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D.C. Circuit Upholds Mercury and Air Toxics Standards (MATS) for Existing Sources

On April 15, 2014, the D.C. Circuit denied all petitions for review of the National Emission Standards for Hazardous Air Pollutants (NESHAPs) for existing coal- and oil-fired electric generating units (EGUs) issued under Section 112 of the Clean Air Act. The court dismissed for lack of standing the petition from Julander Energy, which sought consideration of fuel-switching to natural gas as a beyond-the-floor control technology. All other ripe petitions were denied (a few issues were not decided at this time due to pending petitions for review).

This brief summarizes the decision.

Background

On December 20, 2000, EPA determined pursuant to Clean Air Act section 112(n)(1)(A) that it was "appropriate and necessary" to regulate hazardous air pollutant (HAP) emissions from coal- and oil-fired EGUs under section 112 and added such units to the section 112(c) list of sources that must be regulated under section 112(d). On February 16, 2012, EPA finalized National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units (Utility NESHAP), which reaffirmed the 2000 finding and established standards for hazardous air pollutant (HAP) emissions from new and existing coal- and oil-fired electric utility steam generating units (EGUs).

The rule imposes the first federal limits on emissions of power plant HAPs and requires overall reductions in mercury emissions of 90 percent as well as reductions in acid gases and particulate matter. Several parties challenged the rule, and the D.C. Circuit heard oral arguments in the existing source case December 10, 2013.

The Decision

The panel consisted of Chief Judge Garland and Circuit Judges Rogers and Kavanaugh. Judge Rogers wrote the parts of the majority opinion that provides the background (Section I), addresses the challenges to the "appropriate and necessary" finding (Section II), and the discussion dismissing the claims by the environmental NGOs and Julander Energy Company that the rule was not sufficient stringent (Section IV). Judge Kavanaugh wrote Section III of the majority opinion that addressed the remaining issues as well as his dissent to the majority's "appropriate and necessary" discussion and his concurrence regarding the standing for Julander Energy Company.

"Appropriate and Necessary" Determination (Section II)

State, Industry, and Labor petitioners challenged EPA's interpretation and application of the "appropriate and necessary" requirement in § 112(n)(1)(A). Petitioners challenged both the December 2000 as well as

the most recent determination. However, the court dismissed challenges to the December 2000 finding, noting that the "court need not decide whether EPA's December 2000 'appropriate and necessary' finding was procedurally or substantively valid because EPA reconsidered and 'confirm[ed]' that determination in the Final Rule." (Page 15) One of the central issues was whether EPA was required to consider costs in determining whether it was "appropriate and necessary" to regulate EGUs under section 112, and the court notes that "§112(n)(1)(A) neither requires EPA to consider costs nor prohibits EPA from doing so." (Page 21) Although the Petitioners and dissent argue that "appropriate" can only be interpreted to include consideration of cost, the majority concludes that "Congress sought, as a threshold matter, to have EPA confirm the nature of the public health hazards from EGU emissions." (Page 26) Thus, on the question of whether EPA was required to consider costs in making its threshold decision to list EGUs under section 112, the court holds that

> EPA has explained why it concluded costs were not part of the 'appropriate and necessary' determination, and given Congress's choice to leave the factors entering into that determination to EPA, petitioners, and our dissenting colleague, fail to demonstrate that EPA's considered judgment about the factors to be considered was unlawful as an impermissible and unreasonable interpretation of § 112(n)(1)(A). (Page 29)

In response to the dissent's argument that EPA was required to consider costs,[1] the majority explains that "EGUs' hazardous emissions were relieved of regulation until completion of a study, and once the study confirmed the serious public health effects of hazardous pollutants from EGUs, Congress gave no signal that the matter should end if the remedy was costly." (Page 26) The majority also cites EPA's final rule to note that the "benefits of this rule outweigh its costs by between 3 to 1 or 9 to 1." (Page 27)

In addition to cost, petitioners argued that EPA could not rely on the delisting provisions of section 112(c)(9) in making the pre-listing decision on whether it was "appropriate and necessary" to regulate EGUs. EPA argued that it looked to those criteria as evidence of "congressional judgment as to what degree of risk constitutes a health hazard." (Page 18) The court finds this approach to be a reasonable construction and entitled to deference.

