

EPA Air Regulations Up In The Air At Supreme Court

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On March 3, 2016, Chief Justice John Roberts denied a request submitted by several states for a stay of the U.S. Environmental Protection Agency's Mercury and Air Toxic Standards Rule (MATS). This is a sharp reversal from the U.S. Supreme Court's unprecedented granting of a stay of the EPA's Clean Power Plan on Feb. 9, 2016, and may be a sign of how much things have shifted on the Supreme Court after Justice Antonin Scalia's passing on Feb. 13, 2016.

Given the strict standard that must be met for the Supreme Court to grant a stay of a pending federal agency rule, Justice Roberts' decision to deny the stay of MATS indicates that he did not believe there was a "fair prospect" that a majority of the Supreme Court would vote to reverse the U.S. Court of Appeals for the D.C. Circuit's judgment if MATS was upheld thereby. This suggests that the Supreme Court views MATS more favorably than the CPP, as the Supreme Court reached the opposite conclusion when presented with a stay request for the CPP just days earlier. The Supreme Court's decision on MATS could also signal that the Court's view of EPA regulations will be more lenient without Justice Scalia's input.

This presumption may be put to the test sooner than expected. On March 14, 2016, a coalition of 20 states petitioned the Supreme Court to review the D.C. Circuit's decision to leave MATS in place while the EPA addresses a legal flaw in its rulemaking process.[1] The recent stay of the CPP, the denial of a stay on MATS and the Supreme Court's consideration of the pending writ of certiorari for the MATS appeal may have significant impact on other pending EPA air regulations, including the Cross-State Air Pollution Rule (CSAPR), discussed in more detail below.

What are MATS and the CPP?

Both MATS and the CPP are rules promulgated by the EPA to reduce air emissions from power plants. MATS was issued by the EPA in December 2011 and seeks to reduce mercury and other acidic emissions from new and existing coal and oil-fired power plants. The CPP is governed by rules that were issued in July 2015 and is designed to reduce CO2 emissions from existing power plants by 32 percent from 2005 levels by 2030. The CPP requires states to submit an implementation plan by Sept. 6, 2016. Extensions may be granted until Sept. 6, 2018. Both rules were subject to immediate legal challenges in the D.C. Circuit by industry, state representatives, environmental organizations and public health organizations.



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With respect to the CPP, the challenge over the legality of the rule is still pending. However, on Jan. 21, 2016, the D.C. Circuit denied the plaintiffs request for a stay pending resolution of the litigation, finding that the CPP did not present an extraordinary case requiring a stay to avoid irreparable harm to the petitioning states and energy industry representatives. Numerous states and state agencies, and later various energy industry trade groups, appealed the D.C. Circuit decision not to stay the CPP and filed applications with Chief Justice Roberts of the Supreme Court asking that implementation of the CPP be stayed until the D.C. Circuit's review was completed.

With respect to MATS, the D.C. Circuit upheld the rule. However, on June 29, 2015, in a 5-4 ruling led by Justice Scalia in *Michigan v. EPA*, the Supreme Court found that, while the EPA has authority to regulate mercury emissions, the EPA acted unreasonably by not considering the costs required for plants to comply with MATS before finalizing the rule.[2] Rather than vacating MATS in its entirety, the Supreme Court remanded the case back to the D.C. Circuit and left it to the EPA to decide "within the limits of reasonable interpretation," how to account for cost.[3] On Dec. 15, 2015, the D.C. Circuit decided that the EPA could continue to enforce MATS while it conducted a cost benefit analysis in response to the Supreme Court's ruling. In December 2015, the EPA issued a proposed finding that considering costs in its proposed rule does not alter the determination that it is appropriate to regulate emissions of toxic air pollution from power plants. On March 14, 2016, 20 states petitioned the Supreme Court to review the D.C. Circuit's decision. The states assert that the D.C. Circuit's decision not to vacate MATS upon remand conflicts similar decisions made by the Fifth and Eight Circuits, thereby establishing a circuit split that the Supreme Court should address.

To Stay or Not to Stay? The Supreme Court's Review of MATS and CPP

As the legal standard for granting an emergency stay of pending agency regulations is extremely high, the applications to the Supreme Court requesting a stay of the CPP appeared to have only a limited chance of success. Surprisingly, Chief Justice Roberts opened the decision up to the entire Supreme Court and, on Feb. 9, 2016, in a brief one page decision, the Supreme Court issued an order that granted the stay. The Supreme Court's succinct 5-4 decision was divided among conservative and liberal justices, with Justice Kennedy voting with the conservative justices.

On Feb. 23, 2016, 20 states, emboldened by the Supreme Court's decision on Feb. 9, 2016 to stay the CPP, decided to petition the Supreme Court to stay MATS until resolution has been reached on the EPA's cost-benefit analysis. While the decision to stay the CPP during the pendency of the D.C. Circuit's review was decided by the full Supreme Court, the decision to deny a stay of MATS was decided solely by Justice Roberts, perhaps to avoid a 4-4 deadlock following the death of Justice Scalia. Justice Roberts' unilateral ruling means that MATS remains in effect pending resolution over whether the EPA properly weighed costs and benefits. As the MATS rule was not deemed to have met the high threshold for granting a stay, MATS arguably has a higher chance of being upheld than the CPP.

Implications for Industry: What Will Happen Next?

