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D.C. Circuit Upholds the Utility MACT (Mercury and Air Toxics Standard) Rule in 2-1 Split

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White Stallion Energy Center, LLC v. EPA, No. 12-1100 (D.C. Cir. Apr. 15, 2014).

The D.C. Circuit upheld the controversial **Utility MACT Rule**, also known as the **Mercury and Air Toxics Standard or MATS**, on April 15, 2014, with a 2-1 split, rejecting challenges from State, Industry, and Labor petitioners to the United States Environmental Protection Agency's (USEPA) 2012 promulgation of emission standards for several listed hazardous air pollutants (HAPs) emitted by coal- and oil-fired electric utility steam generating units. *White Stallion Energy Ctr., LLC v. EPA,* No. 12-1100 (D.C. Cir. Apr. 15, 2014); s*ee National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial Institutional Steam Generating Units*, Final Rule, 77 Fed. Reg. 9304 (Feb. 16, 2012)(to be codified at 40 C.F.R. parts 60 and 63) ("Final Rule"). The court's long and detailed decision hinged on whether USEPA's interpretation of the term "appropriate and necessary" from Section 112 of the Clean Air Act in the development of the Final Rule was permissible. *White Stallion Energy Ctr., LLC*, No. 12-1100, 16.

As directed by Congress in the 1990 Clean Air Act Amendments, several studies were conducted to determine whether HAPs emitted by power plants should be regulated under Section 112. In 2000, USEPA concluded that they should be (the 2000 Finding) but, in 2005, USEPA reversed itself (the 2005 Delisting). *Id*. at 9-11. States and other parties petitioned for review, and the D.C. Circuit vacated the 2005 Delisting based on the statute's unambiguous limitation on USEPA's discretion to remove sources once they have been added to the 112(c)(1) list. *Id*. at 11 (discussing *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008)).

The Final Rule, issued in 2012, confirmed USEPA's 2000 Finding, concluding that regulation of emissions from coal- and oil-fired electric generating units ("EGUs") under Section 112 is "appropriate and necessary." *White Stallion Energy Ctr., LLC*, No. 12-1100, 12 (discussing 77 Fed. Reg. at 9310-11). In the proposed rule, USEPA "rejected as 'unreasonable' its interpretation in [the 2005 Finding] that regulation under 112 was "necessary" only if no other provisions in the CAA—whether implemented or only anticipated—could 'directly or indirectly' reduce HAP emissions to acceptable levels." *White Stallion Energy Ctr., LLC*, No. 12-1100, 13 (discussing Proposed Rule, 76 Fed. Reg. 24,976, 24,992 (May 3, 2011)). While several challenges to the Final Rule were raised,

this case addressed those challenges with respect to existing EGUs only.

The court's discussion upholding the Final Rule can be summarized as follows:

- USEPA acted within its legal authority and demonstrated a reasonable connection between its action and the record of decision. Thus, the action was not "arbitrary and capricious" and was to be accorded *Chevron* deference. *Id*. at 36.

- *Chevron* does not require that that agency prove that its "reasons for the new policy are better than the reasons for the old one." *Id.* at 17 (citing *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009)). Further, the court did not need to consider the earlier findings because any issues had been cured with the Final Rule. *White Stallion Energy Ctr., LLC*, No. 12-1100, 15.

- USEPA properly relied on the Section 112(c)(9) criteria to inform its interpretation of the undefined statutory term "hazard to public health." *Id*. at 19.

- USEPA was not required by the language of the statute to consider costs in determining whether it was "appropriate" to regulate HAPs from EGUs. *Id*. at 30.

- USEPA did not err in considering environmental effects in addition to human health effects in order to make its "appropriate and necessary" determination. While other readings of the statute were plausible, the one USEPA chose was also plausible and entitled to deference. *Id*. at 31.

- Further, USEPA may regulate all HAP substances emitted by EGUs. *Id*. at 36. Once USEPA has made an "appropriate and necessary" decision, "EGUs shall be regulated under Section 112 in the same manner as other categories for which the statute requires regulation." *Id*. at 35 (citing 77 Fed. Reg. at 9326). "This source-based approach to regulating EGU HAPs was affirmed in *New Jersey*, 517 F.3d at 582, which held that EGUs could not be delisted without demonstrating that EGUs, as a category, satisfied the delisting criteria set forth in §112(c)(9)." *Id.* at 36.

