

EPA Gives Utilities A Headache With Mercury Rule Revision

By **Keith Goldberg**

Law360 (April 17, 2020, 7:46 PM EDT) -- The U.S. Environmental Protection Agency opened a Pandora's box for utilities with an about-face on the justification underpinning an Obama-era rule limiting coal-fired power plants' mercury emissions, including the potential that ratepayers will try to claw back what they paid for utilities to comply with the rule.

Experts say that at best, the EPA's finalized cost-benefit analysis of its Mercury and Air Toxics Standards rule is an empty gesture to utilities. The EPA said it's not "appropriate or necessary" to regulate hazardous air pollutants from coal and oil-fired plants under Section 112 of the Clean Air Act, but the rule remains in place and utilities have already spent billions to comply with it.

At worst, the EPA's move could spark renewed legal challenges to overturn the MATS rule in its entirety. That puts at risk the ability for utilities to recover through electricity rates the billions of dollars they've spent on installing pollution controls at their plants or shuttering them.

Either way, the EPA's actions inject unnecessary uncertainty into utilities' long-term planning, experts say. Indeed, utility industry groups ranging from the Edison Electric Institute to the American Public Power Association had urged the EPA not to endanger the MATS rule and the investments utilities made to comply with it.

"There is a pretty uniform consensus throughout the electric power universe that it is a terrible idea for the administration to tamper with this rulemaking," said Ballard Spahr LLP environmental partner Brendan Collins, who's represented electricity generators that support the MATS rule.

EPA Administrator Andrew Wheeler said Thursday that the agency is prepared to defend in court its decision to keep the MATS rule — which was enacted in 2012 and required utilities to comply by 2015 — in place.

Experts say the EPA is essentially saying it's bound by the D.C. Circuit's ruling in 2008's *New Jersey v. EPA* that rejected the agency's attempt to shift the regulation of power plant mercury emissions from Section 112 of the CAA to Section 111 of the law, which offers less-stringent regulation.

But the EPA's withdrawal of the "appropriate and necessary" finding justifying the MATS rule creates a situation where the rule could be subject to fresh legal challenges, experts say.

"It kind of opens the door for someone at some point to say, 'New Jersey itself is wrong as a decision. You can't have a regulation that continues absent an affirmative appropriate and necessary finding,'" said Crowell & Moring LLP environment and natural resources partner Tom Lorenzen. "What this to me does is create a whole lot of uncertainty for the utility industry with very little upside."

Experts say the EPA could have really cut the legs out from under the MATS rule by also removing power plants from the list of pollution source categories subject to regulation under Section 112, but ultimately decided not to.

"Although there is still some chance that the coal industry will challenge the standards on the grounds that the appropriate and necessary finding is gone, their prospects for success are dimmer now," said Joseph Goffman, an Obama-era EPA official who is now the executive director of Harvard Law School's Environmental and Energy Law Program.

Still, if a court were to enjoin the MATS rule, utilities might not only have spent billions of dollars on pollution controls in vain, but could also face attempts from consumer groups to convince state utility regulators that utilities can't recover the costs of installing those pollution controls from ratepayers.

"If there's no longer a law that requires those investments, then arguably, you may be prevented from recovering them through rates," Collins said.

And if the MATS rule goes away, there's always the chance of a new presidential administration setting new, stricter emissions standards, experts say. Winston & Strawn LLP environmental of counsel Stephanie Sebor, who's worked on MATS compliance issues, notes that the rule is already eight years old and utilities have been complying with it for five years already.

"There could be justification in the agency's mind to further lower emissions limits given technological advancements that have been made since MATS was promulgated," Sebor said. "It gives a Democratic EPA a chance to take another, bigger bite at the apple."

Ultimately, the EPA's move could further accelerate the retirement of coal-fired power plants if utilities fear they won't be able to recover the costs of installing pollution controls or that the costs could grow even higher, experts say.

"EPA in its final rule dismissed this out of hand," Lorenzen said. "It never really grapples with whether this is likely to happen."

The EPA based its decision to revoke the "appropriate and necessary" finding on the belief that the Obama administration improperly considered benefits from the MATS rule that weren't the air pollutants targeted by the regulations.

The EPA may be trying to lay down a marker to disregard so-called co-benefits in cost-benefit analyses of future regulations, which the Trump administration opposes. But experts say the agency's view is constrained by the specific, unique language of Section 112 and that view can't necessarily be applied to other provisions of the CAA, much less other environmental laws.

"This is, in a sense, a dead-end decision," Collins said. "As a tool for broad change in the administration's handling of costs and benefits, it's no good."

The EPA also recently sent to the White House a controversial proposal to revise how it conducts cost-benefit analyses in crafting CAA regulations, which makes it even more puzzling that the agency chose to take a major step along that path in the context of a MATS rule crafted under a specific CAA provision that utilities have already complied with, experts say.

"Why not pick this fight there, where it doesn't have this consequence for the utility industry and where it is truly about something that is prospective?" Lorenzen said.

In the end, experts say utilities that complied with MATS are collateral damage in the Trump administration's war on calculating the co-benefits of environmental regulations. How much damage the utilities themselves ultimately suffer is an open question.

"I don't see how this appropriate and necessary determination creates too much regulatory uncertainty for utilities. But it does raise the question of when utilities are trying to plan what they're going to do with their existing coal fleets, what's the world going to look like?" Schiff Hardin LLP environmental partner David Loring said. "Any time you have the EPA switching their position on a cost finding, that presents an impediment to planning and that's always a concern."

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