**Mercury and Air Toxics Standards (MATS) – EPA Review**

9/28/18

In late August, the Environmental Protection Agency (EPA) announced that it would be reviewing:

* The agency’s prior determination that regulating power plant hazardous air pollutant emissions under section 112 of the Clean Air Act was “appropriate and necessary”.
* The air pollution control requirements of the Mercury and Air Toxics rule, which were issued on the basis of the appropriate and necessary finding.

*Earlier this week Assistant Administrator Bill Wehrum announced that the EPA will be sending to OMB for interagency review a draft proposal to revoke the appropriate and necessary finding.*

According to some reports the EPA proposal may also remove power plants from the list of sources covered under the air toxics provisions of section 112 of the Clean Air Act.

The draft proposal is likely to cover the following issues:

* Whether it is reasonable to require the utility industry, whose annual revenue usually exceeds $300B, to incur $9.8B in annual costs to reduce its hazardous air pollutant emissions.
* Whether the EPA should account for the benefits of reducing all of the pollutants a regulation reduces or, instead, ignore most of those benefits and consider only the benefits of reducing the hazardous air pollutant(s) “targeted” by the regulation.

If the proposal is issued and eventually adopted, it would have consequences for pollution levels in the near and medium term and for EPA’s ongoing consideration – or not – of the economic benefits of reducing air pollution.

**The Stakes**

**Pollution Control.** The foundation of the MATS rule would be removed if the EPA were to revoke the appropriate and necessary finding. Several paths lead forward from the revocation. The EPA could withdraw the MATS or leave them in place but abandon compliance assurance and enforcement. The agency could also modify the standards to make them less stringent. Parties opposed to MATS could petition the D.C. Circuit to vacate MATS on the grounds that the appropriate and necessary finding had been revoked. Any of these paths very likely would lead to increases in pollution. Even though utilities have installed and have been operating pollution control equipment to meet the current MATS requirements, in almost every case utilities would have the option of saving costs by operating that equipment less frequently or operating it with lower levels of pollution removal efficiency or not operating the equipment at all. This option might be especially compelling in states where pending rate cases have not been resolved.

**Future Pollution Control.** Now that MATS is fully implemented, section 112 requires that the EPA perform a “risk and technology review” to determine whether remaining levels of power plant hazardous air pollutants continue to pose unacceptable risks to public health. If EPA determines that they do, it must establish another round of pollution control requirements for coal- and oil-fired power plants. The prospect that EPA would have to carry out this mandate has fueled speculation that the draft MATS review proposal will include consideration of removing power plants as a source category from coverage under section 112. In that case, and even if EPA later issued standards for hazardous air pollutants from power plants under a different Clean Air Act authority, the agency would not be able to regulate residual emissions even in the face of evidence that residual hazardous air pollutant emissions posed unacceptable risks to public health.

**The Benefits of Reducing Pollution.** Perhaps the best way to understand why the EPA is pursuing what many would see as an issue that has been mooted by utilities’ current compliance with MATS is by viewing the draft proposal as the latest in a series of actions current EPA leadership has been taking to [squelch the agency’s capacity to recognize and account for the public health benefits of reducing air pollution](http://environment.law.harvard.edu/2018/06/denying-health-benefits-pollution-reduction/).

Starting at least as early as last October’s Clean Power Plan repeal proposal and moving through the proposal to restrict the science that the agency can consider, the June advance notice addressing considerations of costs and benefits (cited above), the Regulatory Impact Analysis for the Affordable Clean Energy rule proposal and now this rumored draft MATS review proposal **is *an unbroken line of efforts to suppress, mute, and devalue the public health benefits of reducing air pollution.***

If ultimately issued as a final EPA action, the draft proposal would establish a distinction between the benefits of “targeted pollutant” reductions and those accruing from the full range of reductions beyond the “target pollutant”. As a result, the agency would be ignoring the full benefits of the actual effect of air pollution regulation. The draft proposal is yet another major step in the EPA’s apparent campaign to curtail the recognition of, if not deny, the reality that pollution reductions benefit public health.

