment from mercury contamination. However, Vermont is limited in its enforcement capacity. Vermont has historically enforced the above mercury laws only to the extent possible based on accurate information from manufacturers. This has primarily been in the area of automobile manufacturing. *See Sorrell*, 272 F.3d

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[17] *Available at,* https://dec.vermont.gov/watershed/map/tmdl.

[18] USEPA, *Initial list of Hazardous Air Pollutants with Modifications*, *available at,* https://www.epa.gov/haps/initial-list-hazardous-air-pollutants-modifications

at 115 (upholding Vermont's mercury labeling law in consumer products and noting that "Vermont's interest in protecting human health and the environment from mercury poisoning is a legitimate and significant public goal.").

Vermont's ability to enforce the above laws may now be hindered by EPA's new federal inventory because it contains critical gaps in information and results in a lost opportunity for states to know of additional mercury sources (discussed further below).

STATEMENT OF INTEREST

I. Vermont's Standing and Interest

The State of Vermont has standing to challenge the Mercury Rule. Vermont exhibits all three elements of Article III standing in that it has (1) "suffered an injury in fact" that (2) is "fairly traceable" to the unlawful exemptions in the Mercury Rule, and that (3) will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-61 (1992). The Rule will prevent EPA from publishing an accurate, comprehensive mercury inventory as Congress required.

Although EPA is now creating a new mercury inventory that did not exist before, this new inventory will impact Vermont because it is incomplete. There is a substantial probability that incomplete federal reporting requirements and the subsequent unmonitored trade, use, and disposal of mercury products will hinder Vermont's ability to protect against higher concentration of mercury contamination

in Vermont's lakes, streams, soils, drinking water, and, subsequently, Vermonters' overall health and welfare. Manufacturers will only report the information required by EPA, especially national industries like automobiles. This will leave a gap in information that could have been provided to Vermont and other states. It was Congress' intent to close this "lack of data." JA ___ (162 Cong. Rec. S3523).

The harm from such an incomplete federal inventory is a recognized informational injury. "[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). *See also Pub. Citizen v. Dep't of Justice,* 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure under statute "constitutes a sufficiently distinct injury to provide standing").

Here, the Mercury Rule denies EPA—and therefore the public, including Vermont—information that must be publicly disclosed pursuant to the TSCA. The TSCA imposes an explicit publication requirement: EPA must "carry out and publish in the Federal Register an inventory of mercury supply use, and trade in the United States" every three years. 15 U.S.C. § 2607(b)(10)(B). That inventory is to be informed by "periodic reports" from "any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a manufacturing process." § 2607(b)(10)(D)(i).

The Mercury Rule unlawfully exempts specific entities who manufacture mercury and mercury-added products, thereby ensuring that the resulting published inventory will be substantially less comprehensive than it is required to be. *See Waterkeeper Alliance, Inc. v. EPA*, 853 F.3d 527, 533-34 (D.C. Cir. 2017) (holding that a regulation creating exemptions that resulted in "cutting back on [statutory] reporting and disclosure requirements . . . deprive[d] [plaintiff] of information" sufficient to confer standing); *Friends of Animals v. Jewell*, 824 F.3d 1033, 1041 (D.C. Cir. 2016) (statute and rule eliminating otherwise applicable requirement to publish notice in federal register of permit applications cause informational injury to the organization).

The biggest impact to Vermont (and states) of the new Mercury Rule will be its exemption from reporting all manufacturers and importers of mercury-added products where the only source of mercury is a component within a larger product. This is a vast category of mercury products (including toys and consumer electrical products) with wide-reaching impact. For example, the exemption will affect Vermont's: (i) *sales and use restriction*s, because the Rule's exemption creates a prospective class of mercury-added products that can be sold into the state as a new product without detection; (ii) *notification and labeling laws*, because the exemption from federal reporting prevents Vermont (and other states) from knowing the true universe of mercury-containing products entering their states;

(iii) *disposal regulations,* because waste facilities in Vermont may not have the information necessary to abide by the State's regulations; and (iv) Vermont's participation in federal reporting schemes such as the Clean Water Act and Clean Air Act. Under the Clean Water Act, an incomplete inventory will compromise the TMDL limits, as well as the ultimate mercury-reduction goals for Vermont. Similarly, under the Clean Air Act, the lack of reported information available to states could affect final calculations for developing a typical national average emission factor that each State should abide by.

