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The EPA Gets a First Big Win at the Supreme Court in the Post-Scalia Era

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On March 3, 2016 the Supreme Court denied an application by Michigan Attorney General Bill Schuette and several other states for a stay of the Environmental Protection Agency's Mercury and Air Toxics Standards ("MATS")[1] – a rule designed to reduce emissions of toxic air pollutants from existing and new coal and oil-fired power plants (the "MATS Stay Ruling"). Although not surprising when considering all pertinent circumstances, this ruling stands in marked contrast to the Court's grant of a stay of the EPA's Clean Power Plan ("CPP") in February 9, 2016. The MATS Stay Ruling is a meaningful victory for the EPA and a first Supreme Court legal win for the EPA in the post-Scalia era.

Background

EPA enacted the MATS rule in 2012 in an effort to control toxic mercury emissions from coal and oil-fired electric generating units ("EGUs"), pursuant to Section 112 of the Clean Air Act ("CAA").[2] A coalition of industry groups and 23 states challenged the rule, which was upheld by the U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit Court").[3] The Supreme Court granted certiorari on a single issue raised by the petitioners: "Whether the Environmental Protection Agency ("EPA") unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities".[4]

In a ruling issued on March 25, 2015 (the "MATS Merits Ruling"), the Supreme Court held that the EPA should have taken costs into consideration when *initially* deciding whether regulating power plants' emissions was "appropriate and necessary" under Section 112 of the CAA[5], rather than consider costs only in its determination of the emissions standards pursuant to such regulation, as the EPA did. The Supreme Court remanded the case to the D.C. Circuit Court. On remand, the D.C. Circuit Court ruled that the defect found by the Supreme Court did not necessitate vacating the MATS, and remanded to the EPA to complete the required cost analysis (the "D.C. Circuit Court Ruling").[6] EPA proposed a revised "appropriate and necessary" finding in December 2015[7], and has stated that it intends to finalize the supplemental analysis next month.

Petitioners filed, once again, a motion for certiorari to the Supreme Court – this time with respect to the D.C. Circuit Court's refusal to vacate the MATS. Before doing so however, petitioners applied to Chief

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[1] *Michigan, et al., v. EPA*, 15A886 (2016)
[2] 77 Fed. Reg. 9304 (Feb. 16, 2012)
[3] *White Stallion Energy Center, LLC v. EPA*, 748 F. 3d 1222 (2014)
[4] *Michigan v. EPA*, No. 14-16 (Nov. 25, 2014)
[5] 42 U.S.C. §7412(n)(1)(A)
[6] *White Stallion Energy Center LLC v. Environmental Protection Agency*, No. 12-1100 (D.C. Cir. Apr. 15, 2014)
[7] 40 CFR Part 63

Justice Roberts to stay the implementation of MATS pending consideration of the petition for certiorari.[8] Petitioners claimed that the MATS Merits Ruling rendered MATS an unauthorized use of regulatory power by the EPA, since at no point has the EPA made the cost determinations prescribed by the MATS Merits Ruling. Petitioners claimed that absent such determinations, a stay is necessary if the MATS Merits Ruling is not to be thwarted. Petitioners urged the Supreme Court to consider their request as favorably as it did with respect to the request to stay the EPA's Clean Power Plan (the "CPP") just a few weeks earlier, on February 13, 2016. Justice Roberts denied the request for a stay without explaining the reasons for his ruling.

Stay of CPP vs. Refusal to Stay MATS

Chief Justice Roberts' decision not to stay MATS stands in marked contrast to the Court's recent decision to stay the CPP implementation while that rule is litigated. There are some similarities between the CPP and MATS, and at first glance one might wonder why the outcomes are different. A closer look however reveals notable differences which may account for the opposite conclusions.

First, arguments for the stay of each rule did not appear equally persuasive. To obtain a stay of a rule pending review, a party challenging a rule must show (among other things) that it has a reasonable likelihood of success on the merits of its challenge.[9]

The lead arguments for moving the Supreme Court to stay the CPP directly concerned the EPA's statutory authority to put forward the plan. In short, petitioners claimed that by its very language, Section 111(d) of the CAA prohibits the EPA from regulating *existing* sources, if antecedent EPA regulation already targets *new* sources of the same kind pursuant to Section 112 of the CAA, as is the case with coal and oil-fired EGUs.[10] Petitioners also argued that the CAA does not authorize the EPA to regulate activities beyond the "fence line" of a regulated facility — as the CPP would do by tying fossil fuel power plants' ability to meet emission reduction targets with measures that fall outside such power plants' zone of operation.[11]

The arguments supporting stay of the MATS on the other hand touched on EPA's authority indirectly, not as a matter of legislative interpretation but based on an arguable judicial theory. From a legislative perspective, the EPA's unequivocal statutory authority to promulgate the MATS pursuant to section 112(n)(1)(A) of the CAA was not contested. It was however argued that once the Supreme Court determined that the EPA failed to consider costs when making the "appropriate and necessary" finding, the court should have held the MATS "unlawful".[12] Petitioners further argued that the degree of unlawfulness was so severe, as to merit a finding that the EPA failed to acquire authority to impose the MATS. These arguments attempted to read more into the MATS Merits Ruling than what the Supreme Court actually found - an isolated procedural shortcoming not severe enough to negate EPA's authority over the MATS. Moreover, by granting certiorari only with respect to the cost analysis (while refusing to hear arguments for vacatur or stay of the MATS) and by remanding the case "for further proceedings consistent with this opinion", the Supreme Court essentially projected its view that the cost analysis deficiency did not render the MATS flawed enough to be set aside. In light of the above, repeating arguments before the Supreme Court which were essentially (albeit not explicitly) rejected, positioned the petitioners unlikely to prevail.