**Section 112 of the Clean Air Act – Impact of Withdrawing the Finding or De-Listing Power Plants**

Section 112 of the Clean Air Act mandates that the EPA set emissions control standards for a number of air toxics listed in the CAA itself. The EPA has the authority, under certain circumstances, to remove a category of sources from the list of sources whose toxic air emissions are otherwise covered under section 112. In addition, in the unique case of power plants, the EPA’s CAA mandate to set air toxics emissions standards arises only if the agency determines that setting standards for listed hazardous air pollutants is appropriate and necessary.

Along with the revocation of the appropriate and necessary finding or the de-listing of power plants, the EPA may also propose to withdraw or modify the pollution control standards set by MATS. Even if the proposal itself does not rescind or alter the standards, the revocation of the appropriate and necessary finding would create an opportunity for coal operators or utilities to petition a federal court to vacate the standards.

**MATS Background**

Signed by EPA Administrator Lisa Jackson in December 2011, the Mercury and Air Toxics Standards required coal- and oil-fired power plants to reduce their emissions of mercury and a range of heavy metals and acid gases. As part of the rule, EPA had reinstated the appropriate and necessary finding issued in 2000 and rescinded in 2005. When it was issued, EPA projected that MATS would cut power plant mercury emissions by 90 percent, acid gases by 88 percent and SO2 emissions by 41 percent. EPA also projected that those pollution cuts would avoid thousands of premature deaths and prevent 100,000 heart and asthma attacks annually. While the rule would cost a little under $10B annually, the value of the air quality improvements for human health alone was projected to be $37 billion to $90 billion each year. By the spring of 2015, the majority of coal- and oil-fired power plants had met their MATS obligations and the rest followed by the spring of 2016.

**The Supreme Court: “Appropriate and Necessary” Includes “Cost”**

In June 2015, the Supreme Court ruled (*Michigan v. EPA)* that EPA had erred by not taking account of cost in making its appropriate and necessary determination. The Court stated that it took no position on how the EPA was to account for cost. In remanding the case to the D.C. Circuit Court of Appeals for further proceedings, the Court included no instructions on whether that court should vacate the rule altogether. The D.C. Circuit declined to vacate MATS and sent the appropriate and necessary finding back to the EPA for review consistent with the Supreme Court opinion.

**The Supplemental Appropriate and Necessary Finding**

In April 2016 the EPA issued a Supplemental Finding that after taking account of the cost of the MATS rule, it found no basis for altering the determination that regulating hazardous air pollutants emitted by power plants was appropriate and necessary. The finding relied on two alternative analyses. The first assessed the $9.8B cost of compliance with MATS as reasonable, noting that the utility industry’s annual revenue ranged from $277B to $356B in the years since 2000; the cost of compliance thus represented 2.7% to 3.5% of the industry’s annual revenues. The EPA concluded:

“… that the cost of complying with MATS—compared to historical annual revenues, annual capital expenditures, and impacts on retail electricity prices—is well within the range of historical variability. The EPA further finds that the power sector is able to comply with the rule's requirements while maintaining its ability to perform its primary and unique function—the generation, transmission, and distribution of reliable electricity at reasonable cost to consumers.”

The EPA asserted that the *Michigan* ruling did not require a formal benefit-cost analysis, but nevertheless applied a benefit-cost analysis to provide an alternative basis for the appropriate and necessary finding. Since compliance with MATS had the effect of reducing not just mercury, acid gases and other hazardous air pollutants but also pollutants like SO2 and ambient fine particles, the EPA included the full health benefits of reducing the entire suite of pollutants in its benefit calculations. The result: regulating hazardous air pollutants emitted by power plants would yield net benefits of between $27B and $80B.

