

## The Supreme Court Strikes Down the Mercury and Air Toxics Standards

***While the Court's decision marks a symbolic defeat for EPA, it may not significantly alter power plant operators' compliance efforts.***

In a much anticipated decision delivered on the last day of the term, the Supreme Court struck down the Mercury and Air Toxics Standards, or MATS rule<sup>1</sup> because EPA failed to consider costs in determining whether to regulate the power sector.<sup>2</sup> For America's coal-fired power plants, the decision in *Michigan v. EPA* may have a limited impact. The rule was not stayed during the four-year judicial review of the rule, and as a result retirement, fuel-switching and upgrade decisions have already been made at many facilities in response to MATS as well as other Clean Air Act (CAA) rules and these decisions may not be reversed due to the increased viability of natural gas-fired power generation.

But for some facilities, including those that are in the midst of installing controls that they thought would be required under MATS, the decision highlights a frustrating pattern of CAA rulemaking. With regularity, under Democratic and Republican administrations, EPA's CAA rules targeting the nation's power sector have failed to withstand legal challenge from industry and non-governmental organizations (NGOs) alike. As in previous cases, the Supreme Court's rejection of MATS is anything but timely, coming after billions of dollars of economic investment and cost to consumers, and after significant effort on behalf of EPA, industry, and non-profit groups.

The ultimate fate of MATS remains uncertain. As discussed below, the D.C. Circuit could leave MATS in place while remanding the rule back to EPA to address the shortcomings identified, as it did with the Clean Air Interstate Rule (CAIR).<sup>3</sup> Alternatively, the D.C. Circuit could vacate MATS entirely, leaving EPA to start over. A remand might give the Obama Administration time to write the replacement rule before leaving office, but for tactical reasons, EPA might prefer that the Court vacate MATS altogether in order to increase the chances that its Clean Power Plan will survive.<sup>4</sup>

### Overview of the Court's Decision

In a 5-4 majority decision written by Justice Antonin Scalia, the Supreme Court overturned the MATS rule. The Court held that EPA's refusal to consider costs in deciding whether or not to regulate hazardous air pollutants (HAPs) from power plants under Section 112 of the CAA was not entitled to deference under the "reasonable interpretation" standard set forth by the Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>5</sup> Section 112(n)(1)(A) of the CAA requires EPA to regulate hazardous air pollutants from power plants if EPA determines that regulation is "appropriate and necessary."<sup>6</sup> Justice Scalia described Section 112(n)'s "appropriate and necessary" language as capacious and requiring "at least some attention to costs."<sup>7</sup> The regulatory impact analysis accompanying EPA's MATS rule estimated that MATS would force power plants to spend US\$9.6 billion per year, but valued the benefits

of reductions in hazardous air pollutant emissions at only US\$4 million to \$6 million per year, with ancillary benefits unrelated to hazardous air pollutant emissions reductions (including reductions of particulate matter and sulfur dioxide) of approximately US\$37 billion to \$90 billion per year.<sup>8</sup> But critically, from the perspective of the majority, EPA conceded that its regulatory impact analysis did not influence its determination that regulation of hazardous air pollutants from power plants under Section 112 was “appropriate and necessary.”<sup>9</sup>

In requiring EPA to consider costs in regulating hazardous air pollutants from power plants under Section 112 of the CAA, Justice Scalia distinguished the Court’s decision in *Whitman v. American Trucking Assns., Inc.*, in which the Court held that EPA could not consider costs in setting ambient air quality standards designed to protect public health with an ample margin of safety.<sup>10</sup> Justice Scalia also distinguished EPA’s regulation of all other sources of hazardous air pollutants under Section 112, for which costs plainly cannot be considered by EPA in determining whether to regulate.<sup>11</sup> Finally, Justice Scalia colorfully rejected the notion that EPA could consider costs at later stages in the regulatory process, after EPA had already decided to regulate hazardous air emissions from power plants: “By EPA’s logic, someone could decide whether it is ‘appropriate’ to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system.”<sup>12</sup>

The majority held that while EPA must consider the costs of regulation before deciding whether hazardous air pollutant regulation at power plants is necessary and appropriate, EPA is not necessarily required to “conduct a formal cost-benefit analysis” and has the discretion to decide how it will account for costs.<sup>13</sup> The Court reversed the D.C. Circuit judgment upholding MATS and remanded the consolidated cases back to the D.C. Circuit.<sup>14</sup>