The effect of the new Rule can be seen in the field of mercury-added products in motor vehicles. Automobiles contain mercury-added products in the form of: (i) mercury lamps used in HID headlights and in the displays of control panels and navigation and entertainment systems; as well as (ii) switches in brake assemblies. Vermont's labeling statute applies to these products. *See* Vt. Stat. Ann. tit. 10, § 7106(i)(2). Through IMERC's uniform reporting system, at least eighteen of the top auto manufacturers currently report these mercury-added products, representing virtually the entire automobile industry.[19] Further, since 2007, they report on an annual basis to account for new model cars, and not merely every three years like other industries. *See, e.g.*, JA __ (*Comments on "Mercury;*

[19] *See* "IMERC Mercury-Added Products Database," *available at,* http://www.newmoa.org/prevention/mercury/imerc/Notification/index.cfm.

Reporting Requirements for the TSCA Mercury Inventory," Docket ID No. EPA-HQ-OPPT-2017-0421-0094) (Comment of Association of Global Automakers, et al. 5 (Jan. 11, 2018)).

Now, with EPA's exemption of mercury-added products, auto manufacturers are told they can omit known mercury components. *See* 40 C.F.R. § 713.15(c) (persons who report to IMERC shall continue to do so "except [for] a product that contains a component that is a mercury-added product"). Because the federal government has now delimited the new field of national mercury reporting, auto manufacturers will of course follow that. This raises a serious concern and potential obstacle for states to enforce their own labeling laws against the auto manufacturers. Although states' laws continue to apply, in practice enforcement will become much more difficult. EPA's new directive to auto manufacturers that they may now ignore a vast and known universe of mercury components undermines and compromises the states' exhaustive enforcement, as upheld by this Court in *Sorrell,* 272 F.3d 104. States like Vermont lack the resources of EPA and have little recourse to obtain additional reporting by the auto industry. This is a lost opportunity for more critical enforcement tools that EPA should have considered.

Therefore, without a complete and accurate federal inventory to track for non-compliant entities, with limited resources for individual product investigations, and absent the threat of federal enforcement of federal reporting

requirements parallel to those of the state, Vermont has limited recourse to ensure safety from the hazards of mercury. Vermont thus has a critical interest in ensuring that EPA's Mercury Rule follows federal law.

II. Impact to IMERC States

EPA's exemptions will also impact all IMERC States in several ways. First, EPA's exemptions threaten to contradict IMERC state laws that require reporting for all mercury-added products and components. IMERC will rely on the federal inventory to provide data on mercury-added product categories that are no longer reporting to IMERC States, such as mercury-added switches and relays. IMERC no longer collects data on switches and relays because these products are prohibited from sale in each of the IMERC States. Further, EPA's new inventory will also cover companies that do not sell into the IMERC States but do sell or distribute mercury-added products elsewhere in the United States, thus creating another reporting gap.[20] Lastly, as noted above, IMERC was a critical instrument in getting the automobile industry to report their mercury components every year. Under EPA's new inventory, the auto industry may not provide the same robust information. IMERC States will thus have fewer tools to ensure compliance with their labeling standards for the entire category of mercury-added vehicle

[20] Other limitations in the IMERC data are listed at http://www.newmoa.org/prevention/mercury/imerc/Notification/caveats.cfm (last visited Dec. 4, 2018).

components such as lights and brakes.

Thus, IMERC will have no way of knowing the true universe of mercury-added products or accurate levels of non-compliance for these items. The IMERC States need this information to provide a full picture of the supply chain and to support proper disposal of mercury-added products.

