Mercury Rule Moves Forward

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The federal lawsuit filed by twenty-three states challenging EPA's Mercury and Air Toxics Standards (MATS) is in the 8th inning, and things are not looking good for the challengers. Some background is appropriate.

Section 112 of the CAA requires EPA to regulate emissions of hazardous air pollutants, including mercury, from coal-fired power plants if it finds such regulation is "appropriate and necessary." In 2012, EPA made that finding and issued MATS as a final rule. In doing so, it reviewed the risks to human health from these emissions, but refused to consider any costs in its rulemaking. Its position was that nothing in the Clean Air Act required it to consider costs in deciding whether to issue the rule. The states sought review in the U.S. Court of Appeals for the D.C. Circuit, arguing that EPA had to consider costs at the very beginning of its rulemaking. The D.C. Circuit agreed with EPA, and the states appealed. In 2014, the Supreme Court held that costs had to be considered by EPA in determining whether regulation of these emissions is "appropriate and necessary" under Section 112. It sent the case back to the D.C. Circuit, which in December 2015 sent the rule back to EPA with directions to consider cost.

The problem is that the Supreme Court did not stay the rule, i.e., put it on hold, when it issued its decision. That meant the clock was still ticking towards the date by which power plants had to comply. The states also asked the D.C. Circuit to stay the rule while EPA considered costs. This presented owners of these plants with a choice: (i) Don't comply now, in which case there won't be enough time to order and install equipment to comply if the lawsuit fails, or (ii) comply now even though it's possible the rule ultimately could be nullified. Obviously, there is an enforcement risk with waiting to see how things turn out.

In March, the states petitioned Chief Justice Roberts to stay the rule while EPA considered costs. He denied the petition, and the states appealed to the full Court for a hearing on the issue. On June 13, 2016, that request was denied without comment.

Many believe the states won the battle, but lost the war. The estimated 600 or so power plants affected by the rule were originally required to comply with the rule by April 2015. Most have already done so or have simply shut their doors rather than hope-against-hope that the rule will be invalidated. Thus, even if the rule is ultimately overturned -- admittedly, something that now seems a long shot -- EPA will have

gotten what it wanted all along.

State of Michigan et al. vs. EPA, No. 15-1152 (June 13, 2016)

77 Fed. Reg. 9304 (Feb. 16, 2012).

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