

## EPA Reverses Appropriate and Necessary Determination Supporting the MATS Rule

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EPA's Mercury and Air Toxics Standards (MATS), which regulates emissions of hazardous air pollutants (HAPs) from coal- and oil-fired electric utility steam generating units (EGUs), was promulgated in 2012. Underpinning the rule was EPA's determination under § 112(n)(1)(A) of the Clean Air Act that it is appropriate and necessary to regulate HAP emissions from coal- and oil-fired EGUs. In making its appropriate and necessary determination, EPA did not consider costs, which spurred legal challenges. In 2015, the Supreme Court of the United States held in *Michigan v. EPA* that EPA had unreasonably deemed cost irrelevant to its appropriate and necessary determination. The Court found that EPA "must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary."

The rule was subsequently remanded to EPA to address the identified deficiency, although MATS was allowed to remain in effect. Near the end of the Obama Administration in 2016, EPA made a Supplemental Finding, concluding that the consideration of cost did not alter its determination that it is appropriate and necessary to regulate HAP emissions from coal- and oil-fired EGUs. In the Supplemental Finding, EPA quantified the benefits of MATS by taking into consideration not only reductions in HAP emissions, but also so-called co-benefits of reductions in non-HAP emissions, including reductions in emissions of PM<sub>2.5</sub>. According to EPA, these co-benefits comprised nearly all (approximately 99.9%) of the monetized benefits of MATS (estimated at \$36 billion to \$89 billion in 2015). EPA's Supplemental Finding was subject to legal challenge, and in 2017, EPA requested that the challenge be held in abeyance to allow the Trump Administration to review the Supplemental Finding.

On April 16, 2020, EPA finalized the reversal of the Supplemental Finding. Upon review, EPA determined that equal reliance on co-benefits of reductions in emissions of non-HAP pollutants to support MATS is improper because Clean Air Act § 112 is designed to reduce emissions of HAPs. EPA quantified the benefits of reducing HAP emissions at just \$4 million to \$6 million annually in 2015, which is significantly less than the estimated costs of compliance of \$7.4 billion to \$9.6 billion annually in 2015. Given the imbalance in quantified costs and benefits, EPA concluded that it is not appropriate and necessary to regulate HAP emissions from coal- and oil-fired EGUs.

Although EPA has reversed its appropriate and necessary determination, EPA has left MATS in effect. EPA's position is based on the 2008 holding of the United States Court of Appeals for the D.C. Circuit in *New Jersey v. EPA* that reversal of an appropriate and necessary determination does not remove EGUs from the Clean Air Act § 112(c) list of source categories subject to HAP emission regulation. In order to remove EGUs from the § 112(c) list, EPA would

need to satisfy the delisting criteria in § 112(c)(9). EPA has stated that it does not intend to remove EGUs from the § 112(c) list of affected source categories. Therefore, the MATS rule will remain in effect, and EPA did not alter any of the MATS requirements in the rulemaking.

While EPA's rulemaking does not revoke or revise MATS, it foreshadows the Agency's intended approach to cost-benefit analyses in future Clean Air Act rulemakings. Going forward, EPA intends to place much less weight on co-benefits. Administrator Wheeler stated that although the Agency will "acknowledge co-benefits," it intends for "the actual targeted pollutant [to] be the driver" of regulation.

The rule will likely be challenged in court once it is published in the *Federal Register*. Coal mining groups may seek to overturn MATS entirely, given that the foundation of the rule has been vacated. Environmental groups may seek to challenge EPA's reversal of the Supplemental Finding because EPA did not monetize most of the actual benefits from reductions in HAP emissions, including mercury, lead, and arsenic, nor did EPA take into account actual costs of compliance, which were half of EPA's projected costs. Continue to follow our blog for further updates.

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