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U.S. Supreme Court Holds that EPA Must Consider Costs before Regulating Mercury Emissions from Power Plants

On June 29, 2015, the U.S. Supreme Court ruled in *Michigan v. EPA* that the U.S. Environmental Protection Agency (EPA) failed to properly consider compliance costs before promulgating the Mercury and Air Toxics Standards (MATS) rule for fossil fuel-fired power plants under Section 112 of the Clean Air Act (CAA). The Supreme Court's decision could influence future EPA rulemakings and comes at a time when the agency is putting the final touches on a controversial suite of air regulations aimed at reducing carbon dioxide emissions from power plants.

Under CAA Section 112(n)(1)(A), EPA is required to conduct a study of the public health hazards that may result from emissions of hazardous air pollutants (such as mercury) from power plants and proceed to regulate such emissions if EPA finds, based on the study, that regulation is "appropriate and necessary." After completing the required study in 1998, EPA made an "appropriate and necessary" determination in 2000 and reaffirmed it in 2011. EPA concluded that regulation was appropriate because emissions of mercury and other hazardous air pollutants from power plants posed hazards to public health and the environment and could be controlled. It further found that regulation was necessary because other provisions of the CAA did not adequately address these hazards. Significantly, however, EPA expressly refused to consider the costs of regulation, deeming cost irrelevant to its determination.

On the basis of this "appropriate and necessary" finding, EPA proceeded to regulate power plants under CAA Section 112 when it issued a final MATS rule in early 2012. Various stakeholders immediately filed suit to challenge the rule, and in April 2014, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) upheld EPA's refusal to consider costs in deciding to regulate power plants.

On appeal, the Supreme Court reversed and held that EPA's threshold "appropriate and necessary" determination under CAA Section 112 must include consideration of costs, based on the breadth of the "appropriate and necessary" standard and the statutory context. The Supreme Court rejected EPA's argument that Section 112(n)(1)(A) contrasts with other provisions of the CAA which expressly reference cost, reasoning that such discrepancy only supports the conclusion that the uniquely broad "appropriate and necessary" standard requires consideration of costs. As a result, the Supreme Court held that EPA "strayed far beyond" the bounds of reasonable interpretation of the "appropriate and necessary" standard. Four justices dissented, maintaining that EPA's consideration of costs at subsequent stages of the rulemaking process sufficed for purposes of CAA Section 112(n)(1)(A).

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The Supreme Court's opinion raises a number of questions for the fossil fuel-based power generation industry. Because the Supreme Court remanded the case for further proceedings, the D.C. Circuit is now tasked with determining whether to vacate or stay the MATS rule, or perhaps even keep the rule in place, as suggested by several environmental groups, pending EPA's reconsideration of its "appropriate and necessary" determination to account for costs.

This Supreme Court decision is also important in the context of other prospective rules. For instance, the D.C. Circuit's ultimate disposition of the MATS rule on remand will affect power plants' status as being regulated under CAA Section 112, which may preserve a significant argument that EPA may not simultaneously regulate power plants under CAA Sections 112 and 111(d), the basis of the contentious "Clean Power Plan" proposal for carbon dioxide emissions. Moreover, the Supreme Court's decision suggests that EPA may have limited authority to justify the cost of a rule based on "co-benefits"— benefits that come from reductions in pollutants other than the pollutants actually being regulated by the rule.

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