High Court to Review EPA’s Power Plant Mercury Standards

The Supreme Court recently agreed to review EPA’s controversial Mercury and Air Toxics Standards (MATS Rule), which sets strict limits on emissions of mercury and other hazardous air pollutants (HAPs) from coal- and oil-fired electric generating units (EGUs). The Court will consider whether EPA properly refused to consider costs when deciding whether to regulate EGUs under Section 112 of the Clean Air Act (CAA), the agency’s stated authority for the MATS Rule. A divided panel of the D.C. Circuit upheld the rulemaking earlier this year in *White Stallion Energy Center, LLC v. EPA*. The Supreme Court’s decision to review the MATS Rule could not come soon enough for affected power plants, as the compliance deadline is April 16, 2015.

**Background**

Section 112 of the CAA, the statutory basis for the MATS Rule, directs EPA to perform a study of the health hazards “reasonably anticipated” to result from HAP emissions from EGUs (Utility Study). The provision goes on to state that EPA must regulate EGUs “under this section” if the agency finds that such regulation is “appropriate and necessary” after considering the results of the Utility Study.

In December 2000, after completing the Utility Study, EPA issued a finding that regulating EGUs under Section 112 was “appropriate and necessary” because of the health and environmental hazards posed by mercury emissions from EGUs and the agency’s view that implementing other provisions of the CAA would not adequately address those hazards. EPA reversed its decision, however, in 2005 when it decided to regulate mercury emissions from EGUs under Section 111(d) of the CAA using a cap-and-trade program.

That decision and the trading program, known as the Clean Air Mercury Rule, were vacated by the D.C. Circuit in 2008 because EPA failed to satisfy the requirements for delisting EGUs as a regulated source category under Section 112. Under the Obama administration, EPA reversed its decision again and promulgated the MATS Rule on February 16, 2012.

**White Stallion**

Soon after EPA’s promulgation of the MATS Rule, 24 states and several industry groups filed petitions for review in the D.C. Circuit, challenging the rulemaking on several fronts. The most hotly contested issue before the D.C. Circuit (and the only issue the Supreme Court will consider) was whether EPA properly refused to consider compliance costs when deciding whether it was appropriate and necessary to regulate HAP emissions from EGUs under Section 112. In siding with EPA, the court explained that the provision of Section 112 at issue does not mention costs as a consideration, while other provisions of Section 112 contain an express requirement to consider costs. Thus, the court reasoned, Congress did not intend that EPA be required to take costs into consideration when deciding whether to regulate EGUs under Section 112. The court further relied on Supreme Court precedent establishing that EPA is under no obligation to consider costs in establishing national ambient air quality standards under other provisions of the CAA that likewise do not mention cost as a relevant consideration.

In a sharp dissent, Judge Kavanaugh asked what “appropriate” could possibly mean other than to require EPA to conduct a cost-benefit analysis, which he explained was “just common sense and sound government practice.” Judge
Kavanaugh further explained that EPA could have concluded that the benefits of the MATS Rule outweigh the costs, “[b]ut the problem [was] that EPA did not even consider the costs. And the costs are huge, about $9.6 billion a year – that’s ‘billion’ with a ‘b’ – by EPA’s own calculation.”

Following the D.C. Circuit’s decision, 21 states, along with the Utility Air Regulatory Group and National Mining Association, petitioned the Supreme Court for writ of certiorari.

Future Implications

The timing of the Supreme Court’s decision to review the MATS Rule is important to industry, as the deadline for complying with the rule is less than five months away. While it is unlikely that the Court will render a decision before the compliance deadline, plants forced to shut down because they cannot meet the standards could be brought back online if the Supreme Court rules against EPA.

From a broader perspective, the Supreme Court’s decision to review the MATS Rule does not bode well for EPA as it prepares for battle over its pending greenhouse gas New Source Performance Standards for new and existing power plants, where one of the primary issues will be EPA’s likewise creative interpretation of a separate provision of the CAA – Section 111(d).