SUMMARY OF ARGUMENT

EPA's decision to exclude certain entities from the TSCA administrative reporting requirements for mercury manufacturing and importing violates the Administrative Procedure Act (APA) because the exemptions create new gaps in information in contradiction of Congress's intent to fill those gaps. EPA's decision is arbitrary and capricious or otherwise not in accordance with law for two reasons.

First, those exemptions do not align with the primary purpose of the Lautenberg Act reporting requirements. 15 U.S.C. § 2601(b)(3). The Lautenberg Act requires EPA to create a new, national inventory of mercury-containing products in U.S. Commerce. In creating that inventory, EPA is tasked with identifying manufacturing processes or products that intentionally add mercury. And, EPA is required to use that information to recommend actions to reduce mercury use in the United States. 15 U.S.C. § 2607(b)(10)(C)(i).

Further, in passing the Lautenberg Act, Congress specifically directed EPA to "coordinate the reporting" of the mercury inventory with IMERC. *See* 15 U.S.C.

§ 2607(b)(10)(D)(ii). This is a general requirement and therefore applies to every significant aspect of the reporting process and structure, not merely timing. The new Mercury Rule adopts a contrasting definition for "mercury-added product" than the one IMERC had previously adopted, and fails to consider how the new exemptions frustrate IMERC's ability to fulfill its mission. In doing so, EPA has failed to "coordinate . . . reporting" with IMERC.

EPA exempted from its reporting requirements: (i) manufacturers and importers that intentionally incorporate mercury-containing components into their products; and (ii) other entities who intentionally manufacture large quantities of mercury. 40 C.F.R. § 713.(a), (c), (d). These exemptions prevent EPA from enforcing and upholding the core directives and purposes of the Lautenberg Act reporting requirements. 15 U.S.C. §§ 2607(b)(3), (b)(10). Vermont and the IMERC States require manufacturers to know the mercury content of their products, including components. EPA's Rule promotes, or at least condones, ignorance of this critical information.

Thus, EPA failed to adequately consider the policy effects relevant to its decision as well as vital aspects of the mercury inventory problem placed before it by Congress. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012) (overturning agency decision where agency failed to consider the "relevant factor" of impacts of groundwater withdrawals on fish);

see also Sierra Club v. EPA, 294 F.3d 155, 163 (D.C. Cir. 2002) (noting that promulgation of air quality implementation plans which omitted reasonably available control measures was arbitrary and capricious and, although the result of inadvertence in failing to consider a relevant factor, required a remand to the agency).

Second, the Mercury Rule's exemptions hinder Vermont and other IMERC States from enforcing their existing mercury laws and fulfilling some of their federal obligations effectively. Without the accurate and complete federal inventory called for by the TSCA, Vermont will not be able to effectively enforce its laws enacted to protect its citizens from the harmful effects of mercury pollution and contamination. The impact may be particularly felt in the auto industry, which currently reports to IMERC on an annual basis and includes mercury-added components. This critical area of vehicles' mercury information is undermined by EPA's new inventory exempting it. Because EPA fails to gather this information, IMERC States will miss out on the additional compliance and enforcement tools that would have come from knowing this information on a national scale.

Only EPA is capable of ensuring the level of compliance necessary to produce a complete and accurate inventory of mercury supply, use, and trade in the United States because it has broad enforcement power and resources, and it has access to federal trade information databases through the International Trade

Commission to help the Agency monitor for compliance.[21]

Yet, EPA avoids its responsibility by not requiring complete reporting. States are incapable of collecting the same reporting data from the complete universe of mercury-added products. The complete federal inventory that Congress demands in the TSCA balances the shortcomings of state-level enforcement. But EPA's new Mercury Rule hinders, rather than complements, state enforcement. The Mercury Rule exemptions prevent the states from achieving the optimum compliance levels intended by Congress and, therefore, jeopardize public health and environmental welfare without justification. *Ctr. for Biological Diversity*, 698 F.3d at 1124 (agency failed to provide a "satisfactory explanation" for its decision). This also does not represent the "coordination" between programs that Congress envisioned. 15 U.S.C. § 2607(b)(10)(d)(ii).

