JONES DAY

JULY 2015

Supreme Court Rejects EPA Mercury Rule for Power Plants and Raises Questions about Judicial Deference to Future EPA Rules

On June 29, 2015, the U.S. Supreme Court issued its opinion in *Michigan v. EPA*, which may have serious implications for the Environmental Protection Agency's ("EPA") ability to regulate hazardous air pollutant emissions from power facilities going forward. 576 U.S. ____ (June 29, 2015). In a 5–4 decision, the Court invalidated EPA regulations setting limits on mercury, arsenic, and acid gas emissions from coal-fired power plants (the "MATS Rule" or "Rule") by determining that EPA should have considered the compliance costs imposed on utilities at the first stage of the Agency's regulatory analysis. The Court's opinion is a solid endorsement of the need for agencies to engage in a cost–benefit analysis in deciding whether to regulate. The opinion is also another example of the Court's gradual shift away from paying broad deference to EPA decisions.

The Clean Air Act authorizes EPA to regulate emissions of hazardous air pollutants from certain stationary sources, such as power plants, refineries, and factories under 42 U.S.C. § 7412. EPA may regulate fossil-fuel-fired power plants only if the Agency first "perform[s] a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous air pollutants] after imposition of the requirements" imposed by law. 42 U.S.C. § 7412(n)(1)(A). If EPA "finds … regulation is appropriate and necessary after considering the results of the study," it "shall regulate [power plants] under" § 7412. *Id.*

For the MATS Rule at issue in this case, EPA completed the study required by statute in 1998, 65 Fed. Reg. 79,826 (Dec. 20, 2000), and concluded that regulation of coal- and oil-fired power plants was "appropriate and necessary" in 2000, *id.* at 79,830. EPA reaffirmed its "appropriate and necessary" finding in 2012 but did not consider costs as part of that statutory analysis. 77 Fed. Reg. 9,326 (Feb. 16, 2012). EPA issued a "Regulatory Impact Analysis" with the new regulation and estimated that the regulation would impose $9.6 billion per year in costs on power plants to implement its requirements. At the same time, the Agency issued a vague estimation of potential benefits from the regulation, which it estimated at $4 million to $6 million per year. Industry groups and more than 20 states sought review of the Rule in the D.C. Circuit, by challenging EPA's refusal to consider costs in its required "appropriate and necessary" analysis. The appellate court upheld EPA's

© 2015 Jones Day. All rights reserved.

decision not to consider cost, with one judge concurring, in part, and dissenting, in part. *See White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (2014) (*per curiam*).

The Supreme Court granted certiorari to consider whether EPA unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities. With Justice Scalia writing for the Court, the majority reviewed the Agency's decision not to consider costs at the "appropriate and necessary" stage of regulation under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). While acknowledging that "*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers," the Court explained that "[e]ven under this deferential standard … agencies must operate within the bounds of reasonable interpretation." After examining traditional administrative practice and statutory context, the Court concluded that EPA acted unreasonably in concluding that the phrase "appropriate and necessary" did not require a consideration of cost. Indeed, it held that the "Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary." The Court reversed the D.C. Circuit and remanded for further proceedings.

In concurrence, Justice Thomas wrote that EPA's "request for deference raises serious questions about the constitutionality of [the Court's] broader practice of deferring to agency interpretations of federal statutes" under *Chevron*. The dissent, authored by Justice Kagan, argued that EPA's examination of costs later in the regulatory process was enough to pass muster under § 7412. The dissent made clear, however, that "EPA's power plant regulation would be unreasonable if the Agency gave cost no thought *at all*." It continued that "[c]ost is almost always a relevant—and usually, a highly important—factor in regulation." In fact, the dissent stated that EPA could "take account of multiple factors related to costs of compliance" to "avoid impracticable regulatory burdens" at the categorization and subcategorization stage for certain types of facilities. The dissent did not agree, however, that costs must be considered at the first stage of regulation under § 7412.

