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After Michigan v. EPA: What Comes Next for EPA's Power Plant Mercury Rule?

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On Monday, June 29, the Supreme Court held that EPA violated the Clean Air Act (CAA) when it determined that regulation of mercury and other hazardous air pollutants (HAPs) from certain power plants was "appropriate and necessary" without consideration of costs. Michigan v. EPA, No. 14-45 (June 29, 2015). The decision overturned a contrary decision from the D.C. Circuit (*See* this VNF Climate Air & Energy Update) and raises questions about the fate of the Mercury and Air Toxics (MATS) Rule for power plants.

The Michigan v. EPA Decision

The *Michigan* opinion, authored by Justice Scalia on behalf of a five-Justice majority, concluded that EPA's threshold decision—that regulation of HAPs emitted by fossil-fueled electric generating units (EGUs) under section 112 of the CAA is "appropriate and necessary"—was impermissible given the agency's failure to consider costs at that initial point of the regulatory process. Specifically, the Court held that, under the *Chevron* doctrine, EPA's construction of the term "appropriate" to *not* include a consideration of costs was "unreasonable" based on the "capaciousness" of the word, the larger context of section 112, and the agency's obligation to consider all relevant factors when making regulatory decisions.

What Comes Next for the MATS Rule?

The Supreme Court reversed and remanded the D.C. Circuit decision upholding the MATS Rule. As of now, however, the MATS Rule is still in effect, and will be at least until the D.C. Circuit acts.

In the coming weeks, the D.C. Circuit will reconsider its prior decision in light of the Supreme Court's holding that EPA is required to consider costs in deciding whether to regulate HAPs from EGUs under section 112. Importantly, the Supreme Court decision does not specify whether the D.C. Circuit must vacate or stay the implementation of the MATS Rule pending EPA's new "appropriate and necessary" determination. Consequently, the D.C. Circuit and EPA will be required to initially decide a number of questions.

First, the Circuit Court must decide whether EPA's failure to consider costs as a threshold matter requires the court to vacate (invalidate) the entire MATS Rule or only the "appropriate and necessary" finding. EPA will likely request that the court allow the agency to reconsider whether regulation of power plants is "appropriate and necessary," including with consideration of cost, without invalidating the entire rule. Many industry and state petitioners will likely argue that the entire rule must be invalidated because the MATS Rule was predicated on a now-invalidated determination. If the D.C. Circuit vacates the entire rule, EPA would be required to undertake an entirely new rulemaking—a prospect that could significantly delay EPA's timeline to issue a new HAP rule.

Second, the D.C. Circuit will have to decide whether to leave the MATS Rule in place while EPA makes revisions. In the past, the court has used this procedure (which is known as "remand without vacatur") in cases where a full vacatur "would at least temporarily defeat the enhanced protection of the environmental values covered by the EPA rule at issue." North Carolina v. EPA, 550 F.3d 1176 (2008) (remanding the Clean Air Interstate Rule). EPA will likely argue that the Rule should remain in effect while it considers cost, particularly if the "appropriate and necessary" finding only—as opposed to the

entire rule—is vacated. Industry and state petitioners will likely argue that the rule should not remain in effect.

Finally, to the extent EPA decides to revise its "appropriate and necessary" determination, EPA (and eventually, the courts) will need to address key questions about *how* to consider the costs (and benefits) of regulation, a point which the Supreme Court explicitly chose not to address. For example, it is not clear whether EPA will be required to examine the costs and benefits of regulating on a *prospective* basis (*i.e.*, based on updated information currently available) or *retrospectively* (*i.e.*, based only on the information available to it when it promulgated the MATS Rule in 2012). Another question involves whether EPA could permissibly determine that, due to *unquantifiable benefits* (those for which insufficient information exists to attribute a monetary value), regulation of EGUs is "appropriate and necessary" even if the quantified costs exceed the quantified benefits. Finally, EPA will have to determine whether to take into account *ancillary* benefits attributable to reductions of non-HAP co-pollutants that would take place due to implementation of HAP controls. When EPA calculated costs and benefits as part of the Regulatory Impact Analysis for the 2012 MATS Rule, it found that the costs of control would exceed the direct, monetizable benefits, although the value of all expected benefits, including ancillary benefits from co-pollutants, exceeded expected costs.

Implications

The MATS Rule primarily affects operators of coal- and oil-fired EGUs (natural gas-fired EGUs were exempted from the MATS Rule due to their low levels of mercury and other HAPs). The D.C. Circuit's decisions could thus affect compliance costs for operators that are currently subject to the Rule. Under the Rule, these operators are forbidden from operating affected EGUs after April 2015 unless they install stringent pollution controls to curb HAP emissions. Consequently, many operators have already shut down or retrofitted their existing EGUs in order to comply with the Rule.

Nevertheless, a significant number of affected EGUs have been granted 1-year extensions that allow them to continue operating without meeting the standards until April 2016. Unless the D.C. Circuit allows the MATS Rule to remain in effect while EPA makes revisions, these operators could continue to operate without installing or operating additional controls—at least until EPA issues a new, valid HAP regulation for EGUs. Furthermore, if the D.C. Circuit orders EPA to conduct an entirely new rulemaking process before regulating HAPs from EGUs, EPA will be required to issue a new proposed rule and take public comment on all aspects of the proposal—a process that could take a year or more to conclude.

Finally, some have speculated that if the D.C. Circuit were to vacate the MATS Rule, a key legal argument against EPA's Clean Power Plan would be affected. Specifically, states and industry petitioners argued in the recent *Murray Energy* case that the CAA prohibits EPA from regulating sources under section 111(d)—the provision on which the Clean Power Plan is based—if those sources are already being regulated for HAPs under section 112. The impact that the Supreme Court's recent opinion will have on this issue will likely depend on what actions the D.C. Circuit and EPA take to address the opinion, as well the timing of these actions.

For more information

Van Ness Feldman closely monitors federal and state developments on climate change, air quality, and energy policy. Our professionals provide expert analysis and advice on the implications of emerging legislation, regulatory activity, litigation, and the surrounding policy and political debate. For more information on the MATS Rule and EPA's other regulations, please contact any member of the firm's Environment, Air or Climate Change practices at (202) 298-1800.

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