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# THE ENVIRONMENTAL PROTECTION AGENCY ON THIN AIR, *MICHIGAN V. EPA*: THE PROBLEM OF REGULATIONS ON REMAND WITHOUT VACATUR

Laura H. Sheely\*

## I. INTRODUCTION

“It rests on thin air.”<sup>1</sup> This was Judge Raymond Randolph’s appraisal of his colleagues’ decision in *Checkosky v. Securities and Exchange Commission*, a decision that remanded a federal agency ruling without vacating it.<sup>2</sup> Judge Randolph’s instinct was right: remand without vacatur is questionable under the Federal Administrative Procedure Act<sup>3</sup> and creates a storm of uncertainty for industries bound by agency regulations. Yet the United States Supreme Court continues to use this method in its judicial review of administrative rulemaking.<sup>4</sup> And so it is fitting to appraise this issue in light of the Court’s recent remand without vacatur of the Environmental Protection Agency’s Mercury and Air Toxics Standards (“MATS”) in *Michigan v. Environmental Protection Agency*.<sup>5</sup>

On February 16, 2012, the Environmental Protection Agency (“EPA”) promulgated the MATS to require coal- and oil-fired power plants to reduce mercury, acid gases, and particulate matter emissions.<sup>6</sup> The MATS required existing power plants to comply with strict emission limits by April 15, 2015.<sup>7</sup> As this deadline approached, many power plants had already invested millions before the Supreme Court heard oral arguments in March 2015.<sup>8</sup> The Supreme Court ruled on July 29, 2015, that EPA unreasonably failed to consider costs in its threshold decision that regulating hazardous air pollutants under § 7412 of the

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1. *Checkosky v. SEC (In re Checkosky)*, 23 F.3d 452, 490 (D.C. Cir. 1994) (Randolph, J., separate opinion).

2. *Id.* at 454 (per curiam).

3. *See id.* at 467, 491 (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (1988)).

4. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015).

5. *Id.*

6. 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, 9304 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63) [hereinafter Final Rule] (citing Clean Air Act § 112(b)(1), 42 U.S.C. § 7412 (2006)).

7. *Id.* at 9465.

8. SCOTUSblog, *Michigan v. Environmental Protection Agency*, (February 15, 2015), <http://www.scotusblog.com/case-files/cases/michigan-v-environmental-protection-agency/>.

Clean Air Act was “appropriate and necessary.”<sup>9</sup> In invalidating EPA’s threshold decision, the *Michigan* Court called for the agency “to engage in ‘reasoned decisionmaking’”<sup>10</sup> and cast an air of uncertainty over the future of the MATS by remanding the standard without vacatur. With no clear legal guidance for rules under remand without vacatur, power plants had little choice but to continue to work toward compliance while remaining aware that they may have been compelled to do so under an illegal rule.<sup>11</sup>

EPA deemed the Supreme Court’s ruling in *Michigan* a “very narrow”<sup>12</sup> decision, one that in EPA’s own words had “already taken effect.”<sup>13</sup> In remarks made the day after the *Michigan* ruling, EPA Administrator Gina McCarthy stated that “nothing has been vacated, the rule still stands,” and this is “not a set-back, it’s an extra step.”<sup>14</sup> But contrary to EPA’s response, the *Michigan* decision has important implications regarding when and how the agency must consider costs before developing regulatory directives that require industries to make significant capital investments in emission-control equipment. Moreover, *Michigan* follows other recent Supreme Court decisions that reflect the Court’s tougher stance on deference to expert agency interpretations of ambiguous statutes under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>15</sup> the foundation for judicial deference to administrative agency rulemaking.<sup>16</sup> This posture may lead to increased use of remand without vacatur.

This Note will critically assess a gap that exists in courts’ analysis of regulations on remand without vacatur: the courts’ failure to consider the burdens imposed on the regulated community in complying with regulations under judicial review with uncertain outcomes.<sup>17</sup> Part II summarizes the facts and procedural history of the MATS. Part III provides a background and history of EPA rulemaking actions to regulate power plant emissions of hazardous air pollutants (“HAPs”). Part IV discusses the instant case in which the Court faulted EPA for ignoring costs in its threshold decision to regulate. Finally, Part V argues that the *Michigan* decision signals an ongoing shift in judicial review of EPA rulemaking. *Michigan* continues the erosion of *Chevron* deference, holds that it is no longer acceptable to ignore the costs of expansive regulations,

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9. *Michigan*, 135 S. Ct. at 2711-12.

