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Project Finance Group Client Alert: Supreme Court Decides No to Stay MATS

On March 3, 2016, Chief Justice Roberts denied a request submitted by several states for a stay of the Environmental Protection Agency's ("EPA") Mercury and Air Toxic Standards Rule ("MATS"). This is a sharp reversal from the Supreme Court's unprecedented granting of a stay of the EPA's Clean Power Plan ("CPP") on February 9, 2016, and may be a sign how much things shifted on the Supreme Court upon Justice Scalia's passing on February 13, 2016. For an in-depth discussion of the CPP and the effect of the recent stay, please see our previous client alert titled "*Cloudy Future for the Clean Power Plan After the Supreme Court Stay and Scalia's Passing*" published on February 18, 2016. Available [here](#).

Given the strict standard that must be met for the Supreme Court to grant a stay of a federal agency's rule, Justice Roberts' decision to deny the stay indicates that he did not believe there was a fair prospect that a majority of the Supreme Court would vote to reverse the D.C. Circuit's judgment if MATS was upheld thereby. This suggests that the Supreme Court views MATS more favorably than the CPP given that the majority of the Supreme Court recently concluded that there was a fair prospect that the Supreme Court would vote to reverse the D.C. Circuit's judgment if the CPP was upheld. However, this decision could also signal that the Supreme Court's view of EPA's regulations will be more lenient without Justice Scalia's input.

While the decision to stay the CPP during the pendency of the lower court'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 MATS remains in effect pending resolution over whether the EPA properly weighed costs and benefits in drafting MATS.

MATS AND PENDING CHALLENGE

MATS seeks to reduce mercury and other acidic emissions from new and existing coal and oil-fired power plants by requiring such plants to comply with MATS requirements by April 2015. MATS was issued by the EPA in December, 2011 and became subject to legal challenge on day one. Industry, states, environmental organizations, and public health organizations challenged many aspects of the rule. The D.C. Circuit Court denied all challenges. On June 29, 2015, in a 5-4 ruling led by Justice Scalia in *Michigan v. EPA*, the Supreme Court found that the EPA has the authority to regulate mercury emissions, but that the EPA acted unreasonably by not considering the costs required for plants to comply with MATS before finalizing the rule. Rather than vacating MATS in its entirety, the Supreme Court left it to the EPA to decide “within the limits of reasonable interpretation,” how to account for cost.

The D.C. Circuit Court ruled in December, 2015 that the EPA could continue to enforce MATS while it conducts a cost 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. Twenty states, emboldened by the Supreme Court’s decision 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.

IMPLICATIONS FOR MATS OTHER EPA REGULATIONS

MATS will now remain in effect while the EPA conducts its cost-benefit analysis. In other words, the EPA does not need to start from square one, but instead can assess whether there are any holes to fix and, if so, to provide a cure. 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 under MATS to come into compliance. A large number of power plants affected by MATS have already made the necessary emissions control upgrades to comply with the pollution standards, or have shut down.

This decision signals that, as expected, the Supreme Court sans 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 this 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. The balance of power on the Supreme Court for decisions made during the time when it only has eight justices remains to be seen. The current balance will be greatly shifted again after a ninth justice is approved.

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