- USEPA's choice not to distinguish between EGUs with larger emissions of HAPs (major sources) and fewer emissions of HAPs (area sources) was reasonable. Instead, USEPA chose to regulate HAPs from EGUs with a certain electrical output because it had traditionally done this in other HAP rules according to Section 112(a)(8). USEPA permissibly relied on the more specific rule in interpreting the statute. *White Stallion Energy Ctr., LLC*, No. 12-1100 at 39.

- USEPA's method and the resulting standards for mercury emissions from existing coal-fired EGUs were reasonable based on the data collection process used, even if it was not perfect. *Id*. at 42.

- The court rejected petitioners' challenge to USEPA's declination to establish a less stringent, health-based emission standard for acid gases under § 112(d)(4), despite the fact that USEPA did not conclusively determine that emissions of acid gases such as hydrogen chloride from EGUs pose a health hazard. *Id*. at 42. USEPA stated in the Final Rule it did not have enough evidence to determine whether an alternative standard would protect health "with an ample margin of safety." *Id*. (citing 77 Fed. Reg. at 9405-9506). The court concluded

that petitioners did not offer a "compelling basis for second-guessing USEPA's analysis." *White Stallion Energy Ctr., LLC*, No. 12-1100 at 42.

Industry specific challenges were raised, including USEPA's decisions with respect to subcategories of sources.

- In particular, a group of petitioners argued that circulating fluidized EGUs, or CFBs, should have been placed in a separate subcategory due to the significant design differences. *Id*. at 44. The Clean Air Act allows, but does not require USEPA to create subcategories. *Id.; see* 42 U.S.C. §7412(d)(1). USEPA's determination not to create a subcategory for CFBs relied on the fact that EPA's data reflected CFBs were among the best and worst performers for pollutants, which the court found demonstrated that CFB emission profiles are similar to other EGUs. *Id.* at 45.

- A challenge was also raised regarding the MACT floor set for lignite-fired EGUs, which USEPA chose to subcategorize. *Id*. at 46-47. Again the court found USEPA's data collection process to be reasonable.

- Lastly, the court rejected an argument that USEPA is required to grant a blanket, one-year extension to public utility companies because while USEPA has the discretion to do so, it is not so required. *Id*. at 48. Further USEPA's data indicated that "most units will be able to fully comply" within the three-year period established by USEPA. *Id*. at 49 (citing 77 Fed. Reg. at 9410).

Several environmental groups challenged the Final Rule provisions that permit compliance with the emission standards to be demonstrated through 1) emissions averaging and 2) options for non-mercury metal HAP emissions monitoring. The court held that USEPA's decision for both provisions was permissible under Section 112 and subject to Chevron deference. *Id*. at 51, 56.

Lastly, the court considered Julander Energy Company's challenge that USEPA should have required fuel-switching by EGUs from coal to natural gas. *Id. at 56.* However, the court determined Julander Energy Company lacked standing because its interests did not come within the "zone of interests to be protected or regulated by the statute." *Id*. at 57 (citing*Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

Dissent sets the stage for Supreme Court Appeal?

Judge Kavanaugh wrote a "powerful-sounding dissent," as described by the majority (*White Stallion Energy Ctr., LLC*, No. 12-1100, 26). The dissent challenges USEPA's decision not to consider costs where the legislative history suggests that doing so was the purpose of the term "appropriate." *Id.* (Kavanaugh, B., dissenting). The failure to do so will have significant practical implications because "meeting the [MACT] floor will be prohibitively expensive . . . regardless of whether USEPA decides to go further and set a 'beyond-the-floor' standard." *Id*. at 71. Industry petitioners found the benefits of the Rule were valued at only $4-6 million, versus USEPA's estimate of the benefits at $37 -90 billion based on "the indirect benefits of reducing PM2.5, a type of fine particulate matter that is not itself regulated as a hazardous air pollutant." *Id*. at 71 (citing 77 Fed Reg. at 9428).

Judge Kavanaugh suggests an additional, related flaw in the majority's ruling by the inappropriate reliance on the *Chevron* test alone. *Id*. at 76. The majority should have also considered the implications of *State Farm*, which held that the APA requires an agency to "consider the relevant factors when exercising its discretion under the governing statute." *Id*.; *see Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 42-43 (1983). In Judge Kavanaugh's view, the relevant factors surely would have included the costs of the regulation, if only to ensure that the benefits outweigh the costs. *Id.*

Read the full opinion.

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