10. *Id.* at 2706 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

11. See Charles Wehland, Jennifer M. Hayes, and Meghan Sweeney, *After Michigan v. EPA, High Court Less Swayed by Chevron*, LAW 360, (July 10, 2015), <http://www.law360.com/articles/677500/after-michigan-v-epa-high-court-less-swayed-by-chevron>.

12. Janet McCabe, In Perspective: the Supreme Court’s Mercury and Air Toxics Rule Decision, OUR PLANET, OUR HOME: EPA’S BLOG ABOUT OUR WORLD, (June 30, 2015), <http://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>.

13. Anthony Lacey, *Supreme Court Ruling Prolongs Uncertainty Over Fate of EPA Utility MACT*, INSIDE EPA, (July 3, 2015) (quoting statement of EPA Administrator Gina McCarthy).

14. *Id.*

15. 467 U.S. 837 (1984).

16. E.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989).

17. See Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 108 (2001).

and shows the need for a stay of compliance deadlines so that affected industries can temper the impacts of potentially unlawful rulemaking.

As a result, EPA should allow more time for compliance with regulations under remand without vacatur -- equivalent at least to the length of the review period after remand -- particularly when such regulations call for an industry to make significant investments. In fact, the Supreme Court took note of power plants' burdens of complying with another regulation: new existing source performance standards, which have been challenged in the D.C. Circuit.<sup>18</sup>

There the Court responded by issuing a stay of the Clean Power Plan ("CPP") in order to avoid an outcome similar to that of *Michigan*.<sup>19</sup>

With this mind, even though power plants have already invested millions in emission control equipment in anticipation of the MATS deadline,<sup>20</sup> the Court's decision in *Michigan* is not moot. On the contrary, *Michigan* highlights the need for a more consistent treatment of regulations on remand without vacatur and shows the importance of considering the costs of compliance. As a result of continuing uncertainty over the MATS, *Michigan* matters to the regulated community and the rate-paying public.

## II. FACTS AND PROCEDURAL HISTORY

### *A. Factual Summary of EPA's Decision to Regulate*

The Clean Air Act's statutory scheme for regulating hazardous air pollutants ("HAPs") from coal- and oil-fired electric generating units ("power plants") is "unique" compared to all other stationary HAP sources.<sup>21</sup> Because power plants were already subject to extensive regulation under other Clean Air Act provisions, Congress chose to treat power plants differently.<sup>22</sup> And so, unlike the general scheme that automatically regulated all other major stationary HAP sources,<sup>23</sup> Congress directed EPA to decide whether it was "appropriate

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18. *West Virginia v. E.P.A.*, 136 S.Ct. 1000, \*1 (2016) (mem.).

19. *West Virginia v. E.P.A.*, No. 15A773, 2016 WL 502947, at \*1 (U.S. Feb. 9, 2016).

Following the Supreme Court's holding in *Michigan*, the D.C. Circuit remanded the MATS to EPA and denied State and industry's motions to stay implementation of MATS during EPA's reconsideration of costs. *White Stallion Energy Ctr., LLC v. Env'tl. Prot. Agency*, No. 12-1100, 2015 WL 11051103, at \*1 (D.C. Cir. Dec. 15, 2015), cert. denied sub nom. *Michigan v. E.P.A.*, No. 15-1152, 2016 WL 1046833 (U.S. June 13, 2016). Upon remand, the EPA issued a finding that consideration of costs did not affect the agency's determination that it is appropriate and necessary to regulate HAP emissions from power plants. Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420, 24,420 (April 25, 2016). Ultimately, on June 13, 2016, the Supreme Court denied a petition from twenty States to stay or enjoin the MATS while the EPA conducts its required cost analysis. Stuart Parker, *High Court Denies Utility MACT Suit But Further Appeal Remains Possible*, INSIDE EPA June 13, 2016. The MATS remains in place as of the publication date of this note.

