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3 Takeaways From EPA's Proposed Mercury Rule Finding

By **Juan Carlos Rodriguez**

Law360 (January 2, 2019, 9:35 PM EST) -- The U.S. Environmental Protection Agency's recent proposed revision to a cost-benefit analysis underpinning a mercury air pollution rule was a win for industry that preserves the status quo, while potentially creating more obstacles to prove future regulations are worth the costs of compliance.

Last week, the EPA said in a proposed rule that it has determined it's not "appropriate and necessary" to regulate hazardous air pollutant emissions from coal- and oil-fired power plants under Section 112(n)(1)(A) of the Clean Air Act.

The finding was based on the Trump administration's assessment that health and environmental benefits from the Mercury and Air Toxics Standards rule that aren't directly related to mercury pollution shouldn't be included in the benefit portion of the analysis, which drastically reduced the estimated value of the benefits from the Obama administration's analysis.

If the proposed revision becomes final, it will likely become a touchstone for the administration in future efforts to discern the benefits and costs of regulation. In the meantime, it could throw into confusion a currently pending effort to sink the Obama-era rule entirely and become a target of legal challenges on its own.

Here are three key takeaways from the MATS cost-benefit revision.

EPA Determined to Recalculate Benefits

While the Obama administration said in an April 2016 supplemental finding that the MATS rule would yield between $37 billion and $90 billion in annual benefits, the new proposed rule valued those benefits at between $4 million and $6 million a year. The difference comes from the fact the Trump administration removed from the equation the consideration of co-benefits, such as reductions in particulate matter, that aren't intended by the regulations.

Still intact, however, is the Obama administration's estimate that the costs of compliance with the MATS rule are between $7.4 billion and $9.6 billion annually — meaning the EPA now views the standards as more expensive to comply with than the benefits they provide.

It's no secret the administration opposes the Obama administration's method of considering co-

benefits, and if the proposed rule becomes final, it could become a template of sorts for any other cost-benefit analyses the agency may be required to complete, said Thomas Lorenzen, a partner at Crowell & Moring LLP.

“I think the administration is trying to set down a marker for future regulations,” Lorenzen said. “They believe they should only be looking at a rule’s direct benefits in evaluating whether or not the costs are justified.”

Complications Likely in Current Litigation

The D.C. Circuit in April 2017 granted the EPA’s request to delay an industry challenge to the Obama administration’s MATS cost-benefit analysis after the agency said the Trump administration would re-evaluate it, and the litigation has been on hold since then. The U.S. Supreme Court in 2015’s Michigan v. EPA had sent the MATS rule back to the D.C. Circuit with orders that the agency update the rule to reflect cost considerations.

Petitioners including the Utility Air Regulatory Group and Murray Energy Corp. made arguments against the Obama administration’s analysis that the EPA has now echoed in its proposed revision to the analysis, leading to confusion over how the pending litigation could play out.

The EPA could request the challenge be declared moot since it changed the analysis, but that would mean the petitioners could still argue the entire rule should be nixed. That might lead to a split among industry members, many of whom have asked that the rule be kept in place, said Charles Warren, a partner at Kramer Levin Naftalis & Frankel LLP and chair of the firm’s environmental practice group.

“Industry doesn’t like to see people get off the hook once they’ve already spent the money to comply,” Warren said.

Many Still Awaiting Final Rule

If the EPA finalizes its revised supplemental cost-benefit findings after the public comment period is over, it’s likely to face brand new litigation over that final rule, this time from environmental groups and states that back the Obama administration’s approach, Ann Carlson, a law professor at the University of California, Los Angeles, said.

“I think that case will squarely face the question of whether it’s reasonable for the agency to ignore the co-benefits that would result from regulating mercury and other air toxics at some power plants,” Carlson said.

Many environmental groups and sympathetic states have already filed briefs in the pending litigation that give an indication of their strong support for the Obama administration's cost-benefit evaluation methodology, and the EPA’s new proposed rule was met with a flurry of denunciations from the groups and some state leaders.

Sanjay Narayan, an attorney at the Sierra Club, said new litigation could be interesting because it would test how much courts are willing to defer to the EPA on that question.

“EPA produced a tortured attempt to avoid looking at all the consequences of the rule,” he said. “Does that comport with what the Supreme Court said in Michigan v. EPA about what the word ‘appropriate’

means for the agency's obligations here?"

--Additional reporting by Michael Phillis. Editing by Philip Shea and Emily Kokoll.