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IN FOCUS

August 17, 2020

Judicial Review of Mercury and Air Toxics Regulations

Since 1990, the U.S. Environmental Protection Agency's (EPA's) efforts to regulate mercury and other hazardous air pollutants (HAPs or air toxics) emitted by power plants have faced numerous legal challenges. The Clean Air Act (CAA) Amendments of 1990, Pub. L. 101-549, established a multistep process for EPA to regulate HAP emissions from fossil fuel-fired electric utility steam generating units (i.e., power plants). One of those steps requires EPA to regulate HAP emissions from power plants if the agency determines that it is "appropriate and necessary" to do so.

Stakeholders have challenged each of EPA's "appropriate and necessary" findings and other actions to regulate HAP emissions from power plants. Most recently, litigants are challenging EPA's May 2020 rule that concluded that HAP emission limits for coal- and oil-fired power plants are not "appropriate and necessary" under the CAA (2020 Appropriate and Necessary (A&N) Rule, 85 Fed. Reg. 31,286, May 22, 2020). This rulemaking reversed a prior EPA-issued rule that such limits *were* appropriate and necessary, though EPA declined to rescind the emissions limits that were associated with the prior finding. This In Focus reviews the history of litigation challenging EPA's treatment of HAP emissions from power plants under CAA Section 112 and identifies legal issues that will likely arise in the current litigation.

CAA Section 112 Framework

CAA Section 112(c) requires EPA to identify and list categories of HAP pollution sources prior to regulating their HAP emissions. Under Section 112(c)(9), EPA may delist a source category only if the EPA Administrator makes specific findings that the health and environmental effects of the sources' emissions in that category do not exceed certain thresholds.

Congress explicitly required EPA to assess power plant HAP emissions and consider their regulation. Specifically, CAA Section 112(n) required EPA to study the "hazards to public health reasonably anticipated to occur" from HAPs emitted by power plants once the agency had imposed other CAA requirements, and to regulate those emissions if the agency "finds such regulation is appropriate and necessary after considering the results of the study."

The 2000 A&N Finding and Listing

EPA completed the Section 112(n)(1) study in 1998. In 2000, EPA determined that it was "appropriate and necessary" to regulate HAPs from coal- and oil-fired power plants and listed them as a source of hazardous pollution (2000 A&N Finding, 65 Fed. Reg. 79,825, Dec. 20, 2000). EPA did not issue emission standards as part of the A&N Finding. In 2001, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) dismissed challenges to the 2000 A&N Finding, holding that the matter was nonjusticiable until EPA issued emission standards (*UARG v. EPA*, No. 01-1074 (D.C. Cir., Jul. 26, 2001)).

The 2005 Delisting and the Clean Air Mercury Rule

In 2005, EPA reversed the 2000 A&N Finding (70 Fed. Reg. 15,994, Mar. 29, 2005). EPA concluded that it had erred in the 2000 rule by relying solely on environmental factors without considering the potential mercury emissions reductions achievable under other CAA requirements. EPA determined that in light of these potential reductions, regulating power plant emissions under Section 112 was neither appropriate nor necessary, and it delisted power plants as a source of HAP emissions.

In place of regulating power plant emissions under Section 112, EPA issued the Clean Air Mercury Rule (CAMR) pursuant to CAA Sections 111(b) for new power plants and 111(d) for existing power plants (70 Fed. Reg. 28,606, May 18, 2005). CAMR set mercury performance standards for new power plants and created a voluntary mercury cap-and-trade program for new and existing power plants.

In 2008, the D.C. Circuit vacated the 2005 delisting of power plants as a HAP source because EPA failed to make the health and environmental findings set forth in CAA Section 112(c)(9) prior to delisting (*New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008)). Further, the court vacated CAMR as applied to existing power plants because, as EPA conceded, if power plants are listed under Section 112(c), EPA lacked authority to regulate them under Section 111(d). The court also vacated and remanded CAMR as applied to new power plants in part because EPA issued the Section 111(b) new source performance standards based on the erroneous "vital assumption[]" that EPA would not regulate new power plants under Section 112.

The 2012 Mercury and Air Toxics Rule and the 2016 Supplemental Finding

After settling a suit seeking enforceable deadlines for EPA to regulate HAP emissions from power plants, EPA promulgated the Mercury and Air Toxics (MATS) Rule in 2012 (77 Fed. Reg. 9304, Feb. 16, 2012). The MATS Rule reaffirmed the 2000 A&N Finding and, based on additional analysis and information, determined that setting HAP emissions standards for most existing coal- and oil-fired power plants under Section 112 was "appropriate and necessary." As part of the rule, EPA concluded that it was not "appropriate to consider costs" when making an A&N finding.

The D.C. Circuit upheld the MATS Rule in 2014 (*White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222 (D.C. Cir.

2014)), but the Supreme Court reversed the decision (*Michigan v. EPA*, 576 U.S. 743 (2015)), ruling that EPA must consider cost in Section 112 A&N findings. The Court declined to vacate the MATS Rule, however, as did the D.C. Circuit on remand, leaving the MATS Rule in effect.