20. Michael B. Gerrard, *Supreme Court Ruling on Mercury Shows Little Deference to EPA*, NEW YORK LAW JOURNAL (ONLINE), (Sept. 10, 2015), <http://www.newyorklawjournal.com/id=1202736720746/Supreme-Court-Ruling-on-Mercury-Shows-Little-Deference-to-EPA?slreturn=20160513010251>.

21. *Michigan v. EPA*, 135 S. Ct. 2699, 2704-05 (2015).

22. *Id.*

23. A "major" source is one that emits more than ten tons per year of a single HAP or more than twenty-five tons per year of any combination of HAPs. 44 U.S.C. § 7412(a)(1) (2012). EPA must list and regulate major sources. *Id.* § 7412(c)(1)-(2).

and necessary” to regulate power plant HAP emissions before subjecting them to regulation under § 7412.<sup>24</sup>

To guide this determination, Congress directed EPA to “perform a study of the hazards to public health reasonably anticipated to occur as a result of [HAP] emissions by [power plants].”<sup>25</sup> EPA completed the study<sup>26</sup> in February 1998 and published its decision to regulate power plants pursuant to the Utility RTC in December 2000.<sup>27</sup> In its threshold decision to regulate, EPA did not consider costs and said only that regulation was “appropriate” because mercury is a public health hazard, power plants are the most significant domestic mercury sources, and mercury emission control technologies are now available.<sup>28</sup> Separately, EPA said that regulation was “necessary” because other Clean Air Act requirements had not adequately controlled mercury levels in the environment and their ensuing health risks.<sup>29</sup>

EPA’s subsequent Regulatory Impact Analysis (“RIA”) “played no role” in its decision to regulate.<sup>30</sup> The RIA estimated that the Final Rule would cost power plants \$9.6 billion per year but would yield direct benefits attributable to HAP emissions of only \$4 to \$6 million per year.<sup>31</sup> The RIA also included an estimate of ancillary benefits<sup>32</sup> of \$37 to \$90 billion per year, predominately from anticipated ancillary reductions of non-HAP pollutants.<sup>33</sup> Nevertheless, EPA maintained that the statutory language “appropriate” was ambiguous.<sup>34</sup> Thence it was in the agency’s discretion to interpret the term so as not to require consideration of a power plant’s compliance costs in its threshold decision that regulation was “appropriate and necessary.”<sup>35</sup>

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24. § 7412(n)(1)(A).

25. *Id.*

26. U.S. Environmental Protection Agency, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units-Final Report to Congress*, EPA-453/R-98-004a (Feb. 1998) [hereinafter Utility RTC], <http://www3.epa.gov/ttn/atw/combust/ultox/eurte1.pdf>.

27. Regulatory Finding on the Emissions of Air Pollutants from Electric Steam Generating Units, 65 Fed. Reg. 79,825, 79,825 (Dec. 20, 2000) [hereinafter Regulatory Finding].

28. *Michigan v. EPA*, 135 S. Ct. 2699, 2705 (2015) (citing Final Rule, *supra* note 6, at 9326, 9363).

29. *Id.* (citing Final Rule, *supra* note 6, 77 Fed. Reg. at 9363).

30. Brief for the Federal Respondents at \*14, *Michigan*, 135 S. Ct. 2699 (2015) Nos. 14-46, 14-47, 14-49) (citing 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. 9304-01, 9323 (Feb. 16, 2012)).

31. *Regulatory Impact Analysis of the Final Mercury and Air Toxics Standards*, EPA REPORT NO. EPA-452/R-11-011, ES-1 (Dec. 2011), <http://www3.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf> [hereinafter RIA] (last visited Jan. 30, 2016).

32. *Michigan*, 135 S. Ct. at 2706 (noting that ancillary or co-benefits consist of commensurate reductions of sulfur dioxide, particulate matter, and other substances that are not hazardous air pollutants).

33. *Id.* (citing Final Rule, *supra* note 6, at 9306).

34. Brief for the Federal Respondents, *supra* note 30, at 11 (citing 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, 76 Fed. Reg. 24976-01, 24,989 (May 3, 2011)).

