WILMERHALE

Supreme Court Rejects EPA Rulemaking Process for Power Plant Emissions Standards

TUESDAY, JUNE 30, 2015

The US Supreme Court held yesterday that the Environmental Protection Agency (EPA) unreasonably failed to consider costs when it made the initial decision to regulate emissions of hazardous air pollutants from power plants. The Supreme Court's decision reversed a 2014 DC Circuit Court decision that had upheld EPA's regulation (called the Mercury and Air Toxics Standards or MATS rule), and sent the case back to the DC Circuit for further proceedings.

Of particular note, the decision:

- did not vacate the MATS rule;
- may result in further opportunities for public participation and judicial review; and
- was issued after the April 16, 2015 compliance deadline that applied to entities that did not receive an extension.

Background

Section 112(n)(1)(A) of the Clean Air Act established a process for EPA to determine whether to regulate electric utility steam generating units (EGUs), which are fossil-fuel-fired power plants larger than 25 megawatts. The statute required EPA to study the hazards of EGU emissions, and then decide whether it was "appropriate and necessary" to regulate EGUs. After completing the required study in 1998, EPA issued its "Utility Air Toxics Determination" in 2000, concluding that regulation of coal- and oil-fired EGUs was "appropriate and necessary."

EPA issued the MATS rule in February 2012, which "confirmed" the Utility Air Toxics Determination and stated that it was reasonable to do so "without considering costs." After the MATS rule was challenged, the DC Circuit agreed that EPA was not required to consider costs in making its "appropriate and necessary" determination under Section 112(n)(1)(A).

The MATS rule limits mercury, acid gases and other toxic emissions from coal- and oil-fired EGUs. Sources may comply with those limits by incorporating the maximum achievable control technologies (MACT) in order to control emissions or—for older, smaller or less efficient units—by

ceasing operations.

The three-year compliance period for the MATS rule began on April 16, 2012, 60 days after the final rule was published. Existing sources were required to comply with the MATS rule by April 16, 2015, or seek an extension of that compliance date from the appropriate permitting authority (typically state agencies). The MATS rule also created a pathway for a "5th year option"—allowing qualifying "reliability-critical" units to achieve compliance within an additional year (i.e., by April 16, 2017).

Implications

1. The MATS rule was challenged on many grounds, and the Supreme Court took up only a single, narrow issue: whether it was reasonable for EPA not to consider cost when making its "appropriate and necessary" finding. On remand, the DC Circuit may suspend the MATS rule to allow EPA to clear this procedural hurdle, or may vacate the rule.

- In the former case, EPA likely will avail itself of substantial information on the costs and benefits of the MATS rule that has been developed and collected since EPA issued the Utility Air Toxics Determination, including cost-benefit analyses and voluminous relevant comments.
- In the latter case, a new rule ultimately issued by EPA likely would closely resemble the MATS rule, given the scrutiny it has already received, but the process of issuing a new rule may take many months or years

  In either case, the regulated community likely will have further opportunities to comment on the MATS rule and seek judicial review.

1. Regulated entities that have not yet achieved compliance with the MATS rule should carefully consider whether to continue or abandon their efforts to comply. Entities that decide to continue must further decide whether they will do so on pace to meet outstanding deadlines (noting that the MATS rule still has not been vacated), or new deadlines that may be imposed in the future.
2. Several states reportedly have implemented mercury control standards that are more rigorous than the MATS rule. For EGUs in those states, compliance decisions likely will be driven by state standards, and not the fate of the MATS rule.

WilmerHale's Energy, Environment and Natural Resources Group will be monitoring the issues raised by the Supreme Court's decision and would be happy to discuss with you more particular implications for your company or industry.

Authors

H. David Gold

SPECIAL COUNSEL

david.gold@wilmerhale.com

+1 617 526 6425