In a separate, but notable, concurring opinion, Justice Clarence Thomas not only agreed with the majority that EPA unreasonably failed to consider costs, but also called into question the Court’s *Chevron* decision and whether the Court’s longstanding practice of deferring to agency interpretations of federal statutes was permitted under the Constitution.<sup>15</sup> Justice Thomas’ concurrence was not joined by any of the other justices and follows his criticism of the Court’s *Chevron* standard of review in several other recent opinions.<sup>16</sup> Although an outright adoption of Thomas’ views on *Chevron* appears unlikely at this point, the other Justices have recently indicated increasing resistance towards deferring to agency interpretations.<sup>17</sup> This trend, if it continues, would have significant ramifications for all administrative law cases before the Court, including future challenges to EPA rulemakings.

Justice Elena Kagan wrote the dissenting opinion and was joined by Justices Ginsburg, Breyer and Sotomayor.<sup>18</sup> In her dissent, Justice Kagan agreed with the majority that, absent explicit Congressional direction to the contrary, an agency must consider costs or be found to have acted unreasonably.<sup>19</sup> However, she argued that the Court should have upheld the MATS rule because EPA *had* considered costs when developing the MATS regulations, even if the agency had failed to do so when making the “appropriate and necessary” determination. For Justice Kagan, the relevant question was whether EPA could reasonably find it “appropriate” to trigger the regulatory process to set mercury emissions standards “based on harms (and technological feasibility) alone, given that costs will come into play ... before any emission limit goes into effect.”<sup>20</sup> That is, the difference between the majority and the dissent was not whether EPA had to consider costs, but when. Justice Kagan then found that EPA reasonably considered costs when developing the MATS regulations.<sup>21</sup> Justice Kagan, however, appears to be incorrect in suggesting that the “MATS floor” of the top 12% of facilities inherently accounts for costs.<sup>22</sup> Plainly, few — if any — facilities “choos[e] their own emissions levels”; rather, emission levels are mandated at the local, state and federal level.

## The Implications of Vacatur or Remand

Following the Supreme Court's decision, the D.C. Circuit will be left to determine whether the MATS rule should be remanded to EPA or vacated. If MATS is remanded it will remain in place while EPA evaluates whether, when costs are taken into consideration, regulating hazardous air pollutants from power plants remains "appropriate and necessary" — and if so, EPA decides to draft new regulations. Thus, MATS would remain in effect well past its final implementation date of April 2016, and potentially into the next administration. Under a remand, therefore, any power plant that has not already installed MATS controls, would have to proceed with their plans, notwithstanding the invalidity of the rule. But if the rule is vacated, MATS would immediately be repealed. Power plants could potentially consider halting their efforts to comply with MATS obligations and could even seek modification of Title V operating permits requiring compliance with MATS.

In remanding CAIR in 2008, the D.C. Court of Appeals signaled that it is inclined to remand significant environmental rulemakings to EPA without vacatur.<sup>23</sup> In her concurrence in *North Carolina*, Judge Judith Rogers explained that CAIR must be upheld because the rule "had become so intertwined with the regulatory scheme that its vacatur would sacrifice clear benefits to public health and the environment while EPA fixes the rule."<sup>24</sup> In the case of the MATS rule, EPA may likewise argue that the environmental and health benefits of MATS also justify remand. Although most power plants have long since developed plans to comply with MATS and many power plants already have emissions controls in place (including dry sorbent injection and scrubbers), vacatur could result in uneven compliance, and could result in some power plants either not completing installation of controls or not operating controls that are already in place.

## The Impact of the Decision on EPA's Clean Power Plan

EPA has already indicated that it is inclined to push for remand rather than vacatur of MATS, and normally, there would be no downside to EPA doing so. Here, however, vacatur of MATS might actually help sustain EPA's regulation of greenhouse gases from power plants under the Clean Power Plan. That rule, which has not yet been finalized, will be challenged, in part, on the basis of EPA's decision to regulate hazardous air pollutants at power plants under Section 112 of the Act.<sup>25</sup> Opponents of EPA's Clean Power Plan, including Professor Laurence Tribe of Harvard Law School, have argued that the proposed Clean Power Plan rule is invalid because EPA cannot regulate power plant emissions under both Section 111(d) and Section 112 of the CAA.<sup>26</sup> There are two competing versions of Section 111(d) which were amended and approved into law without being reconciled.<sup>27</sup> The House version of Section 111(d) appears to prevent EPA from regulating any "source category", including power plants, that is also subject to regulation under Section 112 of the CAA. The Senate version of Section 111(d), however, does not mention source categories and may only bar EPA from regulating *hazardous air pollutants* under both Section 111(d) and Section 112 of the CAA.

