Twenty States Ask Supreme Court to Revisit EPA Mercury Regulation

By Cassandra Yannelli [1]
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On March 18, a group of 20 states asked the U.S. Supreme Court to revisit the handling of implementation for a U.S. Environmental Protection Agency, or EPA, regulation on power plants. A 2015 Supreme Court decision, Michigan v. EPA [3], held that EPA interpreted the Clean Air Act unreasonably when it “deemed cost irrelevant to the decision to regulate power plants” for its Mercury and Air Toxics Standards, or MATS. Following the decision, the fate of the regulation was “remanded” to a lower court, the U.S. Court of Appeals for the D.C. Circuit, which decided to keep the rule in effect while EPA developed a supplemental cost justification.

The states, led by Michigan Attorney General Bill Schuette, argued that the Supreme Court “held that EPA must consider costs before it can regulate, yet EPA continues to regulate even though it still has not considered costs.” Their request follows a denial by Chief Justice John Roberts of a state request to “stay” implementation of MATS in early March 2016.

In addition to Michigan, the other state petitioners are Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia and Wyoming. In proceedings before the D.C. Circuit Court of Appeals on MATS, several states—including Massachusetts, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Rhode Island and Vermont—previously intervened on behalf of EPA.
MATS aimed to limit emissions of mercury and other air toxics produced by power plants in order to protect public health and the environment. Published on Feb. 16, 2012, MATS targeted coal- and oil-fired electric generating units by setting emission standards on harmful air pollutants that can result in a series of health problems ranging from cancer to respiratory illnesses. EPA states that MATS would prevent 11,000 premature deaths a year and accumulate up to $90 billion in health benefits.

States argue that EPA mostly relied on co-benefits, health benefits not directly resulting from reductions in mercury or air toxics but from fine particulate matter, in order to establish its findings that the rule will yield billions of dollars in net benefits. The Supreme Court appeared sympathetic to this concern about the reliance on ancillary co-benefits, potentially signaling interest in the issue more broadly.

“The court’s focus on, and clear preference for, direct benefits over ancillary benefits gets to the essential question of why a rulemaking is appropriate in the first place: the direct benefits of a regulatory action should exceed its costs,” stated Bill Kovacs, senior vice president for environment, technology and regulatory affairs at the U.S. Chamber of Commerce, in recent testimony [4].

As the Supreme Court considers the state request, EPA is expected to finalize [5] a supplemental finding that considering costs does not alter the determination that it is appropriate to regulate via MATS in May 2016. EPA proposed [6] a similar finding in November 2015 and, on March 22, 2016, sent its final finding to the White House Office of Management and Budget for review [7].

EPA received comments on the proposed finding from states supporting as well as opposing their approach to cost. Northeast States for Coordinated Air Use Management, or NESCAUM, found [8] “EPA’s cost approach in the proposed supplemental finding to be reasonable and a reflection of standard regulatory practice in the states.” Craig Butler, director of the Ohio Environmental Protection Agency, wrote [9], “We believe that U.S. EPA should provide a more up-to-date and accurate analysis that realistically conducts an assessment of the benefits and compliance cost of the rule.”