Petitioners also argued that EPA could only consider public health hazards and could not consider environmental or other harms. Similarly, the court holds that EPA could consider environmental effects and notes that it "need not decide whether environmental effects alone would allow EPA to regulate EGUS...because EPA did not base its determination solely on environmental effects." (Page 31)

With respect to petitioners' argument that EPA was required to base its "appropriate and necessary" determination only on public health hazards that occur exclusively due to EGU HAPs, the court notes that

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[1] Judge Kavanaugh dissents on the majority's determination that EPA correctly decided the "appropriate and necessary" determination. Judge Kavanaugh would have found that costs were inextricably part of the "appropriate" portion of the determination. (Page 1 of dissent) He argues that: "[EPA's] only statutory direction is to decide whether it is 'appropriate' to go forward with the regulation. Before making that decision, what information would you want to know? You would certainly want to understand the benefits from the regulations. And you would surely ask how much the regulations would cost. You would no doubt take both of those considerations – benefits and costs – into account in making your decision. That's just common sense and sound government practice. So it comes as a surprise in this case that EPA excluded any consideration of costs when deciding whether it is 'appropriate' – the key statutory term – to impose significant new air quality regulations on the Nation's electric utilities. In my view, it is unreasonable for EPA to exclude consideration of costs in determining whether it is "appropriate" to impose significant new regulations on electric utilities." (Page 1 of dissent)

EPA's interpretation is entitled to deference. EPA had explained that "focusing on HAP emissions from EGUs alone when making the appropriate finding ignores the manner in which public health and the environment are affected by air pollution." (Page 32) While this departed from the Agency's 2005 approach, EPA argued that the prior approach was flawed. Significantly, the court notes that EPA's Mercury Study concluded that "'even if there were no other sources of [mercury] exposure, exposures associated with deposition attributable to U.S. EGUs' would place the most susceptible populations above the methylmercury reference dose." (Page 32) Thus the court concludes that "EPA did find, as petitioners contend it was required to do, that EGU emissions alone would cause health hazards." (Page 33)

Petitioners also argued that because of the treatment of EGUs in §112(n)(1)(A), Congress intended EPA to regulate EGUs differently form other sources. The court, however, agrees with EPA and notes that under section 112, "the statutory framework for regulating HAP sources appears in §112(c), which covers listing, and §112(d), which covers standard-setting." (Page 34)

Lastly, petitioners also challenged EPA's authority to promulgate standards for all listed HAPs and not just those HAPs for which EPA expressly determined caused health or environmental hazards. However, the court again agreed with EPA and found EPA's interpretation entitled to deference.

Additional Challenges from Petitioners (Section III)

Scientific Record to Support Regulation of Specific HAPs. Petitioners had challenged whether EPA sufficiently quantified the contribution of EGU mercury emissions to overall mercury exposure. However, the court concludes that "EPA is not obligated to conclusively resolve every scientific uncertainty." (Page 37). Rather, the court finds that EPA's "appropriate and necessary" determination is supported by the scientific evidence.

Major Source Classification. On the issue of whether the Act required EPA to distinguish between "major sources" and "area sources", the court holds that "§ 112(d) does not require EPA to regulate EGUs as 'major sources' and 'area sources'; it merely says that, *if* EPA lists major and area sources, it must then regulate them according to the separate provisions." (Page 39; emphasis in original) Further, the court notes that "EPA's decision not to draw such a distinction here is a reasonable one. As EPA emphasizes, distinguishing between major source and area source EGUs runs counter to the separate statutory provisions governing EGUs. While other sources are classified as major or area sources depending on the quantity of emissions they emit, § 112 specifically defines EGUs in terms of their electrical output... Consistent with ordinary rules of statutory construction, EPA reasonably relied on the more specific definition in § 112(a)(8) rather than the general definitions applicable to all other sources." (Page 39)