EPA has argued that the two competing versions of Section 111(d) are ambiguous and that it can regulate greenhouse gases under the Clean Power Plan regardless of any action it takes in regulating hazardous air pollutants from power plants under Section 112.<sup>28</sup> Nonetheless, the Supreme Court's reversal of the MATS rule gives EPA an opportunity to sidestep the issue entirely, avoiding subjecting its interpretation of Section 111(d) to judicial scrutiny that the Clean Power Plan might not withstand. Thus, allowing vacatur of MATS would eliminate one potentially strong challenge to the Clean Power Plan.

But other potentially significant challenges to EPA's Clean Power Plan would still remain. Given the Supreme Court's recent opinions regarding the limits of deference to administrative interpretations of statutes — including the Court's decision last term in the *UARG* case — EPA's decision regarding whether to pursue a remand of the MATS rule or issue a new rule under Section 112 of the Act may be a

more difficult decision than it appears at first blush. If called upon to sacrifice hazardous air pollutant regulation at power plants in favor of the Clean Power Plan, EPA may decide that its priority is the Clean Power Plan, particularly because many of the environmental benefits of the MATS rule (including installation of pollution controls and retirement of potentially non-compliance power plants) have already been realized.

## Other Practical Implications of the Ruling

In contrast to the potentially far-reaching political and legal implications of the Court's decision, the ruling in *Michigan* appears to have little immediate practical impact. Given the considerable time and expense needed to comply with MATS, the vast majority of affected power plants have already complied or are nearing full compliance. Further, the compliance decisions made years ago considered factors in addition to MATS, including the Cross-State Air Pollution Rule (CSAPR), ozone and SO<sub>2</sub> emission requirements, and plant retirement and fuel-switching. While it is possible that a handful of plants that would otherwise have been shuttered may remain in operation due to the Court's ruling, or plants already in compliance may discontinue using their control technologies, it is likely that most of EPA's desired mercury (and other HAP) emission reductions have been achieved.

The Rule's initial compliance deadline was April 16, 2015.<sup>29</sup> According to a survey conducted by SNL Energy, a total of 80% of covered US electricity assets, including half of the nation's coal-fired capacity, were in compliance with MATS by the April 2015 deadline.<sup>30</sup> EPA granted extensions of up to a year to the remaining 20% of affected power plants (approximately 200 plants in total) to comply with MATS. The overwhelming majority of the plants receiving extensions, 89% in total, needed the additional time to install controls or to complete a conversion to natural gas that is already in process. The final 3% of power plants (22 units in total) currently operating under extensions and without mercury controls remain in operation to meet grid capacity or reliability commitments that extended beyond the April 2015 compliance deadline. It is only these plants, and possibly a handful of additional plants, comprising approximately 1% of US energy production, that may be spared by the Court's decision.

Power plant operators could decide not to run their controls in the wake of the Court's decision, but several considerations indicate that most may not end up doing so. *First*, the vast majority of MATS compliance costs were capital improvement costs. Installation of control technologies and emissions testing comprised the bulk of compliance expenditures per plant. Once installed and tested, that large capital investment far outweighs the costs of between US\$500,000 and US\$1.5 million annually for mercury absorbent materials given the minor parasitic loads. *Second*, the mercury emissions control requirements are already incorporated in most facilities' Title V operating permits. As such, plant owners and operators would be required to amend the permit. That amendment process could be time-consuming and expensive, especially if the facility is located in a region where environmental justice metrics indicate concern or where the circumstances otherwise suggest a contentious amendment process is likely. *Third*, controls used to reduce mercury emissions also serve to reduce other emissions. In particular, many plants subject to MATS must also meet emission requirements under CSAPR for ozone and/or fine particulates. In light of these considerations, several major power plant owners and operators have already gone on record and announced that their MATS controls would remain in place regardless of the Supreme Court's decision.

## Conclusion

As a practical matter, the Court's decision will do little to change the decisions that have already been made to upgrade or retire many of the nation's older power plants. Symbolically, the decision is a defeat for EPA. The Agency and other parties must now decide whether to ask the D.C. Circuit to remand MATS to EPA and temporarily keep the rule in place or request vacatur.