35. Brief for the Federal Respondents, *supra* note 30, at 17 (citing 42 U.S.C. § 7412(n)(1)(A)).

### B. Procedural History in the Court of Appeals for the D.C. Circuit

After EPA published its Regulatory Finding that it was “appropriate and necessary” to regulate HAP emissions from power plants,<sup>36</sup> the agency promulgated the MATS in February 2012,<sup>37</sup> setting national HAP emission standards for six subcategories of power plants.<sup>38</sup> In response, several state, industry, and labor group petitioners challenged the Final Rule in the D.C. Circuit.<sup>39</sup> After consolidating the petitions as *White Stallion Energy Center, LLC v. EPA*, the D.C. Circuit ruled that EPA reasonably concluded that it did not need to consider costs in making its initial “appropriate and necessary” determination and denied the consolidated petitions.<sup>40</sup>

### C. Supreme Court Disposition

The United States Supreme Court granted the consolidated states’ and industries’ petitions for certiorari<sup>41</sup> to examine whether EPA unreasonably “refuse[d] to consider cost” when it decided that it was “appropriate and necessary” to regulate power plant HAPs.<sup>42</sup> Justice Scalia, writing for the 5-4 majority,<sup>43</sup> held that EPA acted “unreasonably” when it deemed compliance costs, calculated to be 1,600 to 2,400 times greater than the direct benefits, “irrelevant to the decision to regulate power plants.”<sup>44</sup> The central theme in Justice Scalia’s reasoning was that the deference afforded to federal administrative agencies, known as *Chevron* deference,<sup>45</sup> requires agencies to “operate within the bounds of reasonable interpretation.”<sup>46</sup> But EPA “strayed far beyond those bounds” when it interpreted “appropriate and necessary” as authorization to ignore costs in its threshold decision to regulate power plants.<sup>47</sup>

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36. Regulatory Finding, *supra* note 27, at 79,825.

37. Final Rule, *supra* note 6, at 9327 (stating that “it is reasonable to [make the listing decision] without considering costs”).

38. Final Rule, *supra* note 6, at 9367-68. The Final Rule established emission limitations for six subcategories of power plants: (1) coal-fired unit not low rank virgin coal, (2) coal-fired unit designed low rank virgin coal, (3) IGCC unit, (4) liquid oil-fired unit-continental, (5) liquid oil-fired unit-non-continental, and (6) solid oil-derived fuel-fired unit.

39. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229 (Fed. Cir. 2014), *cert. granted*, 83 U.S.L.W. 3326 (U.S. Nov. 25, 2014) (No. 14-46).

40. *Id.* at 1241.

41. The Court consolidated the petitioner parties consisting of Michigan (No. 14-46) along with United Air Regulatory Group (No. 14-47), National Mining Association (No. 14-14), and 23 other state petitioners. The Court also consolidated the respondent parties consisting of the Environmental Protection Agency along with 26 environmental groups and states.

42. *Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015).

43. Chief Justice Roberts along with Justices Kennedy, Thomas, and Alito joined the majority opinion.

44. *Michigan*, 135 S. Ct. at 2706, 2712 (emphasis added).

45. *Id.* at 2707 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)) (noting that, under *Chevron*, a court will accept an agency’s interpretation of an ambiguous statutory provision as long as it is “reasonable”); *see infra* text accompanying note 70.

46. *Id.* (quoting *United Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014)).

47. *See id.* (citing Clean Air Act, 42 U.S.C. § 7412(n)(1) (2012)).

Authoring the dissent, Justice Kagan<sup>48</sup> echoed the majority's premise that regulating power plants "would be unreasonable if '[t]he Agency gave cost no thought *at all*.'"<sup>49</sup> But instead of requiring cost considerations as part of the threshold decision to regulate, the dissenting justices praised EPA for including costs later in the process of establishing emission limits.<sup>50</sup> Further, by adding the value of ancillary benefits<sup>51</sup> developed in the RIA, Justice Kagan estimated that the total health benefits would exceed industry's compliance costs by three to nine times.<sup>52</sup>

Ultimately, the Court's ruling (1) reversed the D.C. Circuit's decision, (2) held that EPA improperly interpreted "appropriate" to exclude consideration of costs in its threshold decision to regulate power plants, and (3) remanded without vacating the Final Rule to the D.C. Circuit for further proceedings consistent with the majority opinion.<sup>53</sup>

