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Split Supreme Court Raises EPA Regulation Questions

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Special to the Legal

In the wake of U.S. Supreme Court Justice Antonin Scalia's passing on Feb. 13, the court has been attracting attention for its recent 4-4 decisions in some high-profile cases. Most notably, in *United States v. Texas*, the court split when reviewing the federal government's appeal from a U.S. Court of Appeals for the Fifth Circuit decision that halted certain parts of President Obama's immigration plan. The Supreme Court also voted 4-4 in three other cases over the past several months. In *Hawkins v. Community Bank of Raymore*, the court evaluated issues relating to gender discrimination claims under the Equal Credit Opportunity Act; in *Friedrichs v. California Teachers Association*, the court considered the legality of allowing public-sector unions in California to impose fees on public workers, including nonunion members; and in *Dollar General v. Mississippi Band of Choctaw Indians*, the court focused on the jurisdiction of a tribal court over Dollar General in a case involving the alleged sexual assault of an underage Native American intern. With the Supreme Court splitting 4-4 in each of these cases, the lower court rulings remain in effect.

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If it wasn't already clear during Scalia's tenure on the court, the recent gridlock among the remaining eight justices confirms the importance of Scalia's vote. Only several months prior to his death, Scalia voted with the five-justice majority in two significant Clean Air Act (CAA) cases affecting the power generation sector. In the first of these cases, the Supreme Court reviewed an appeal of the D.C. Circuit's decision upholding the Environmental Protection Agency's (EPA) Mercury and Air Toxics Standards (MATS); and in the second case, the Supreme Court reviewed the D.C. Circuit's refusal to stay the EPA's Clean Power Plan (CPP). In each case, the Supreme Court overturned the decision of the D.C. Circuit below. It is reasonable to assume, therefore, that if these two cases had come before the high court just a few months later, both cases would have ended in a 4-4 vote, and the D.C. Circuit's rulings (both going in the opposite direction of the Supreme Court's) would have been preserved.

MATS and the CPP—Litigation History

The EPA promulgated MATS in 2012 to control emissions of

hazardous air pollutants (HAPs), such as mercury, acid gases, and arsenic and other metals, from power plants (specifically, emissions from sources known as electric generating units, or EGUs). Numerous parties, including industrial groups, state representatives, and environmental organizations, challenged MATS before the D.C. Circuit. The D.C. Circuit upheld MATS, finding that the EPA reasonably excluded cost factors when it determined that it is "appropriate and necessary" to regulate EGUs under CAA Section 112.

Challengers appealed to the Supreme Court, and in June 2015, in *Michigan v. EPA*, 135 S. Ct. 2699, a Scalia-led 5-4 majority concluded that, although the EPA has the authority to regulate mercury emissions under CAA Section 112, the EPA acted unreasonably in failing to consider the costs of compliance in determining that it is appropriate and necessary to regulate HAPs from EGUs. In particular, the court emphasized that consideration of cost must involve an examination of the costs likely to be imposed by the regulation in relation to the benefits. In his opinion, Scalia reasoned that while the EPA is afforded some flexibility in satisfying its statutory obligation to regulate EGUs if it finds that such regulation is appropriate and necessary, the EPA may not fail to consider the important cost of compliance when deciding whether regulation is "appropriate."

The Supreme Court did not vacate MATS, but directed the EPA to fulfill its obligation to consider costs in justifying regulation of EGUs under CAA Section 112. In response to the Supreme Court's decision, the EPA issued its "supplemental finding" in April 2016, in which that the EPA affirmed that a consideration of cost does not cause the EPA to change its earlier determination that regulation of HAPs from EGUs is appropriate and necessary under CAA Section 112. The EPA's supplemental finding is currently the subject of new challenges before the D.C. Circuit.