The decision can be read as a continuation of a trend away from Court deference to executive agency interpretations of statutory authority. In *Utility Air Regulatory Group v. Environmental Protection Agency*, the Court rejected EPA's request for deference to its interpretation of the Clean Air Act to require certain air permits for greenhouse gas emissions from stationary sources. 573 U.S. ____, 134 S. Ct. 2427, 2442-2443 (2014); *see also* Jones Day *Commentary*, "*Utility Regulatory Group v. EPA*: U.S. Supreme Court Stops EPA's Rewrite of the Clean Air Act" (July 2014). In *King v. Burwell*, the Court expressly refused to apply *Chevron* deference to an agency's interpretation of the Affordable Care Act. 576 U.S. ____ (2015), slip op. at 8. Although the Court framed the *Michigan* analysis with a standard *Chevron* deference discussion, the Court again rejected EPA's interpretation of the Clean Air Act. This string of decisions suggests that EPA cannot count on receiving deference for statutory interpretations that significantly expand its regulatory reach.

Given that the Court remanded the case to the D.C. Circuit, the Rule will technically remain in effect while that court determines EPA's next steps. The form of the ultimate D.C. Circuit mandate will make a difference for whether and when compliance with the MATS Rule is ultimately required. For example, if the D.C. Circuit remands to EPA, MATS may remain in effect while the Agency is considering the required costs and benefits. If the court vacates the Rule, however, EPA must begin the regulatory process again. In that case, power companies may not have to comply with upcoming deadlines under the MATS Rule unless state rules or permit conditions require otherwise.

The decision whether to vacate a flawed rule "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150- 51 (D.C. Cir. 1993). What the parties argue on remand remains to be seen, and as indicated below, may have implications for future challenges to President Obama's forthcoming Clean Power Plan ("CPP"). Procedurally, the next step is likely to be an Order from the D.C. Circuit requesting the parties to file respective Motions to Govern Future Proceedings to address, among other things, whether remand without vacatur, a stay, or vacatur of the Rule is the appropriate remedy.

The Supreme Court's decision and the D.C. Circuit's ultimate resolution of the case also will have implications for electric

and coal companies' legal challenges to the CPP. The CPP, which seeks to cut carbon emissions by 30 percent from 2005 levels by 2030, is promulgated by EPA under § 111(d) of the Clean Air Act. Two versions of § 111(d) of the Clean Air Act were signed into law—one from the Senate and one from the House—and critics of the CPP argue that one version forbids EPA from issuing carbon emissions standards under § 111(d) for sources already covered by other regulations like the MATS Rule. Jones Day *White Paper*, "Review of EPA Authority for Upcoming Rules for Greenhouse Gas Emissions from Electric Power Plants" (February 2014).

If the MATS Rule is ultimately vacated and fossil-fuel-fired power plants are not subject to regulation under the hazardous air pollutant provisions of the Clean Air Act, critics of the CPP may lose one of their legal arguments against the new greenhouse gas regulations. Alternatively, if the D.C. Circuit remands to EPA and the MATS Rule remains in effect, the court's decision will preserve power companies' § 111(d) argument in their challenge of the CPP. Given the significant implications of the D.C. Circuit's upcoming decision, power companies and other challengers of the CPP are likely to press for a speedy resolution. Nevertheless, resolution may not occur before the challenges to the CPP unfold.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Mary Beth Deemer
Pittsburgh
+1.412.394.7920
mbdeemer@jonesday.com

John A. Rego
Cleveland
+1.216.586.7542
jrego@jonesday.com

Thomas M. Donnelly
San Francisco
+1.415.875.5880
tmdonnelly@jonesday.com

Charles T. Wehland
Chicago
+1.312.269.4388
ctwehland@jonesday.com

G. Graham Holden
Atlanta
+1.404.581.8220
ggholden@jonesday.com

Casey F. Bradford
Atlanta
+1.404.581.8119
cbradford@jonesday.com

Kevin P. Holewinski
Washington
+1.202.879.3797
kpholewinski@jonesday.com

Jennifer M. Hayes
Pittsburgh
+1.412.394.7992
jhayes@jonesday.com

Nancy MacKimm
Houston
+1.832.239.3776
nmackimm@jonesday.com

Meghan E. Sweeney
Chicago
+1.312.269.4311
msweeney@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.