STANDARD OF REVIEW

Under the APA, a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . or

[21] *See "Mercury—U.S. Inventory Report: Supply, Use, and Trade,"* Docket ID No. EPA-HQ-OPPT-2017-0127-0002) (Supporting and Related Material. 9-10 (Mar. 29, 2017), *available at:* https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0127-0002 (last visited Dec. 7, 2018).

unwarranted by the facts." 5 U.S.C. § 706(2).

A court should invalidate agency determinations that fail to "examine the relevant data and articulate a satisfactory explanation for [the] action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assoc. v. State Farm Auto Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). When reviewing that determination, courts "must 'consider whether the decision was based on a consideration of the *relevant* factors and whether there has been a clear error of judgment.'" *Id.* (emphasis added and citation omitted).

ARGUMENT

I. The Mercury Rule's Exemptions Contravene the Purposes of the Toxic Substances Control Act and They Should be Vacated Under the APA.

An agency action is arbitrary and capricious if the agency relied on factors other than those intended by Congress or did not consider an important aspect of the issue confronting the agency. *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 853 (3d Cir. 1999).

In *Waterkeeper Alliance, Inc. v. EPA*, this Court invalidated portions of the EPA's final CAFO rule because the rule was contrary to the statutory language of the Clean Water Act. 399 F.3d 486, 503 (2d Cir. 2005). This Court recognized the Clean Water Act required all effluent limitations be included in each permit and that the nutrient management plans at issue in the case met the definition of effluent limitation established by Congress. *Id.* Thus, the rule's failure to require

nutrient management plans be included in each permit was held to be contrary to law and arbitrary and capricious. *Id.* Similarly, in *Public Citizen, Inc. v. Mineta*, this Court held that the National Highway Traffic Safety Administration's final rule on tire pressure monitoring systems was invalid because it was "contrary to the 'unambiguously expressed intent of Congress'" in the TREAD Act of preventing motor vehicle crashes caused by under-inflated tires. 340 F.3d 39, 55 (2d Cir. 2003) (citing *Chevron U.S.A. Inc. v Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). These cases demonstrate that where the court can discern a clear intent from the statutory language, the court should invalidate rules that are contrary to Congressional intent.

Here, the TSCA contains a clear expression of congressional intent. In 2016, the Lautenberg Act required EPA to adopt mercury reporting rules to develop and publish a new "inventory of mercury supply, use, and trade in the United States" every three years. 15 U.S.C. § 2607(b)(10)(B). Additionally, EPA must "identify any manufacturing processes or products that intentionally add mercury" and "shall coordinate the reporting under this subparagraph with the Interstate Mercury Education and Reduction Clearinghouse [IMERC]." § 2607(b)(10)(D)(ii). The only express reporting exemption adopted by Congress applies to "person[s] engaged in the generation, handling, or management of mercury-containing waste,"—but even that does not apply if the waste will be used to produce new

mercury products to be used in commerce. § 2607(b)(10)(D)(iii). The language and structure of the Lautenberg amendments illuminate Congress's intent for EPA to promulgate regulations to yield the most complete inventory of mercury-containing products feasible.

Vermont agrees with EPA's own interpretation of the directives of the Lautenberg Act in that they call for a "comprehensive inventory such that existing data gaps would be eliminated, where feasible." 82 Fed. Reg. 49,574. Congress's use of the term "inventory" signifies the intent to create a "detailed" and "complete" description of the relevant mercury activities involving mercury supply, use, and trade. An inventory is a "*complete* list of the things that are in a place." *Inventory*, Merriam Webster's Dictionary (18th ed. 2018) (emphasis added). EPA's reporting requirements must therefore *fill* the existing data gaps rather than create new gaps.