Mercury MACT Floor. Petitioners had argued that EPA collected data from only the best-performing EGUs for mercury emissions, and as a result, contended that the standard reflected the results achieved by the "best of the best" and not the result of the best 12 percent of all EGUs as required by the Act. The court, however, holds that the assertions by the Petitioners were not supported by the record. The court agrees with EPA that while "it would be arbitrary and capricious for EPA to set a MACT floor based on intentionally skewed data, the facts indicate that EPA did not do so here. Nor does the record suggest that EPA's data collection efforts resulted in unintentional bias. ... In short, EPA's data-collection process was reasonable, even if it may not have resulted in a perfect dataset." (Pages 41-42)

Acid Gas HAP. Petitioners objected to EPA's decision not to set a health-based standard for HCl as permitted under § 112(d)(4). However, the court finds that "Section 112(d)(4) makes clear...that EPA's authority to set alternate standards is discretionary. ...EPA concluded that it lacked enough evidence to determine whether an alternative standard would protect health 'with an ample margin of safety.' ... Petitioners dispute EPA's weighing of the evidence, but petitioners offer no compelling basis for second-

guessing EPA's analysis." (Page 42) Relatedly, petitioners challenged that consideration of ecosystem effects when regulating of acid gas emissions conflicted with the statutory Acid Rain Program. However, the court holds that "petitioners failed to raise that argument before the agency, and did not raise it in this court until their reply brief." Thus, the court deemed the argument forfeited. (Page 42)

UARG Delisting Petition. Petitioners argued that EPA's denial of UARG's delisting petition was arbitrary and capricious. The court rejects these challenges finding that "UARG's delisting petition did not demonstrate that EPA could make either of the two predicate findings required for delisting under § 112(c)(9)(B): (1) that no source in the category emits HAP "in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed" and (2) that emissions from no source in the category "exceed a level which is adequate to protect public health with an ample margin of safety." (Page 43)

Chromium Emissions Data. Petitioners also challenged data on which EPA relied to assess non-mercury health impacts. However, the court disagrees and explains that "EPA did not act arbitrarily or capriciously in relying on the chromium emissions data to which petitioners object. EPA reasonably believed that these representatives — given their 'concern[] about data accuracy' — would review 'all data before certifying their accuracy and submitting them to the EPA.'...EPA did not err in relying on this certified data." (Page 44; internal citations removed) Thus, the court could not "consider the data from petitioners' independent resampling, which was conducted after the Final Rule issued and was not part of the administrative record." (Page 44)

Circulating Fluidized Bed (CFB). A group of electric utilities and industry also challenged EPA's decision not to create a separate subcategory for circulating fluidized bed EGUs (CFBs). Again, though, the court finds that the Act provides EPA with deference and EPA was not required to subcategorize CFB units. The court explains "EPA's decision not to create a CFB subcategory in the Final Rule is reasonable and well-supported by the record. Among other things, EPA noted that CFBs were among the best and worst performers for various pollutants, indicating that CFBs have emissions profiles similar to other coal-fired units despite their operational differences." (Page 45) Additionally, the court notes that "EPA's decision to subcategorize CFBs in the Boiler MACT Rule is not to the contrary. There, EPA concluded that CFBs presented relevant differences with respect to carbon monoxide — not mercury, acid gases, or particulates (the pollutants at issue in this rulemaking)." (Page 45)

MACT Floor for Lignite Units. EPA did create a subcategory for lignite-fired EGUs, and industry petitioners argued that EPA erred in calculating the MACT floor for these units and picked the top 6 percent of units as opposed to the top 12 percent. However, the court holds that "EPA has offered a reasonable, non-biased explanation of its data-collection and analysis process". (Pages 46-47)

Beyond-the-Floor Limit for Lignite Units. In response to industry petitioners' contention that the beyond-the-floor limit for lignite-fired EGUs is not achievable, the court rejects the challenge, noting that "the record contains no data inconsistent with EPA's position on the efficacy of activated carbon injection, [and thus the court defers] to the agency's determination that the beyond-the-floor emission standard for lignite-fired EGUs is achievable." (Page 48)