As of now, MATS will remain in effect while the EPA conducts a cost-benefit analysis. The EPA is expected to complete a new cost accounting by April 16, 2016, which is the same deadline for plants that had received one-year extensions to come into compliance under MATS. It remains to be seen whether the Supreme Court will hear the states appeal to determine whether MATS should be vacated. Either way, it is likely that the EPA's cost benefit analysis will be challenged upon its completion. Several states have already submitted adverse comments to the EPA's proposed finding, arguing that the EPA's

analysis must be based solely on the costs and benefits of regulating specified air pollutants, not pollutants regulated under other regulations.

Unlike MATS, the EPA is prohibited from implementing or enforcing the CPP until (i) the D.C. Circuit issues a decision on the petitioners challenges to the regulation and no writ of certiorari is filed or (ii) if a writ of certiorari is filed with the Supreme Court, until such writ is denied or the Supreme Court hears the case and issues a final decision. The Supreme Court's grant of the stay will likely delay the September 2016 deadline for submission of state implementation plans. The D.C. Circuit has indicated that it will expedite its review of the CPP, and oral arguments are currently scheduled for June 2, 2016. Should a D.C. Circuit decision be issued by the fall of 2016 and should the Supreme Court grant certiorari to consider the case on its merits, a final decision would not be reached until 2017, at the earliest.

Environmental and industry groups debate the significance of the CPP stay, denial of the MATS stay and the realignment of the Supreme Court after Justice Scalia's passing. The CPP stay seemed to signal that the EPA would have to pare back its air regulations, whereas the denial of the MATS stay signaled the opposite. Many power plants affected by MATS have already made the necessary emissions control upgrades to comply with the pollution standards. Some existing coal-fired power plants have closed as a result of cheap natural gas and increasingly competitive electricity production from renewable energy sources and, arguably, the early impacts of the CPP, MATS and other EPA air regulations. Other fossil fuel-fired power plants have already taken significant action to reduce their overall greenhouse gas emissions, especially in states, including California, Colorado and the states that participate in the Regional Greenhouse Gas Initiative,[4] which already regulate such emissions. Despite the stay of the CPP, many states continue to move forward with preparing state implementation plans. More than 30 states are currently on pace to be halfway to reaching their CPP emission reduction targets in just five years, with 21 states on target to exceed their emission reduction goals.[5] Further, President Obama's recent 2016 budget proposal seeks to extend tax credits for wind and solar power, while many states are implementing renewable energy targets on their own initiative, signaling continued momentum in the transition to a low-carbon economy.

Additional EPA Regulations: What do These Decisions Mean for Current and Future EPA Air Regulations such as CASPR?

The CPP and MATS are not the only recent EPA air regulations receiving thorough judicial scrutiny. The CSAPR, issued in July, 2011, requires states to significantly improve air quality by reducing power plant emissions that contribute to ozone or fine particle pollution in other states. In August 2012, the D.C. Circuit vacated CSAPR, alleging that it improperly required states to reduce their emissions by more than their own contribution to a downwind state's nonattainment. This decision was overturned on appeal to the Supreme Court, which remanded CSAPR to the D.C. Circuit. In October 2014, the D.C. Circuit granted the EPA's request to lift the stay and toll the CSAPR compliance deadlines by three years, to allow for adequate time for the rule's implementation. On Feb. 26, 2016, the EPA issued a ministerial action aligning the dates in the CSAPR rule text with its revised implementation. The first phase of implementation began in 2015 and Phase 2 will commence in 2017.

The ongoing legal challenge to various EPA air regulations and related political repercussions of the CPP stay are now even more in flux given the MATS decision and subsequent challenge and the current vacancy on the Supreme Court. The future makeup of the Supreme Court and any action before a new justice is confirmed by the Senate are extremely difficult, at best, to predict. Although President Obama has nominated to the Supreme Court the current D.C. Circuit Chief Judge Merrick Garland, who has sided with the EPA in several regulatory challenges before the D.C. Circuit during his tenure, including

decisions related to the MATS challenge,[6] confirmation of the Supreme Court nominee will likely involve a protracted political battle that may ultimately be determined by the next elected president. Although all federal judges must recuse themselves if their impartiality may “reasonably be questioned,”[7] Supreme Court justices ultimately decide whether to participate in a case. The results of the presidential and congressional elections in November could also lead to revocation or modification of the CPP, MATS or CASPR.

These recent decisions signal that, as expected, the Supreme Court without Scalia might not be as strongly opposed to EPA regulations, or as likely to grant stay requests pending ongoing litigation. The fact that Chief Justice Roberts denied the MATS stay, just a few weeks after joining in the stay of the CPP, suggests that the Supreme Court’s unprecedented decision to stay the CPP was an outlier rather than the beginning of a trend. However, the balance of power on the Supreme Court for environmental decisions, and the future of the CPP, MATS and CSAPR remains to be seen.

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[1] <http://src.bna.com/dmJ>.

[2] http://www.supremecourt.gov/opinions/14pdf/14-46_10n2.pdf.

[3] http://www.supremecourt.gov/opinions/14pdf/14-46_10n2.pdf.

[4] Including Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.

[5] <http://www.ucsusa.org/global-warming/reduce-emissions/clean-power-plan-states-of-progress#.VrvU79srLIV>.

[6] http://www.law360.com/environmental/articles/772367?nl_pk=8bee01a2-3aac-47b0-81b7-f7f1a0a73e0b&utm_source=newsletter&utm_medium=email&utm_campaign=environmental.

[7] 28 U.S.C. § 455.