

D.C. Circuit Strikes down EPA's Clean Air Mercury Rule

A unanimous three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit in *State of New Jersey v. EPA*, No. 05-1097, et al., vacated on February 8 two key rules issued by the Bush Administration on the regulation of mercury emissions from power plants. The D.C. Circuit held that the Environmental Protection Agency (EPA) lacks authority to remove electric utility steam generating units (EGUs) from the list of regulated source categories subject to stringent Maximum Achievable Control Technology (MACT) standards under section 112 of the Clean Air Act (Hazardous Air Pollutants) except by applying the delisting criteria specified in the Act. The court also invalidated EPA's Clean Air Mercury Rule (CAMR), issued under section 111 (New Source Performance Standards) as a substitute for the more rigorous controls required by section 112. The D.C. Circuit's ruling has significant implications for coal-fired power plants.

BACKGROUND

In 1990, Congress amended section 112 of the Clean Air Act (CAA or the Act) to require EPA to regulate emissions of more than one hundred specific air toxics, including mercury, by issuing MACT standards. EGUs received special statutory treatment. Specifically, before regulating air toxics from EGUs, EPA was required to study the relationship between power plants and mercury and then find whether regulation under section 112 was "appropriate and necessary." The EPA completed the study in 1998 and, in December 2000, made the "appropriate and necessary" finding. As a result, coal and oil-fired EGUs were added to the list of regulated source categories under section 112.

After the change in administration, EPA revisited its "appropriate and necessary" finding. In 2004, EPA proposed two alternatives for regulating mercury. The first largely followed the December 2000 proposal and called for the issuance of MACT standards under section 112. The second alternative proposed regulations under section 111 that set performance standards for new EGUs, capped total mercury emissions for the EGU sector, and created a voluntary cap-and-trade program for new and existing sources. In March 2005, EPA selected the section 111 approach and published two rules implementing this approach. The "Delisting Rule" reversed the EPA's December 2000 "appropriate and necessary" finding and removed EGUs from the section 112 list of source categories that are subject to MACT standards. The CAMR regulated mercury emissions from EGUs under section 111. A number of states and environmental groups challenged both rules.

THE DECISION

The D.C. Circuit held that EPA's Delisting Rule was unlawful for failure to follow the specific delisting process set forth in

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section 112(c)(9). Because EPA conceded that if EGUs remain listed under section 112 they cannot be regulated under section 111, the Court also vacated the CAMR.

Section 112(c)(9) requires that in order to remove a source category from the list, the EPA must determine that “no source in the category or subcategory . . . exceed[s] a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.” EPA acknowledged that it did not apply or follow these criteria. Instead, EPA argued that the agency could avoid application of the delisting criteria by reversing its initial “appropriate and necessary” finding. The court rejected this argument and noted that the plain language of section 112(c)(9) requires the application of specific delisting criteria to the removal of “any source category.” The court also relied on prior case law requiring that the word “any” be given an expansive meaning in the context of the CAA. The court also remarked that Congress had explicitly exempted EGUs from other provisions of section 112, but had not done so in section 112(c)(9). Applying the two-pronged test in the *Chevron v. NRDC* decision, which is applied to challenges of EPA’s interpretations of the CAA, the court found that the statute was unambiguous under step one of the analysis and that EPA’s interpretation was contrary to the plain language of the statute and therefore unlawful.

The court also vacated the CAMR. The court reasoned that because reversal of the Delisting Rule places EGUs back within regulation of section 112, and EPA’s own interpretation holds that section 111(d) cannot be used to regulate sources listed under section 112, the CAMR regulations are also invalid. The court remanded the new source performance standards contained in the CAMR for reconsideration.

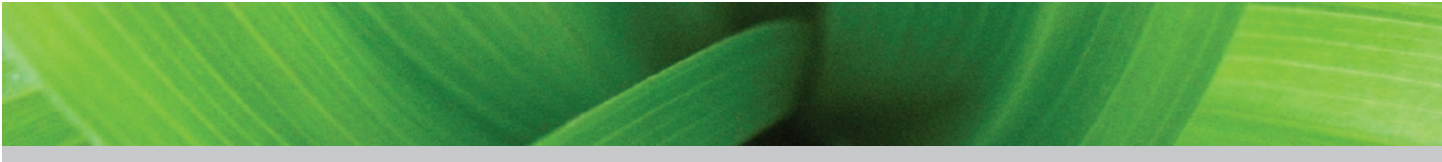
IMPLICATIONS

EPA appears to have very few options for responding to the D.C. Circuit’s decision. Success on rehearing or in a request for Supreme Court review seems unlikely given the D.C. Circuit’s definitive interpretation of explicit statutory procedures for delisting source categories that emit air toxics.

On remand, EPA might consider a formal delisting of EGUs pursuant to the criteria in section 112(c)(9). That course may be difficult given the stringent statutory standard for delisting. Specifically, the statute authorizes delisting only if EPA can demonstrate that no EGU emits mercury (and possibly other air toxics) in an amount which would exceed a level adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from those emissions.

Without a successful appeal of the ruling or a delisting, EPA will have to regulate EGUs under section 112(d), setting MACT standards imposing stringent limits on air toxics emissions from the source category. Although several states have established their own state programs regulating mercury from EGUs in the past few years, any future national MACT standard may have implications for new and existing EGUs if that standard is more stringent than those state programs.

Given EPA’s limited options, the D.C. Circuit’s decision may have the effect of reviving interest in Congress to adopt multi-pollutant control legislation focused only on the electric power sector. Among other things, such an



approach could seek to establish coordinated caps for power plant emissions of mercury, sulfur dioxide, nitrogen oxides, and carbon dioxide. Proponents of such a multi-pollutant control program for power plants assert that a power sector-only program would be an easier launching point for U.S. greenhouse gas regulation than an economy-wide program.

FOR ADDITIONAL INFORMATION

Van Ness Feldman regularly assists energy companies to understand air quality and emissions matters. For additional information on this regulation or other air-related legislation or issues, please contact Stephen Fotis, Britt Fleming, or Kyle Danish at (202) 298-1800, or any member of the firm's Environmental practice at www.vnf.com.

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