**Previewing the Potential Issues in the Pending Draft**

The draft proposal soon to be sent to OMB will include a review of the supplemental appropriate and necessary finding. The issues likely to be in play were already previewed by the EPA itself. In early June 2018, EPA issued an Advance Notice of Proposed Rulemaking, “Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process”. The Advance Notice of Proposed Rulemaking specifically cited the MATS supplemental finding as potentially objectionable, at least to some, because it was an example of past actions where the “the Agency has justified the stringency of a standard based on the estimated benefits from reductions in pollutants not directly regulated by the action (i.e., “ancillary benefits” or “co-benefits”).” In the supplemental finding’s benefit-cost analysis, EPA used the high-value public health and monetary benefits that would flow from the reduction in fine particles resulting from compliance with the MATS even though the targeted pollutant was mercury.

The Utility Air Regulatory Group, represented by Hunton and Williams, where Assistant Administrator for Air and Radiation Bill Wehrum was a partner at the time, and Murray Energy, a long-time lobbying client of Acting Administrator Andrew Wheeler, among others, challenged the supplemental finding in the D.C. Circuit *(Murray Energy v. EPA)*. Their briefs also likely preview the current EPA’s approach in a proposal to revoke the supplemental appropriate and necessary finding. Among the arguments made in the briefs:

* Weighing costs against benefits is the only basis on which the EPA can make an appropriate and necessary finding.
* In evaluating the costs of compliance, the EPA must consider “all costs and disadvantages, including the impacts on coal companies, communities, and workers, as well as localized impacts”.
* Since section 112 addresses only a specified list of hazardous air pollutants, the benefits flowing from the reductions of other pollutants must be excluded from the benefit-cost analysis when determining whether regulation is appropriate and necessary.

Section 112 requires that the EPA set emissions control standards for hazardous air pollutants based on the emissions reductions achieved by the highest-performing sources. The industry briefs also suggested that since section 112(n) required the EPA to study “alternative” methods of emissions control, the EPA should have included “alternative” – presumably less stringent – emissions compliance options the MATS rule.

**Two Conundrums**

**Health Benefits of Reducing Pollution.** The Obama EPA *Murray Energy* brief defending the supplemental appropriate and necessary finding presented extensive case law supporting the agency’s discretion to do what it did: account for the full range of pollution that would be reduced as a result of the regulation and reflect the health benefits of those reductions in its benefit-cost calculations. Were the draft proposal to follow the approach implied in the June Advance Notice and laid out in the industry briefs in the *Murray Energy* case, the agency would have to do two things. First, it would have to argue that even though the *Michigan* Court described “appropriate and necessary” as “capacious”, the agency did not have the discretion as a matter of law to take account of all of the pollution reduced by MATS in calculating benefits.

Second, the EPA would have to argue in the alternative that even if it had discretion, it was reasonable to ignore the reductions in SO2 emissions and ambient fine particles – and the health benefits of those reductions – resulting from MATS. In fact, the initial and supplemental appropriate and necessary determinations are based on a formidable record establishing the dramatic public health and economic benefits of reducing SO2 and ambient fine particles. Since MATS was issued in 2012, the scientific case presenting, for example, the danger of fine particle concentrations even at low levels [has grown only more compelling](https://jamanetwork.com/journals/jama/article-abstract/2667069). The case for the regulation of mercury, one of the “targeted” MATS pollutants, has also grown stronger, with [recent science showing that the EPA underestimated the benefits](http://environment.law.harvard.edu/wp-content/uploads/2016/02/Sunderland_Benefits-Regulating-Haz-Air-Pollutants.pdf) reducing mercury. Another conundrum facing the agency: i) does it contend with the even stronger case for regulation made by post-2011 science, or does it try to justify ignoring information that was not in the record at the time of the issuance of MATS?; ii) can it take account of the broader range of costs identified in the *Murray Energy* industry brief, without taking account of the full benefits of the regulation?.

**Industry Compliance.** With the last of the MATS compliance deadlines having passed almost two and a half years ago, the utility industry is in full compliance with the MATS requirements. That means that utilities have already invested capital to install pollution control equipment and in some states PUCs have incorporated a portion of those investments in the rate base. (In other states, such cases may still be pending). Industry reported this summer that it had spent a total of $18B to comply with the rule, which appears to be less than the EPA projected when MATS was issued. Will the agency take into account these lower costs in a benefit-cost-analysis?