

Supreme Court's Ruling on the Mercury and Air Toxics Standards (MATS)

June 29, 2015



Background

On June 29, 2015, the U.S. Supreme Court issued an opinion reversing a 2014 D.C. Circuit Court of Appeals decision that upheld EPA's Mercury and Air Toxics Standards (MATS). A brief summary of the Court's decision is provided below:

The Clean Air Act requires that EPA study hazardous air pollutant (HAP) emissions from power plants before deciding whether regulating HAP emissions from power plants is "appropriate and necessary." EPA completed that study in 1998, and in December 2000 EPA published its conclusion that the regulation of coal- and oil-fired power plants was appropriate and necessary. EPA based its determination on a finding that HAP emissions from power plants pose a risk to human health and the environment, and that controls were available to reduce these emissions. EPA did not take into consideration the costs associated with controlling HAP when deciding whether regulations were appropriate and necessary. The D.C. Circuit upheld the EPA's decision not to consider costs. The Supreme Court reversed this decision, holding that EPA must consider costs, including compliance costs, before deciding to develop regulations. The Supreme Court remanded the case back to the D.C. Circuit for further proceedings consistent with its opinion.

Impact of the Supreme Court's Decision

It is important to understand that the Supreme Court did not vacate the MATS Rule; therefore, the rule remains in effect until the D.C. Circuit revisits its previous decision. Upon rehearing, the D.C. Circuit could:

1. Vacate the rule and send it back to EPA for further rulemaking.
2. Stay the implementation of the rule while EPA addresses the deficiencies in the rulemaking process (i.e., includes costs in its determination of reasonable and necessary).
3. Leave the MATS Rule in place while EPA addresses the deficiencies in the rulemaking process.

There is no way to predict how the D.C. Circuit will proceed; however, we think it unlikely given the long history of the MATS Rule that the court will vacate the rule in its entirety. A more likely outcome would be that the D.C. Circuit allows the MATS Rule to remain in place while EPA completes its cost impact evaluation. Alternatively, the court could temporarily stay the implementation of the rule while EPA completes the cost evaluation. Under this scenario, units that have not been issued a permit that includes MATS emission limits or installed their MATS control systems may have additional time to come into compliance. EPA has already developed MATS-related compliance costs and benefits, so the cost impact evaluation could be done in an expedited manner.

It will take some time for the D.C. Circuit to issue its revised decision; however, scenarios published by

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environmental law firms suggest that a decision could come before the end of the year, at the earliest. One possible time line for the D.C. Circuit's review is presented below:

Date	Judicial Action
June 29, 2015	Supreme Court rules that EPA should have considered costs and remands the issue back to the D.C. Circuit for further proceedings.
August 1, 2015	D.C. Circuit issues 90-day briefing schedule.
November 1, 2015	Briefing schedule concludes.
December 15, 2015	D.C. Circuit issues decision on how to proceed
Potential Outcomes	<ol style="list-style-type: none"> 1. Keep MATS Rule in place while EPA addresses deficiencies – Compliance continues as currently scheduled. 2. Stay implementation of MATS Rule while EPA addresses deficiencies – Compliance delayed another 1 to 2 years while EPA completes its cost impact analysis. 3. Vacate the MATS Rule and remand to EPA - Compliance delayed another 2 to 3 years while EPA completes its cost impact analysis and proposes/finalizes a replacement rule.

Most likely to least likely

What to Do in the Meantime

Facilities that have already installed MATS controls to meet the April 2015 compliance date will have to continue to comply with all applicable MATS requirements at least until the D.C. Circuit issues its decision. Given the possibility that the D.C. Circuit Court could simply stay the implementation of the MATS Rule or leave the rule in place while EPA develops its cost evaluation, facilities that received the one-year compliance extension should continue to work toward the April 2016 compliance date.

Even if the federal MATS Rule is ultimately vacated, facilities that have installed controls and been issued a permit with the MATS emission limits may still be required to meet those emission limits. The continued enforceability of the MATS emission limits will likely depend on how the emission limits were adopted and incorporated into the facility's permit. The Clean Air Act allows states to adopt emission standards that are more stringent than the federal standards; therefore, assuming the state standards were adopted in accordance with state requirements, it's likely that HAP emission limits would remain state-enforceable

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limits. Answers to the following questions would support a case-by-case analysis of whether permit limits would continue to be enforceable by the state:

1. Was the facility issued a permit that included the MATS emission limits?
2. If so, was it a construction permit or a modification to the facility's Title V Operating Permit?
3. Has the facility installed their MATS control systems?
4. Under what authority was the permit was issued:
 - a. Did the state adopt the federal regulations by reference, or
 - b. Did the state implement its own MATS rule through legislative action?
5. Does the state have separate mercury control standards?

Potential Impact on Other Pending Regulations

It does not appear that the Supreme Court's MATS decision will have a significant impact on other recently published or proposed environmental regulations including the proposed Clean Power Plan. The Court's decision focused exclusively on §112(n) of the Clean Air Act which requires EPA to perform a study of HAP emissions from power plants in order to determine whether regulating emissions from power plants is appropriate and necessary. The Clean Power Plan regulations are being promulgated under §111(d) of the CAA, and cost is one of the factors EPA considers when developing standards under section 111 of the Act.

Summary

The MATS Rule remains in effect until the D.C. Circuit Court decides how to proceed. There will be some regulatory uncertainty until the D.C. Circuit Court publishes its decision; however, given the long history of the MATS Rule it appears likely that the MATS Rule will remain in effect while EPA develops its cost impact evaluation. Assuming the D.C. Circuit does not vacate or stay the implementation of the rule, all facilities must continue to work toward the April 2016 compliance date.

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