### III. BACKGROUND AND HISTORY OF THE LAW

The Supreme Court's decision in *Michigan* involved judicial review of EPA's rulemaking procedure under § 7412(n)(1)(A) of the Clean Air Act.<sup>54</sup> The decision rested on the doctrine of *Chevron* deference<sup>55</sup> and the evolving debate over how much deference to allow an agency engaged in interpretation of an ambiguous statute.<sup>56</sup> In its original form, § 7412 of the Clean Air Act of 1970 directed EPA to publish and periodically revise a list of substances determined to be HAPs<sup>57</sup> and subsequently promulgate categorical National Emission Standards for Hazardous Air Pollutants ("NESHAPs") for HAP sources within 360 days of their listing.<sup>58</sup> Frustrated with this slow progress,<sup>59</sup> Congress directed EPA to regulate major and area sources of such HAPs—but Congress set separate provisions for regulating power plants.<sup>60</sup>

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48. Justices Ginsburg, Breyer, and Sotomayor joined the dissenting opinion.

49. *Michigan*, 135 S. Ct. at 2714 (Kagan, J., dissenting) (alteration and emphasis in original) (quoting *Michigan*, 135 S. Ct. at 2706 (majority opinion)).

50. *Id.* (Kagan, J., dissenting).

51. See *supra* note 32 for explanation of ancillary benefits.

52. See *Michigan*, 135 S. Ct. at 2721-22 (Kagan, J., dissenting).

53. *Id.* at 2712 (majority opinion).

54. See *id.* at 2705.

55. *Id.* at 2706 (citing *Chevron*, 467 U.S. 837, 842-43).

56. See *infra* text accompanying notes 210-15.

57. § 7412(a)(6) (defining "hazardous air pollutant" as "any air pollutant" that is included on the list of pollutants in § 7412(b)); see also, SUSAN L. SMITH, SCOTT B. SAULS & ERNEST LANNET, ENVIRONMENTAL LAW PRACTICE GUIDE § 17.06[2][a] (2016) (Michael B. Gerrard ed., 2016) (noting that Congress included a list of HAPs in the 1990 Clean Air Act amendments).

58. § 7412(b)(a)(A); see also, SUSAN L. SMITH, SCOTT B. SAULS & ERNEST LANNET, ENVIRONMENTAL LAW PRACTICE GUIDE § 17.06[1][a][i] (noting that in the twenty years that followed passage of the 1970 Act, EPA had listed only eight HAPs and developed emission standards for seven of the eight).

59. S. Rep. No. 101-228, at 3513 (1989) (stating that "[t]he law has worked poorly").

60. § 7412(a)(8). Electric Generating Units (referred to herein as "power plants") are defined as "any fossil fuel fired combination unit of more than 25 megawatts that serves a generator that produces electricity for sale."

At the time of the 1990 Clean Air Act Amendments, Congress recognized that power plants were already subject to multiple regulatory requirements such as the Act's acid rain provisions.<sup>61</sup> Aware that acid-reducing equipment may have a bonus effect of concurrently reducing HAP emissions, Congress adopted a "wait and see" approach in the statutory scheme for power plants.<sup>62</sup> Because the effects of such programs were undetermined at the time of the 1990 amendments, Congress wrote a unique provision allowing regulation of power plant HAP emissions only if EPA finds such regulation "appropriate and necessary" after completion of additional studies.<sup>63</sup>

Thus, the language of § 7412(n)(1)(A) established a process for regulating power plant HAPs that is different from the automatic process applied to other categories of stationary sources.<sup>64</sup> This language predicated regulation upon the results of the Utility RTC, a "study of hazards to the public reasonably anticipated to occur as a result of emissions by electric utility steam generating units."<sup>65</sup> Congress directed EPA to complete the Utility RTC<sup>66</sup> within three years after the passage of the 1990 amendments and to regulate power plants only if it "finds such regulation is appropriate and necessary after considering the results."<sup>67</sup> If EPA made such a decision, regulation of power plants would follow the same process as other stationary HAP sources.<sup>68</sup> In this case, the process required development of a Maximum Achievable Control Technology ("MACT") for coal- and oil-fired power plants, commonly referred to as the Mercury and Air Toxics Standard ("MATS").<sup>69</sup>