Congress mandated mercury reporting because much of the necessary data to develop the mercury inventory—and subsequently reduce the hazardous effects of mercury—are not otherwise available. EPA acknowledged how incomplete the initial 2017 inventory was prior to promulgating the reporting requirements. *See* 82 Fed. Reg. 15,522. EPA found in the absence of the reporting requirements, existing data were "lack[ing] in specificity and [in the] level of detail to develop a *complete* inventory or target use reduction efforts efficiently for both the government and

private sectors." 82 Fed. Reg. 49,564, 49,568 (emphasis added).

Despite EPA's acknowledged need for a detailed and complete inventory, EPA still chose to exempt two important categories of mercury reporting: (i) manufacturers and importers of components that are mercury-added products; and (ii) large-scale manufacturers and importers of mercury. EPA's decision to exempt these entities contravenes Congress's mandate for a complete inventory and does nothing to reduce mercury contamination in the United States. Instead, the Rule is likely to increase contamination as entities may attempt to justify their non-compliance with the stricter requirements of Vermont and the IMERC States by claiming compliance with federal standards. As discussed below, both exemptions are arbitrary and capricious.

A. EPA's Decision to Exempt Manufacturers and Importers of Mercury-Added Components from Reporting Is Arbitrary and Capricious.

The Mercury Rule exempts from reporting manufacturers and importers of "a product that contains a component that is a mercury-added product." 40 C.F.R. § 713.7(b)(1)-(2). EPA's reasoning for this exemption is inadequate and inconsistent with the law. One of EPA's primary rationales for the mercury-added component exemption is that it would lessen the "burden or liability on entities that are not likely to be aware if or how mercury is present in the products that they trade." 83 Fed. Reg. 30,054, 30,067. With this, EPA allows manufacturers and

distributors to be ignorant of the toxic chemical content of the products they trade, and allows this ignorance to be a complete excuse for noncompliance with environmental regulation.

This has significant consequences because there is a large category of products that contain a "component" that is a mercury-added product. Mercury-containing switches/relays, batteries, and lamps are examples of products that fall under EPA's broad definition of "component." These may be components of larger products, such as: (i) pumps and electrical control panels containing switches and relays; (ii) battery-powered toys and watches; and (iii) various mercury lamp products, such as car headlights, streetlights, commercial lighting, neon signs, medical/scientific lighting, and many products with backlighting. Some of these end products are almost always produced with mercury-containing components, implicating nearly the entire market for those products.

For example, one impact will be on the automobile industry's reporting. *See, e.g.*, JA __ (*Comments on "Mercury; Reporting Requirements for the TSCA Mercury Inventory,"* Docket ID No. EPA-HQ-OPPT-2017-0421-0094) (Comment of Association of Global Automakers et al. 3 (Jan. 11, 2018)) (noting that the majority of mercury use in vehicles are used in components). Through the exemption, EPA has instructed auto manufacturers to ignore their mercury components like those contained in lights and brake assemblies. This causes

confusion and conflicts with the IMERC States' otherwise clear requirement to report that information. The lost opportunity to collect that information from EPA is a critical loss of states' ability for enforcement and compliance with state labeling standards—an area that states worked hard to achieve. *See Sorrell*, 272 F.3d 104.

Another impact will be in managing the disposal of these components. Mercury-containing components used in automobiles and home appliances now enter the scrap-metal recycling stream when those products are recycled for scrap. JA __ (*Comments on "Mercury; Reporting Requirements for the TSCA Mercury Inventory,"* Docket ID No. EPA-HQ-OPPT-2017-0421-0086) (comment of Steel Manufacturers Association at 3)). Exempting mercury-added components from EPA's inventory "deprive[s] the . . . recycling industry of the information they need to reduce mercury contamination in scrap metal, [and] it is also inconsistent with the information required to be reported in [the IMERC] states." *Id.*

These are new gaps in reporting that the TSCA does not allow. EPA's decision to allow these new gaps is arbitrary and capricious for three reasons: (i) it violates both the letter and spirit of the TCSA, as amended by the Lautenberg Act; (ii) it is based on irrelevant factors; and (iii) it is not justified by EPA's stated concerns.

