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The U.S. Supreme Court Will Decide if EPA Should Consider Costs

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On November 25, 2014, the Supreme Court granted certiorari to review the D.C. Circuit's April 2014 decision, which held that ***United States Environmental Protection Agency (EPA)*** had the authority to issue the ***Mercury and Air Toxics Standards for power plants under the Clean Air Act (CAA)*** §112 without considering costs when determining if the rule was "appropriate or necessary" under CAA § 112(n)(1)(A). *See*, *State of Michigan et al. v. EPA,* case number 14-46; *Utility Air Regulatory Group v. EPA,* case number 14-47; and *National Mining Association v. EPA*, case number 14-49, in the U.S. Supreme Court. The regulation at issue in this case is formally known as the 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, 77 Fed. Reg. 9,304 (Feb. 16, 2012); but, better known as ***Mercury Air Toxics Standards (MATS).*** The MATS rule sets standards for the emission of hazardous air pollutants (HAPs) from electric utility steam generating units (EGUs or power plants) under the CAA. MATS applies to numerous power plants and establishes emissions limits for mercury, filterable particulate matter as a surrogate for toxic metals and hydrogen chloride as a surrogate for acid gases. EPA projected that the MATS rule will result $9.6 billion in annual costs but will create only $4-6 million in annual reduced HAPs benefit. 77 Fed. Reg. at 9,306, Table 2, Pet. App. 208a.

The issue on review, consolidated from the petitions filed by the Utility Air Regulatory Group, the National Mining Association and 21 states, including Michigan and Texas, was stated in the National Mining Association's petition as "whether an administrative agency, when authorized by Congress to regulate only if "appropriate," can deem the cost of the regulation irrelevant, with the result that, by the agency's own estimate, regulatory costs outweigh the benefits by almost two thousand to one." *See*, Petition for Writ of Certiorari, National Mining Association v. EPA, case number 14-49, in the U.S. Supreme Court. The D.C. Circuit has held that EPA did not have to consider cost when determining if the rule was "appropriate or necessary" under CAA §112 and provided "[i]n this complex case, we address the challenges to the Final Rule by State, Industry, and Labor petitioners, by Industry petitioners to specific aspects of the Final Rule, by Environmental petitioners, and by Julander Energy Company. For the following reasons, we deny the petitions challenging the Final Rule." *White Stallion Energy Center v. EPA,* 748 F.3d 1222 (D.C. Cir 2014).

Notably, D.C. Circuit Court Judge Kavanaugh's dissent disagreed with the majority's decision to

uphold EPA's exclusion of cost from its decision-making, although he concurred with the majority's application of the case law of the zone of interests test, and accepted the majority's conclusion that Julander was not within the zone of interests protected by the Clean Air Act. The U.S. Supreme Court will now decide whether the EPA should have considered the costs associated with its determination that the *MATS rule was "appropriate or necessary" under CAA §112.*

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