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61. *Michigan v. EPA*, 135 S. Ct. 2699, 2715-16 (2015) (Kagan, J., dissenting) (noting that the Clean Air Act's acid rain provisions required power plants to install equipment to reduce their emissions of nitrous oxides and sulfur dioxide, the principal pollutants that cause acid rain); see also Keith Harley, *Symposium on Energy Law: Article: Mercurucial but not Swift – U.S. EPA's Initiative to Regulate Coal Plant Mercury Emissions Changes Course Again as it Enters a Third Decade*, 86 CHI.-KENT L. REV. 277, 287 (2011). Equipment designed to remove particulate matter is also effective at removing mercury. *Id.* These systems typically work by injecting activated carbon, a sorbent material into hot gases flowing from boilers. *Id.* Mercury adheres to the sorbent material, which is subsequently removed by particulate matter collection systems. *Id.*

62. *Michigan*, 135 S. Ct. at 2715-16 (Kagan, J., dissenting).

63. § 7412(n)(1)(A).

64. *Id.*

65. *Id.*

66. Section 7412(n)(1) of the Clean Air Act also mandated two additional studies focused on mercury emissions from power plants. The first was "a study of mercury emissions from [power plants], municipal waste combustion units, and other sources, including area sources" ("Mercury Study"). § 7412(n)(1)(B). This Mercury Study aimed to analyze mercury emissions by taking into account (1) the rate and mass of such emissions, (2) the health and environmental effects of such emissions, (3) technologies available to control such emissions, and (4) costs of such technologies. *Id.* The second study was conducted by the National Institute of Environmental Health Sciences on "the threshold level of mercury exposure below which human health effects are not expected to occur" ("NIEHS Study"). *Id.* § 7412(n)(1)(C).

67. § 7412(n)(1)(A).

68. § 7412(d)(1); see also *Michigan*, 135 S. Ct. at 2705 (noting that EPA decided to regulate power plant HAPS "on the same terms as ordinary major and area sources").

69. § 7412(d)(2); see also Harley, *supra* note 61, at 281 (describing the process for determining a MACT for large commercial and industrial sources).



### A. *Chevron Deference and the Clean Air Act*

The Court reviewed the MATS under the two-pronged test established in *Chevron*,<sup>70</sup> in which the reviewing court will grant deference unless the expert agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute."<sup>71</sup> *Michigan* builds on previous applications of *Chevron* deference to the EPA's statutory interpretations.<sup>72</sup> For example, in 2014, the Court in *Utility Air Regulatory Group v. EPA* found that EPA's interpretation of a "major emitting facility" in the context of the Prevention of Significant Deterioration ("PSD") and Title V programs was not permissible under *Chevron* step two.<sup>73</sup> Resolving a challenge to EPA's "Tailoring Rule,"<sup>74</sup> Justice Scalia found that the rule was due no deference under *Chevron* because the EPA failed to give effect to unambiguous intent of Congress and thereby "went well beyond the 'bounds of its statutory authority'" in promulgating the Tailoring Rule.<sup>75</sup>

### B. *Regulating Mercury in Power Plant Emissions*

EPA asserted its statutory authority to regulate power plant mercury emissions as "appropriate and necessary" under § 7412(n)(1)(A) without considering costs to power plants.<sup>76</sup> Mercury is a naturally occurring element of coal.<sup>77</sup> While combustion of coal is the largest source of atmospheric mercury, this is not the only source.<sup>78</sup> Municipal and medical waste incinerators, gold mining, and other industrial sectors also contribute to mercury emissions.<sup>79</sup> Once atmospheric mercury reaches lakes and rivers, aquatic microorganisms convert it to methylmercury.<sup>80</sup> In turn, methylmercury tends to bioaccumulate in

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70. *Chevron*, 467 U.S. at 842-43. The *Chevron* test affords discretion to agency interpretations of ambiguous statutes if the agency's decision satisfies a two-step analysis. Under step one, the court asks "whether Congress has directly spoken to the precise question at issue." Then, in step two, the court determines whether the choice represents a "reasonable interpretation." When Congress's intent "is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Courts apply step two only if "Congress has not directly addressed the precise question at issue."