Second, the procedural postures leading to the motions to stay the CPP and the MATS were very different. In addition to a likelihood of success on the merits, a party seeking a stay of a rule pending certiorari must show a "reasonable probability" that four justices will vote to grant the petition for certiorari.[13] Although the motion to stay the CPP came before the D.C. Circuit heard the merits of the case, the great impact of the rule, its novelty, and the high degree of legal uncertainty attached to it helped petitioners convince the

[8] Under Supreme Court Rules 22 and 23, a party may petition an individual justice for a stay. As the Circuit Justice for the D.C. Circuit, Chief Justice Roberts decides any petition to stay a ruling of that court.
[9] *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010)
[10] Brief for Petitioners at 11, *West Virginia. v. E.P.A.*, No. 15A773, 2016 WL 502947, ___ S. Ct. ___ (2016)
[11] *Id*. at 9
[12] Brief of petitioners at 2, *Michigan v. E.P.A.*, 135 S. Ct. 2699, 192 L. Ed. 2d 674 (2015)
[13] *Hollingsworth v. Perry,* 558 U.S. ___ (2010) at 190

court of a reasonable chance that certiorari could be granted. Conversely, petitioners moved to stay MATS after both the Supreme Court and the D.C. Circuit had heard the parties' arguments and found that the MATS should largely be upheld. It is, accordingly, not surprising that Justice Roberts concluded that a *second* grant of certiorari on the narrow issue of remedy is unlikely.

Finally, the MATS petitioners were probably unable to convince Justice Roberts, as they are required, that "irreparable harm" would be likely if a stay were not granted.[14] As opposed to the CPP's novel carbon pollution control scheme (initially proposed in August 2015), the MATS were promulgated in 2011, with relevant rulemaking processes dating back to the early 2000s. During this period, and especially since 2011 when the compliance deadline of April 2015 became official, power plants subject to the MATS have either made the necessary adjustments or have retired. When the MATS Merits Ruling was issued, only approximately 20% of pertinent power plants had yet to comply with the MATS, the vast majority of which are in the process of doing so, having received a one-year compliance extension from the EPA. Furthermore, the EPA has already proposed (and is expected to finalize in May 2016) a revised "appropriate and necessary" finding[15], so that a stay would probably have little (if any) impact on compliance dates for the rule, and thus would do little to avert any "irreparable harm" if petitioners were to prevail on their challenge. The same cannot be said of the costs averted by staying the CPP. States and regulated entities have already invested millions of dollars annually just in *planning* for CPP compliance – dollars that by and large will not have to be spent while the rule is stayed. In light of the above, staying the MATS at this point would have largely been moot, which cannot be said with respect to the CPP.

Despite the foregoing differences, the Obama Administration and proponents of the MATS are relieved by the MATS Ruling. At least in their view, the MATS Ruling curtailed a ripple effect they feared the Supreme Court's stay of the CPP would have on its approach towards staying other regulation pending review thereof by lower courts.

Stay of MATS Still Possible

On March 18, 2016, yet another petition for certiorari was submitted to the Supreme Court regarding the MATS.[16] This time, in addition to repeating the call on the Supreme Court to vacate the MATS, petitioners claimed that the D.C. Circuit Ruling conflicts with previous decisions by the U.S. Court of Appeals for the Fifth and Eighth Circuit Courts on the question of vacating unauthorized agency decisions, and thus should be definitively resolved by the Supreme Court. In light of this, petitioners framed a question for the court to answer – "When an agency promulgates a rule without any statutory authority, may a reviewing court leave the unlawful rule in place?".

Beyond the high hurdles the petitioners will face concerning the merits of their arguments, as explained hereinabove, they will need to convince the court that their petition is not moot, even though the Solicitor General' response to the motion is scheduled for April 15, 2016 – only a few weeks before the EPA is expected to publish the final MATS supplemental cost-analysis, and just one day short of the deadline by which power plants (that received one-year extensions) must come into compliance under MATS.

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[14] *Id*.
[15] *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100 (D.C. Cir. Dec. 15, 2015); https://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2060-AS76
[16] *Michigan et al. v. Environmental Protection Agency,* 45 ELR 20124 (U.S. June 29, 2015) petition for cert. filed, (U.S. March 14, 2016) (No. 15-1152)