



EPA Reconsiders Cost Justification for MATS and Proposes No Additional Requirements for Power Plants

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On December 27, 2018, the Environmental Protection Agency (EPA or Agency) issued a rulemaking package, *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units – Reconsideration of Supplemental Finding and Residual Risk and Technology Review*, which would impact affected power plants in four key ways. First, [the proposal](#) reconsiders the 2016 Supplemental Finding justifying the costs associated with the Mercury and Air Toxics Standards (MATS). Second, EPA is proposing to keep the MATS in place but is requesting comment on whether the standards should be rescinded. Third, EPA is proposing the Agency’s risk and technology review (RTR) for covered power plants and concluding that no new standards should be required. In addition, EPA is soliciting comment on establishing a subcategory for emissions of acid gas HAP from existing power plants firing eastern bituminous coal refuse.

Background

The CAA includes a multi-step process for regulating hazardous air pollutants (HAP) emissions from the power plant source category. The process includes a threshold step determining whether it is “appropriate and necessary” to regulate coal- and oil-fired power plants for HAPs (referred to as an A&N Finding); taking an action to “list” electric utility steam generating units (EGUs) for HAP regulation under section 112 of the CAA; setting technology-based HAP emission standards; and finally, evaluating the remaining HAP emissions from the source category to determine whether the risk posed by the residual emissions is acceptable after compliance with the technology-based standards.

In December 2000, pursuant to CAA section 112(n)(1)(A), EPA determined it was appropriate and necessary to regulate coal- and oil-fired EGUs, and added such units to the CAA section 112(c) List of Categories of Major and Area Sources for regulation. In 2005, EPA issued a final rule that reversed the A&N Finding, removed coal- and oil-fired EGUs from the CAA section 112(c) list, and established a flexible trading program for mercury emissions under CAA section 111 (Clean Air Mercury Rule, or CAMR).

In 2008, in *New Jersey v. EPA*, the D.C. Circuit vacated the delisting and CAMR, ruling that EPA’s reversal of its A&N Finding did not remove coal- and oil-fired EGUs from the CAA section 112(c) source category list and that the Agency failed to comply with the specific section 112(c)(9) requirements for delisting a source category. In 2012, EPA reaffirmed its initial 2000 A&N Finding and finalized MATS, which currently regulates HAP emissions from coal- and oil-fired EGUs.

In 2015, the Supreme Court held in *Michigan v. EPA* that EPA erred when the Agency determined that cost did not have to be considered when making the A&N Finding. The D.C. Circuit remanded MATS, requiring EPA to consider the cost of MATS relative to the A&N Finding. EPA responded to the remand with its 2016 Supplemental Finding, in which the Agency concluded that the consideration of cost did not change its conclusion that it was appropriate and necessary to regulate HAP emissions from coal- and oil-fired EGUs. The 2016 Supplemental Finding was legally challenged by *Murray Energy Corp. v. EPA*, but the D.C. Circuit has been holding the case in abeyance to allow time for the Trump administration to review the finding and the related legal framework.

In this current rulemaking package, EPA is proposing the reconsideration of the 2016 Supplemental Finding as well as proposing the results of the residual risk and technology review pursuant to the Agency’s authority under section 112 of the CAA.

Revised Supplemental Cost Finding

EPA is proposing that it is not “appropriate and necessary” to regulate HAP emissions from coal- and oil-fired power plants under section 112 because the costs of such regulation far outweigh the quantified benefits from reductions of HAP emissions.

EPA reviewed the cost analysis presented in the 2016 Supplemental Finding and proposes to determine that neither of the Finding’s approaches to considering cost satisfies the Agency’s obligation under CAA section 112(n)(1)(A), as interpreted by the Supreme Court in *Michigan*. Specifically, EPA explains that what was described in the 2016 Supplemental Finding as the preferred approach, the “cost reasonableness test,” does not meet the statute’s requirements to fully consider costs and was an unreasonable interpretation of the CAA mandate.

