



EPA's Consideration of Costs Leaves MATS Rule Unchanged

On April 14, 2016, the U.S. Environmental Protection Agency ("EPA") submitted for publication in the Federal Register a Supplemental Finding,¹ explaining how the agency took costs into account in promulgating Mercury and Air Toxics Standards for power plants (the "MATS Rule") under Section 112 of the Clean Air Act. The Supplemental Finding is EPA's response to the U.S. Supreme Court decision in *Michigan v. EPA*.²

Background

Section 112 of the Clean Air Act authorizes EPA to regulate hazardous air pollutant emissions from power plants if the agency finds that such regulation is "appropriate and necessary."³ EPA initially issued such a finding in 2000,⁴ and reaffirmed the finding when it first promulgated the MATS Rule in February 2012.⁵ EPA's finding was primarily based on its determination that certain hazardous air pollutant emissions from power plants pose risks to public health and the environment. The Rule was subsequently challenged in the United States Court of Appeals for the District of Columbia Circuit, in part on the grounds that EPA was required to consider costs in making its "appropriate and necessary" determination. The D.C. Circuit rejected that argument and upheld EPA's decision not to consider costs.⁶

On June 29, 2015, the United States Supreme Court reversed the D.C. Circuit, holding that EPA must consider costs, including costs of compliance, before deciding whether it is appropriate and necessary to regulate emissions of hazardous air pollutants from power plants. The MATS Rule was remanded to the agency, which proposed a Supplemental Finding in December 2015,⁷ ultimately leading to the current and final Supplemental Finding.

The Supplemental Finding

In the Supplemental Finding, EPA declares that the consideration of costs, including the estimated \$9.6 billion annual cost of compliance, did not cause the agency to alter its previous conclusion that regulation of hazardous air pollutant emissions from power plants is appropriate and necessary. EPA emphasized that no new information provided during the public comment period on the Supplemental Finding convinced the agency otherwise. EPA took two approaches to considering costs.

First, the agency evaluated the costs of the MATS Rule as compared to other metrics relevant to the power sector, including sales, capital expenditures, consumer costs, and reliability. EPA found that the projected annual cost of MATS compliance is between 2.7

and 3.5 percent of annual electricity sales from 2000 to 2011. In response to comments on the proposed Supplemental Finding, EPA added information on historical total production expenditures to its consideration of capital expenditures and determined that the incremental cost due to requirements under the MATS Rule constitutes a small portion (between 3.0 and 5.9 percent) of the power sector's annual capital and production expenditures over a 10 year period. The agency also concluded that the projected impact of the MATS Rule on electricity rates, approximately 0.3 cents per kilowatt hour, was within the range of recent price fluctuations. EPA further reasoned that retirements that may result from the MATS Rule would primarily affect older and smaller units, and that the power sector would be able to comply with the MATS Rule and still satisfy projected electricity demands. After considering each of these metrics, EPA concluded that the cost of compliance with the MATS Rule is reasonable when compared to benefits such as addressing potential harms to public health and the environment.

Second, EPA relied on the formal cost–benefit analysis included in the 2012 final MATS Rule.⁸ In that analysis, EPA estimated that the MATS Rule would yield total annual monetized benefits of between \$37 billion and \$90 billion (using a 3 percent discount rate), or \$33 billion and \$81 billion (using a 7 percent discount rate)⁹ in addition to unquantified benefits. These numbers were calculated by monetizing the benefits of reducing certain health outcomes, including mercury-related IQ points lost, premature deaths, nonfatal heart attacks, hospitalizations for respiratory and cardiovascular diseases, lost work days, restricted-activity days, respiratory illnesses, acute bronchitis, and asthma attacks. Many of these benefits are associated with reductions of sulfur dioxide and particulate matter emissions, which will also occur as a result of the reductions in hazardous air pollutant emissions called for by the Rule. EPA also monetized effects from the reduction in carbon dioxide emissions using the “social cost of carbon” methodology. EPA compared these figures to the projected \$9.6 billion in annual compliance costs and found that the benefits (monetized and nonmonetized) of the MATS Rule outweigh the costs.

Future Implications

Aside from memorializing its consideration of costs, EPA did not amend any other aspects of the MATS Rule through the Supplemental Finding. Challenges to the Supplemental Finding may be filed within 60 days of publication in the Federal Register. Those challenges may focus on whether it is permissible for EPA to support the MATS Rule primarily through reliance on “co-benefits,” meaning the ancillary health benefits resulting from reductions in emissions of criteria pollutants normally regulated under other provisions of the Clean Air Act (rather than reductions of the hazardous air pollutants addressed through Section 112). In *Michigan*, the Supreme Court did not decide whether the Clean Air Act allows EPA to rely on co-benefits,¹⁰ but some of the questions raised during oral argument suggest that, if the Court were presented with the issue, it could decide that EPA may consider only the direct benefits of regulating hazardous air pollutants under the MATS Rule, and may not “bootstrap” the benefits resulting from associated emissions reductions of other pollutants.¹¹

Because the MATS Rule remained in effect throughout the litigation and while EPA was working on the Supplemental Finding, many power plants have already taken significant steps to achieve the standards set by the Rule. The MATS Rule establishes emissions limits for heavy metals (such as mercury, arsenic, chromium, and nickel) and acid gases (including hydrochloric acid and hydrofluoric acid). The Rule's limits are primarily achieved by installing controls such as scrubbers or filters. The initial deadline for coming into compliance was April 16, 2015, but many local permitting authorities granted one-year extensions pursuant to existing Section 112 authority.¹² EPA may grant subsequent deferrals of up to one year, but the agency has made clear that further extensions are not as broadly available as the initial one-year periods.¹³ Most power plants have therefore already installed necessary controls and are or will be coming into compliance by this month. However, certain issues, including whether co-benefits may be considered in making an “appropriate and necessary” determination under Section 112, could affect future rulemakings, and therefore further challenges to the MATS Rule are expected.

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Endnotes

- 1 *Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units.*
- 2 [Case No. 14-46](#), 135 S. Ct. 2699.
- 3 42 U.S.C. § 7412(n).
- 4 [65 Fed. Reg. 79825](#) (Dec. 20, 2000).
- 5 [77 Fed. Reg. 9304](#) (Feb. 16, 2012).
- 6 *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (2014).
- 7 [80 Fed. Reg. 75025](#) (Dec. 1, 2015).
- 8 EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* (Dec. 2011).
- 9 EPA's estimates are in 2007 dollars.
- 10 135 S. Ct. at 2711 (“Even if the Agency could have considered ancillary benefits when deciding whether regulation is appropriate and necessary—a point we need not address—it plainly did not do so here.”).
- 11 [Case No. 14-46 Official Argument Transcript](#) at 59–65.
- 12 42 U.S.C. § 7412(i)(3)(B) (allowing extensions of up to one year if necessary for the installation of controls).
- 13 EPA, *Enforcement Response Policy for Use of Clean Air Act Section 113(a) Administrative Orders in Relation to Electric Reliability and the Mercury Air Toxics Standard* (Dec. 16, 2011).

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