In response to the Supreme Court's ruling, EPA finalized a supplemental A&N finding in 2016, which concluded that the 2000 A&N finding that regulating power plant emissions is "appropriate and necessary" was still valid after taking into account the MATS Rule's estimated costs (2016 Supplemental Finding, 81 Fed. Reg. 24,420, Apr. 25, 2016). Industry groups challenged the 2016 Supplemental Finding, but in 2017, the D.C. Circuit paused the litigation while EPA reconsidered it (*Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir.)).

Current Status and Next Steps

The 2020 A&N Rule reversed the 2016 Supplemental Finding. EPA found that its prior analysis was flawed because it gave "equal weight" to direct benefits (HAP emission reductions) and co-benefits (non-HAP emission reductions) of the regulation. Excluding co-benefits from the cost-benefit comparison led EPA to conclude that regulating HAP emissions from power plants is not "appropriate and necessary" because monetized costs exceed by a factor of 1,000 the monetized benefits of HAP-specific emissions reduction.

The 2020 A&N Rule does not, however, remove coal- and oil-fired power plants from the Section 112 list. Consistent with *New Jersey v. EPA*, EPA recognized that it could not remove power plants from the Section 112 list by reversing an A&N finding without satisfying the health risk criteria set forth in CAA Section 112(c)(9). Finding that the estimated cancer risk from exposure to power plant HAPs would fail to meet the health risk criteria, EPA noted that it is "extremely unlikely that any EPA Administrator could (much less would) lawfully exercise his or her discretion [under CAA Section 112(c)(9)] to 'de-list' the coal- and oil-fired power plant source category." As long as power plants remain listed as a source category, EPA concluded that the MATS Rule emissions limits must remain in effect.

Six groups have filed challenges to the 2020 A&N Rule: (1) Westmoreland Mining Holdings, a coal producer; (2) a coalition of public health and environmental organizations; (3) a coalition of 20 states and five local governments; (4) a group of emission control technology suppliers; (5) a state energy utility company; and (6) three utility companies that generate electricity from low-emissions sources. The D.C. Circuit has consolidated the cases, along with a challenge by some of the same parties to EPA's residual risk and technology review (RTR) that accompanied the 2020 A&N Rule (*Westmoreland Mining Holdings, LLC v. EPA*, No. 20-1160 (D.C. Cir.)). In the RTR, EPA evaluated the risk to public health remaining after applying the MATS Rule's technology-based standards and concluded that no changes to the MATS Rule were warranted.

Westmoreland is seeking review of not only the 2020 A&N Rule but also the 2016 Supplemental Finding, the 2012 MATS Rule, and the 2000 A&N Finding and listing rule. The public health and environmental organizations, a subset of the state and local governments challenging the 2020 A&N Rule, the emissions control technology companies, and the three utility companies have moved to intervene in Westmoreland's suit to defend these agency actions.

The court has not set a briefing schedule, and the full set of issues the petitioners will raise is not yet known. Based on the comments submitted on the proposed 2020 A&N Rule, as well as the relevant litigation history, several key issues will likely arise in the case or its aftermath:

- **Whether EPA may reverse an A&N finding without satisfying the Section 112(c)(9) delisting criteria:** EPA asserts that an A&N finding "is structurally and functionally separate" from the agency's authority to delist source categories.
- **Whether the 2020 A&N Rule affects the MATS Rule and EPA's authority to regulate HAP emissions from power plants:** Westmoreland will likely argue that rescinding the prior A&N finding leaves the MATS Rule without a legal basis, and that the MATS Rule must therefore be vacated.
- **Whether EPA's framework for analyzing benefits and costs is reasonable:** Public health and environmental organizations, state and local governments, and utility companies will likely challenge both the agency's exclusion of co-benefits and how it quantified specific costs and benefits.
- **Potential effect on related litigation:** The court ordered the parties challenging the 2016 Supplemental Finding to submit their proposals for how the case should proceed once it resumes (*Chesapeake Climate Action Network v. EPA*, No. 15-1192 (D.C. Cir.)). Those proposals will likely address whether the case is moot in light of the reversal of the 2016 Supplemental Finding. Environmental groups have also challenged EPA's HAP emissions standards for certain coal waste-fired plants, which the agency issued in April 2020 after reevaluating data from the MATS Rule (*Citizens for Pennsylvania's Future v. EPA*, No. 20-1207 (D.C. Cir.)). A ruling in the 2020 A&N Rule litigation addressing the legal basis of the MATS Rule may affect the litigation over the April 2020 emission standards.
- **Potential effect on existing power plants:** Power plants have already installed controls to comply with the MATS Rule deadlines. However, the litigation over the 2020 A&N Rule could still affect their emission control strategies. Some stakeholders are concerned that if the court vacates the MATS Rule, power plants may shut off their existing pollution controls absent federal enforcement of their HAP emissions.

For more information, see CRS In Focus IF11078, *EPA Reconsiders Benefits of Mercury and Air Toxics Limits*.

Kate R. Bowers, Legislative Attorney
Linda Tsang, Legislative Attorney

IF11622

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