In the proposed Revised Supplemental Finding, EPA considers cost differently for the purposes of the appropriate and necessary finding. EPA proposes to find that equal reliance on the particulate matter (PM) air quality co-benefits projected to occur as a result of the reductions in HAPs was flawed, as the focus on CAA section 112 is HAP emissions reductions. EPA proposes to directly compare the cost of compliance with MATS with the benefits specifically associated with reducing emissions of HAP in order to satisfy the Agency’s duty to consider cost in the context of the CAA section 112(n)(1)(A) appropriate and necessary finding. EPA now estimates that the total cost of compliance with MATS is \$7.4 to \$9.6 billion annually, more than the monetized HAP benefits of \$4 to \$6 million annually.

EPA concluded that the identification of unquantified HAP benefits and significant monetized PM co-benefits associated with MATS is not sufficient to support a finding that it is appropriate and necessary to regulate EGUs under CAA section 112. However, EPA is proposing that the Agency’s determination that it is not appropriate and necessary to regulate EGUs under CAA section 112 would not remove coal- and oil-fired EGUs from the list of affected source categories for regulation under section 112, nor would it impact the 2012 MATS requirements, which would remain in place.

Notwithstanding statements regarding keeping the MATS rule in place, EPA also requests comment on two alternative interpretations of the impact of reversing the 2016 Supplemental Finding that would allow EPA to rescind the MATS rule and also requests comment on whether the Agency is obligated to rescind the rule once the cost finding has been revised. One of these alternative interpretations would result in the source category remaining on the statutory list for regulation but without any standards.

Residual Risk and Technology Review

EPA also is proposing the results of the Agency’s RTR of MATS, as required under CAA section 112. EPA proposes that the results of the RTR show that no revisions to the MATS requirements are warranted.

The CAA requires EPA to assess the risk remaining eight years after the promulgation of final HAP standards. Based on the completed risk assessment, EPA has determined that the residual risk due to emissions of HAP from the coal- and oil-fired EGUs source category is acceptable and that the current standards provide an ample margin of safety to protect public health.

The CAA also requires EPA to assess, review, and revise HAP standards as necessary, taking into account developments in practices, processes, and control technologies every eight years. Based on the Agency’s technology review, there have been no new developments in HAP emission controls that would achieve additional cost-effective reductions. Therefore, EPA proposes that no revisions to MATS are warranted based on the results of the RTR.

Potential Subcategory for Eastern Bituminous Coal Refuse

EPA solicits comment on establishing a subcategory for emissions of acid gas HAP from existing EGUs firing eastern bituminous coal refuse. EPA requests feedback on whether the subcategory should be established and also on the level of standards for such a subcategory.

The subcategory and standards would affect approximately ten existing EGUs in Pennsylvania and West Virginia that use eastern bituminous coal refuse to generate electricity. Bituminous coal refuse-fired EGUs must install downstream acid gas control technology to meet the final acid gas MATS standards. EPA proposes that such control technology would be expensive and potentially technically and practically infeasible to retrofit on the small number of units that currently fire eastern bituminous coal refuse.

Implications and Next Steps

Rescission of the MATS rule would have a major impact on the power plant sector. Significant investments in control technology already have been made with cost recovery plans in place and approval by regulators. Thus, it is not surprising that a large portion of the utility sector asked the Trump Administration in 2018 to retain the MATS requirements. Eliminating the rule entirely may ultimately pose even greater costs to the industry if it invalidates the cost recovery structure.

EPA will take comment on the proposal for 60 days after publication in the *Federal Register* and will hold at least one public hearing. With the current partial government shutdown, it is not clear how quickly the proposal will be published.

For more information

Our professionals are available to provide counsel to affected entities as they assess the implications of the rule and prepare to submit comments to EPA. Please contact [Britt Fleming](#), [Stephen Fotis](#), or any other professional in Van Ness Feldman's [Environmental](#) Practice Group for additional information related to this rulemaking.

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