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## Endnotes

- <sup>1</sup> National Emissions Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, Final Rule, 77 Fed. Reg. 9304 (Feb. 16, 2012 (hereinafter MATS or the MATS rule)).
- <sup>2</sup> *Michigan v. EPA*, Slip Op. No. 14-46 (June 29, 2015).
- <sup>3</sup> *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008) (per curiam).
- <sup>4</sup> "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 79 Fed. Reg. 34829 (June 18, 2014), available at <https://www.federalregister.gov/articles/2014/06/18/2014-13726/carbon-pollution-emission-guidelines-for-existing-stationary-sources-electric-utility-generating> (last accessed June 30, 2015).
- <sup>5</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* at \*6 ("EPA strayed far beyond those bounds when it read §7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.").
- <sup>6</sup> 42 U.S.C. § 7412(n)(1)(a).
- <sup>7</sup> *Id.* at \*7.
- <sup>8</sup> *Id.* at \*2.
- <sup>9</sup> *Id.*
- <sup>10</sup> *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457 (2001); *Id.* at \*10 ("That principle has no application here. 'Appropriate and necessary' is a far more comprehensive criterion than 'requisite to protect the public health'; read fairly and in context, as we have explained, the term plainly subsumes consideration of cost.").
- <sup>11</sup> *Id.* at \*11 ("This line of reasoning overlooks the whole point of having a separate provision about power plants: treating power plants *differently* from other stationary sources.").
- <sup>12</sup> *Id.* at \*11.
- <sup>13</sup> *Id.* at \*14.
- <sup>14</sup> *Id.* at \*15.
- <sup>15</sup> See *Michigan et al. v. Environmental Protection Agency et al.*, 575 U.S. \_\_\_, \_\_\_ (2015) (THOMAS, J., concurring in judgment).
- <sup>16</sup> See, e.g., *Department of Transportation v. Association of American Railroads*, 575 U.S. \_\_\_, \_\_\_ (2015) (THOMAS, J., concurring in judgment) (slip op., at 21–22);
- <sup>17</sup> See, e.g., *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 at 2442 (2014) ("We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions. An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always 'give effect to the unambiguously expressed intent of Congress.'"); see also *King et al. v. Burwell, Secretary of Health and Human Services, et al.*, 576 U.S. \_\_\_, \_\_\_ (2015) (slip. op., at 8-9) (finding that Congress would not have delegated the statutory interpretation question to the IRS and that it was for the Court to decide the correct reading of the statute.).
- <sup>18</sup> *Michigan et al. v. Environmental Protection Agency et al.*, 575 U.S. \_\_\_, \_\_\_ (2015) (KAGAN, J., dissenting).
- <sup>19</sup> *Id.* at 6.
- <sup>20</sup> *Id.* at 8.
- <sup>21</sup> *Id.* at 9.
- <sup>22</sup> *Id.* at 4. ("Every 12% floor has cost concerns built right into it because the top sources, as successful actors in a market economy, have had to consider costs in choosing their own emission levels.")
- <sup>23</sup> See *North Carolina v. EPA*, 550 F.3d 1176, 1177 (D.C. Cir. 2008) (per curiam) ("This court has further noted that it is appropriate to remand without vacatur in particular occasions where vacatur 'would at least temporarily defeat ... the enhanced protection of the environmental values covered by the EPA rule at issue.'").
- <sup>24</sup> *Id.* at 1178-79 (Rogers, J., concurring).
- <sup>25</sup> See *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. June 9, 2015); *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. June 9, 2015).
- <sup>26</sup> Comments of Laurence H. Tribe and Peabody Energy Corporation, 79 Fed. Reg. 34830 (June 18, 2014).
- <sup>27</sup> Robert R. Nordhaus & Ilan W. Gutherz, Regulation of CO<sub>2</sub> Emissions from Existing Power Plants Under § 111(d) of the Clean Air Act: Program Design and Statutory Authority, Environmental Law Institute, 44 ELR 10366 (May 2014).
- <sup>28</sup> EPA has sought to reconcile these differences in its Clean Air Mercury Rule (CAMR), and in responding to challenges to its proposed Clean Power Plan, by arguing that Section 111(d) only prevents EPA from regulating hazardous air pollutants from power plants under both Section 111(d) and Section 112. *Id.* at 10376.
- <sup>29</sup> 78 Fed. Reg. 24073 at 24087 (codified at § 63.10030(a)).
- <sup>30</sup> SNL.com, "Supreme Court's eventual MATS ruling will be (mostly) moot," available at <https://www.snl.com/InteractiveX/Article.aspx?cid=A-32620730-13109> (last accessed June 30, 2015).