First, EPA's decision to exempt components of mercury-added products is

contrary to the plain text of the TSCA and inconsistent with the purpose of the mercury inventory. The TSCA requires "any person who manufactures [or imports] . . . mercury-added products" to report under the mercury reporting rule. 15 U.S.C. § 2607(b)(10)(D)(i). The primary purpose of the Lautenberg Act is to fill information gaps in existing reporting structure and to, ultimately, reduce mercury contamination in the United States. *See id.* § 2601(b)(3) ("The EPA must establish reporting requirements to assure that . . . innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment."). If EPA allows manufacturers to remain ignorant about the presence of mercury within components of their products, then that chief objective of the TSCA is not fulfilled. *Public Citizen*, 340 F.3d at 55 (agency's rule was "contrary to the 'unambiguously expressed intent of Congress'").

Second, EPA failed to properly balance all the relevant factors, particularly the effect of the exemption on Congress's directive to include reporting by "any person" who manufactures mercury, in furtherance of a complete mercury inventory. *See Rite Aid of Pa.*, 171 F.3d at 853 (agency action is arbitrary and capricious if the agency relied on factors other than those intended by Congress or did not consider an important aspect of the issue confronting the agency); *see also Ctr. for Biological Diversity*, 698 F.3d at 1124 (agency decision is arbitrary and capricious where it fails to consider an important factor relevant to its action, such

as the policy effects of its decision or vital aspects of the problem in the issue before it). Because EPA is unwilling to identify a significant universe of non-reporters, this exemption makes an enforceable national mercury reporting standard impossible. It is also a failure to coordinate with IMERC as the TSCA requires. *See* 15 U.S.C. § 2607(b)(10)(D)(ii).

Third, EPA's justifications for its exemption of mercury-added components are woefully inadequate. EPA first states in the final Mercury Rule's preamble that: "The Agency views the inclusion of a mercury-added product that is a component within an assembled product differently from the act of intentionally inserting mercury (*i.e.*, chemical substance) into the component itself." 83 Fed. Reg. 30,054, 30,061. EPA suggests that a component that by its very nature contains mercury (like a switch or a lamp), is not an "intentional" use of mercury in the final product.

EPA's interpretation of "intentional" is misguided. The TSCA does not define "intentional" but uses the phrase only as a catch-all in the statute. *See* 15 U.S.C. § 2607(b)(10)(D)(i) (EPA must gather "periodic reports" from "any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a manufacturing process."). EPA interprets this to require reporting only from people who themselves added the mercury to the component. EPA's argument is creative, but not supported. The Supreme Court has clarified

that catch-all phrases such as this one do not limit the class of people to whom the statute applies. *See, e.g., Barnhart v. Thomas*, 540 U.S. 20, 27 (2003) (using the hypothetical of "parents who, before leaving their teenage son alone in the house for the weekend, warn him, 'You will be punished if you throw a party or engage in any other activity that damages the house.' If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) *any other* activity that damages the house.") (emphasis added).

Similarly, the term "intentional" in the TSCA does not limit the group of persons who otherwise manufactures mercury or mercury-added products. The catch-all phrase was simply to identify mercury as an actual product constituent, as opposed to a truly inadvertent or accidental addition of mercury. *See* 83 Fed. Reg. 30,062 (discussing intentional use of mercury in a manufacturing process); *id.* at 30,061 (EPA agrees with the Minamata Convention of Mercury's definition that "intentional" means the addition of mercury where mercury remains present in the final product); *id.* at 30,060 ("intentional" is the use of mercury for a "specific purpose"); *see also* 162 Cong. Rec. S3523 (anyone "using mercury or mercury compounds will be required to report"). Thus, any product like a car brake light that relies on mercury lamps is an intentional use of mercury and must be reported.