Blanket Extension for Public Power Companies. Public utility petitioners argued that public power units should receive a blanket one-year extension for compliance. Similarly, the court notes that"[o]nce again, petitioners' argument amounts to a claim that a decision the Clean Air Act leaves to EPA's discretion should instead be mandatory" and finds that EPA's decision not to issue a blanket extension was not arbitrary or capricious. (Page 48)

Challenges from Environmental Groups (Section IV)

Environmental petitioners, including Chesapeake Climate Action Network, Conservation Law Foundation, Environmental Integrity Project, and Sierra Club, challenged emissions averaging and options for non-mercury metal HAP emissions monitoring.

Emissions Averaging. While challenges to emissions averaging are also the subject of a pending petition for reconsideration, the court concludes it could decide the issue here. The court explains that the environmental petitioners' main objection was that the Final Rule did not include a "discount factor" whereby emission rates would be reduced for sources using an averaging alternative. However, the court finds that "EPA permissibly interpreted § 112(d) to allow emissions averaging as provided for in the Final Rule" (Page 51) and EPA sufficiently explained why the Agency determined that a discount factor was unnecessary.

Monitoring. The environmental petitioners had argued that stack testing conducted quarterly or once every three years could not provide reasonable assurance of compliance. Again, though, the court finds that EPA has broad discretion and "has provided a reasonable explanation for its determination that each of [the non-continuous] monitoring options complies with the statutory requirements of CAA §§ 114 and 504." (Page 55)

Upper Prediction Limit (UPL).[2] In evaluating the calculation of the MACT floor for lignite units, the court notes that "EPA accounted for variability due to differing chemical compositions of coal by applying its Upper Prediction Limit analysis...Industry petitioners...suggest in passing that EPA's results are flawed..., but offer no explanation as to why that is so. Such cursory treatment is inadequate to place their challenge to EPA's variability analysis before the court." (Page 47) Thus, the court does not address the appropriateness of the UPL methodology in the opinion.

Challenges from Julander Energy (Section IV)

Julander Energy Company, an oil and natural gas development, exploration, and production company, challenged EPA's decision not to consider combustion of natural gas as a control technology on which to base beyond-the-floor standards. However, the court finds that Julander lacked standing to challenge the regulations, particularly considering that natural gas-fired EGUs are not subject to the rule. The court holds that "Julander's interest in increasing the regulatory burden on others falls outside the zone of interests protected by the CAA and therefore Julander may not proceed as a petitioner in this court."[3] (Page 61)

Additional Issues

The court did note that a few issues raised by petitioners were unripe for review including petitioners' claims that the Science Advisory Board's (SAB) final report on the Mercury Technical Support Document (TSD) was submitted too late to allow public comment and that EPA unreasonably refused SAB's request to review the final TSD (page 38, fn 4) and environmental petitioners' challenges to continuous parameter monitoring systems (CPMS) as both are the subject of pending petitions for reconsideration before EPA. Thus, these issues could be addressed at a later date by EPA or the court.

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[2] For a discussion of recent requests from EPA to remand portions of the EGU NESHAP for new sources, please see MJB&A's Issue Brief, *EPA Seeks Remand to Defend Several Air Toxics Emissions Standards*, dated March 11, 2014.

[3] The "zone of interests test" was the basis of Judge Kavanaugh's concurrence – he found that the majority reached the appropriate end result, but that the D.C. Circuit's precedence on the test is "in a state of disorder and needs to be cleaned up in the near future." (Page 2 of dissent, 63 of consolidated decision).

Next Steps

Petitioners may appeal this ruling to the full D.C. Circuit, the Supreme Court, or both. Petitioners have until May 30, 2014, to file petitions for rehearing or rehearing en banc. Petitioners have 90 days from April 15, 2014 or from denial of a timely-filed rehearing petition, to file a petition for *certiorari* with the Supreme Court.

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