The CPP is implemented through an EPA rulemaking finalized in July 2015. The CPP is intended to reduce carbon dioxide emissions from existing power plants by 32 percent from 2005 levels by 2030. Under the CPP, states must start submitting implementation plans by 2018 to demonstrate how they will achieve required emission reductions, and then initiate necessary emissions reductions by 2022. As with MATS, numerous parties filed challenges to the CPP with the circuit court, this time claiming that the EPA overstepped its CAA Section 111 authority in promulgating the CPP. In addition to challenging the legality of the regulation, certain petitioners requested that the D.C. Circuit stay the CPP pending resolution of the litigation. Although the court agreed to expedite its review of the case, it denied the stay request, finding that the challengers had not demonstrated the likelihood of irreparable harm from the application of the CPP.

Opponents of the CPP, including nearly 30 states and state agencies and several industry and trade groups, then filed emergency stay applications with Chief Justice John Roberts, asking the Supreme Court to halt implementation of the CPP until the D.C. Circuit completed its review of the CPP. The high court did not hear oral argument on the stay applications, but nevertheless, a 5-4 majority—which again included Scalia—sided with the CPP's opponents in *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.). The Supreme Court issued an order that prevents the EPA from implementing the CPP until the D.C. Circuit issues its judgment, and the Supreme Court has an opportunity to weigh in (assuming that a petition for a writ of certiorari is eventually sought, and if the Supreme Court grants such petition). The breadth of the Supreme Court's order was initially regarded as signaling a near-certain Supreme Court block of the CPP on appeal. However, in Scalia's absence, the question of what the Supreme Court will do with the CPP following the D.C. Circuit's disposition is up in the air.

Where do we go from here?

Due to the scope of the Supreme Court's ruling on MATS and the D.C. Circuit's subsequent decision

to remand MATS without vacatur, MATS remained in effect while the EPA conducted its cost-benefit analysis and developed the supplemental finding. MATS will continue to remain in effect while the D.C. Circuit resolves the pending challenges to the supplemental finding. In fact, both the April 2015 initial compliance deadline, and the April 2016 deadline for affected power plants who received a one-year compliance extension, have already passed. This means that a majority of the sources subject to MATS have had to take some action to transition toward compliance with the regulation. Indeed, many affected facilities have either made material operational changes such that they are no longer subject to MATS—i.e., by moving away from coal combustion entirely or retiring affected units—or installed significant control system upgrades to satisfy MATS's stringent emission standards.

Accordingly, for a majority of affected EGUs, it may not matter if MATS is ultimately invalidated, particularly if economic trends continue to favor natural gas over traditional coal-fired electricity generation. And yet, there are still a small number of facilities that continue to seek relief from specific aspects of MATS. In any event, if MATS is ultimately invalidated, there are likely to be precedential implications for future EPA regulations affecting the power sector. Additionally, if MATS is vacated, the EPA could not enforce it, and those sources that have installed controls to meet specific emission standards under the regulation would be under no ongoing obligation to continue to operate such controls.

With respect to the CPP, the legality of the regulation will be reviewed by the D.C. Circuit this fall. The court is scheduled to hear oral argument on the CPP en banc on Sept. 27. Regardless of the D.C. Circuit's ruling, a subsequent appeal to the Supreme Court is a virtual certainty. However, without Scalia, who likely influenced the Supreme Court's decision to stay the CPP in the first instance, it is difficult to predict whether the court will even be able to reach a decision to hear the case and, if it does, whether a majority of justices will agree on the appropriate resolution of the litigation. Without a majority decision, the D.C. Circuit's ruling will stand. It is particularly noteworthy that, as stated above, the D.C. Circuit and the Supreme Court—including Scalia—reached opposite outcomes in both the MATS and CPP cases.

Apart from the outstanding questions surrounding MATS and the CPP, Scalia's passing raises additional uncertainties about how the Supreme Court will generally interpret environmental law questions going forward, including in particular, the amount of deference afforded to the EPA. Environmental statutes and regulations grant to the EPA considerable discretion in many contexts, and Scalia often led the charge in challenging the appropriate scope of the EPA's exercise of that discretion. Whether the Supreme Court will take a similar approach in the future remains to be seen. •