EPA's next justification is to lighten the burden on manufacturers. *See* 83

Fed. Reg. 30,067. This too is not supported by evidence or data to justify creating such a critical gap in information. *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 193 (D.C. Cir. 2007) ("The agency must cogently explain why it has exercised its discretion in a given manner, and that explanation must be sufficient to enable the court to conclude that the agency's action was the product of reasoned decision-making."). Other than conclusory statements, EPA does not cite sufficient evidence or data showing that manufacturers are in need of a lighter burden. In fact, in trying to lessen the burden on manufacturers and distributors, EPA's rule creates the perverse consequence of burdening those least likely to know whether a product contains mercury: entities who eventually dispose of or recycle the product at the end of its lifecycle. This is irrational. *See Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir. 1975) (agency action will be held arbitrary and capricious when the inadequacy of the agency's explanation frustrates review); *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (agency must explain what justifies the determination with actual evidence beyond a "conclusory statement"); *Motor Vehicle Mfrs. Assoc.*, 463 U.S. at 43 (same).

B. EPA's Decision to Exempt Large-Scale Manufacturers and Importers of Mercury Is Arbitrary and Capricious.

The Mercury Rule exempts from reporting all manufacturers and importers of 25,000 pounds or more for mercury compounds and 2,500 pounds or more for

elemental mercury. 40 C.F.R. § 713.9(a). Because these mercury producers are very large, their data forms a substantial portion of the overall supply of mercury in the United States. Not having current mercury production information from these large producers of mercury will result in an incomplete representation of the current mercury supply in the next inventory. This exemption is thus arbitrary and capricious, including for the additional reasons put forth by co-Petitioner NRDC on this point, which Vermont hereby adopts.

II. The Mercury Rule's Exemptions Impede Vermont and Other IMERC States from Enforcing Their Own Laws Enacted to Prevent Mercury Contamination.

EPA's exemptions discussed above (for components that are mercury-added products and large-scale producers) are arbitrary and capricious given the effect on states and their ability to reduce mercury contamination. The exemptions will impact Vermont and other states in three critical ways.

First, Vermont and other IMERC states' laws could be undermined. Vermont (and other states) have outright bans for certain products with mercury-added components. Vt. Stat. Ann. tit. 10, § 7105. The purpose of restricting or banning the sale of certain mercury-added products is to eliminate non-essential uses of mercury in consumer, household, and commercial products, thereby reducing mercury releases to the environment associated with the production, use, and disposal of such products. The same goes for state labeling laws. *See* Vt. Stat.

Ann. tit. 10, §§ 7104(a), 7106(c) (requiring visible and legible labels for consumers prior to purchase).

The Mercury Rule could now potentially allow some mercury-added products to enter a state unreported, unlabeled, and undetected, particularly from the exploding area of online product sales. Just recently, Vermont found that mercury-added products listed for sale on a major online website were not labeled in compliance with the IMERC States' long-existing labeling requirements. JA __ (Letter from IMERC to Amazon.com, Inc. (Apr. 10, 2018)). Those unlabeled and unknown products with mercury-containing components will then be disposed of in landfills, without appropriate hazardous waste mitigation protocols, which will increase air, water, and land contamination. If states cannot adequately enforce their own mercury-reduction laws, then the ultimate purpose of the Lautenberg Act is frustrated and poses real risk for state programs. EPA's "failure to adequately address" this important aspect of the problem brought to it by Congress thus makes the "the [Mercury] rule's rationality questionable." *Motor Vehicle Mfrs. Assoc.*, 463 U.S. at 43.

Second, Vermont and other IMERC states will lose out on informational resources. Vermont necessarily needs to rely on federal reporting and labeling of mercury-added products to help prevent irresponsible disposal. On its own, Vermont does not have adequate informational resources to effectively enforce its

own rules against national and large-scale industries (like online retailers, automobile manufacturers, etc.). If an importer or manufacturer is producing or selling mercury-containing products without proper labeling and fails to report to the State, Vermont has little chance of knowing of the violation and therefore little recourse. EPA on the other hand, does have the capacity to track such large-scale non-reporters through international trade data.[22]

The IMERC program suffers from similar resource inadequacies. The clearinghouse portal provides a convenient avenue for producer and importers of mercury-added products to encourage compliance, but there is no backstop to track non-reporters that sell within their state borders and little leverage to compel such importers and manufacturers to comply. If EPA's Mercury Rule required manufacturers and importers of products with mercury-added components to report for the new federal inventory, both Vermont and the IMERC states would be able to use that information as a guide in monitoring and enforcing against non-reporters to support their own laws.

But with EPA's current component exemption, the states will have incomplete data. Despite efforts from Vermont and the IMERC States since turn of the century, and despite an "EPA commitment in 2006 to [begin collecting some of

[22] ITC. Harmonized Tariff Schedule of the United States (2015), *available at*, https://www.usitc.gov/publications/docs/tata/hts/bychapter/1500htsa.pdf

this data], there is not yet any good data on mercury supply and uses in the United States." 162 Cong. Rec. S3511-01, S3522-23. This lack of data has impacted both our state and national abilities to reduce health risks from mercury exposure and compromises our ability to comply with the Minamata Convention of Mercury to which the U.S. Government has agreed to become a party. *Id.*

The unique position of the EPA and the specific directives of the Lautenberg Act amendments to the TSCA provide the perfect opportunity for the EPA to patch the holes in the state enforcement programs and provide for an inventory that is truly accurate and useful for achieving the purposes that Congress has espoused. EPA has records of all products legally moving across the country. Vermont and the IMERC States do not have the resources or structure to maintain such a comprehensive state-level database—that was the purpose of the TSCA amendments.

Third and last, the states are subject to federal notification laws that the Mercury Rule also undermines. For instance, Vermont is required to compile mercury totals for accurate TMDL calculations. *See supra* 16-17. Without accurate representations of national averages of mercury use, the TMDL calculations may yield ineffective results, preventing Vermont and its TMDL partners from achieving adequate water quality standards and goals.

Vermont and other IMERC States also report mercury emissions outputs

pursuant to the EPA's National Emissions Inventory. Mercury compounds are HAPs that are known to cause cancer and other severe health impacts.[23] EPA can only compile accurate HAP data if there is complete reporting of the trade, use, and disposal of mercury-containing products across the country. When complete HAP data is not available, which is sometimes the case, EPA must make efforts to augment the National Emissions Inventory with other source data it prepares, such as from the Mercury Rule's inventory.[24] The Mercury Rule exemptions thus create substantial lapses in federal HAP data. As a result, EPA will not be able to properly augment states' data, and therefore, will be ineffective in fighting against exposure to this preventable health risk.

In sum, without knowledge of the complete universe of mercury products being produced, traded, used, and disposed of in these states, the states' compliance with these federal requirements is compromised.

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[23] *See supra* note 9.

[24] 2017 NEI Final Plan: Revised July 2018, § 3.3 Expected Pollutants and Data Categories, at 9, https://www.epa.gov/sites/production/files/2018-07/documents/2017_nei_plan_final_revised_jul2018.pdf (last visited Nov. 28, 2018).

CONCLUSION

Respondent EPA's Mercury Rule is arbitrary and capricious and runs contrary to Congress's intent embodied in the Lautenberg Act amendments to the Toxic Substances Control Act and therefore should be vacated.

Respectfully submitted,

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December 7, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 9,372 words in compliance with Second Circuit Local Rule 32.1(a)(4)(A). This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: December 7, 2018 /s/ *Justin Kolber*
Justin Kolber

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2018, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the Court's CM/ECF system, which will send notification of said filing to all Counsel of Record.

Dated: December 7, 2018 /s/ *Justin Kolber*

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