71. *Id.* at 844.

72. *See Michigan*, 135 S. Ct. at 2712-14 (Thomas, J., concurring).

73. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2449 (2014).

74. *Id.* at 2437-38 (quoting § 7479(1)) (noting that under the Tailoring Rule, EPA proposed to adjust the statutory thresholds for a "major emitting facility" of greenhouse gas to 100,000 tons per year to replace the values in the statute that set the threshold of 100 tons per year for listed facilities and 250 tons per year for other facilities and under the Tailoring Rule, facilities with the potential to emit at least 100,000 tons per year of greenhouse gas would have been subject to PSD and Title V permitting for their construction and operation).

75. *Id.* at 2445 (quoting *Arlington, City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (emphasis deleted)). Justice Scalia found it "hard to imagine a term less ambiguous" than the numbers given in this section of the Clean Air Act. *Id.* Consequently EPA "went well beyond the 'bounds of its statutory authority'" in promulgating the Tailoring Rule.

76. *See Michigan*, 135 S. Ct. at 2707.

77. Harley, *supra* note 61, at 278.

78. *Cleaner Power Plants*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/mats/cleaner-power-plants> (last visited June 18, 2016).

79. *Id.*

80. *How People Are Exposed to Mercury*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/mercury/how-people-are-exposed-mercury> (last visited June 18, 2016).

the food chain and increase mercury levels in the flesh of top-level predatory fish consumed by people.<sup>81</sup>

The Utility RTC found “a plausible link between anthropogenic releases of mercury from industrial and combustion sources in the United States and methylmercury in fish” and concluded that power plant emissions remained a health risk to specific populations, particularly women of child-bearing age.<sup>82</sup> In addition, the study concluded that such emissions were increasing from coal-fired power plants.<sup>83</sup>

### *C. A History of Mercury Regulation for Power Plants*

EPA actions towards regulating power plant HAPs have spanned twenty years and four presidential administrations.<sup>84</sup> Congress signed the aforementioned 1990 Clean Air Act amendments into law during the George H.W. Bush administration.<sup>85</sup> This created the framework for regulating all major HAP sources.<sup>86</sup> The Clinton administration then oversaw the completion of the Utility RTC along with development of MACTs for more than sixty categories of industry other than power plants.<sup>87</sup>

On December 14, 2004, shortly after the Supreme Court’s decision in *Bush v. Gore* signaled the end of President Clinton’s EPA, the agency issued a regulatory decision mandating that regulation of power plant HAPs was “appropriate and necessary” upon the findings of the Utility RTC.<sup>88</sup> This finding placed power plants on the list of sources, preemptively requiring EPA to establish emission standards for HAPs.<sup>89</sup>

The Regulatory Finding stated EPA’s reasons for concluding that regulating power plants was both “appropriate” and “necessary.”<sup>90</sup> EPA stated that regulation was “appropriate” because power plants posed health and environmental hazards, and controls were available to “effectively” reduce such emissions.<sup>91</sup> Separately, EPA stated that regulation was “necessary” because implementation of other provisions of the Clean Air Act would not “adequately

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81. *Id.*

82. Utility RTC, *supra* note 26, at § 7-1, § 7.2.2.

83. *Id.*

84. Harley, *supra* note 61, at 277-78.

85. Harley, *supra* note 61, at 279.

86. Harley, *supra* note 61, at 280..

87. Harley, *supra* note 61, at 282.

88. Andrew M. Grossman, *Michigan v. EPA: A Mandate for Agencies to Consider Costs*, 2015 CATO SUP. CT. REV. 281, 281-82 (2014 -2015). The Supreme Court’s decision in *Bush v. Gore* ended the possibility of Gore’s presidency, a presidency that would have likely resulted in a continuation of Clinton’s environmental policies and the development of MACTs for power plants. *Id.*

89. *Id.*; see also Regulatory Finding, *supra* note 26, at 79,826. NEED EXPLANATORY PARENTHETICAL

90. Regulatory Finding, *supra* note 27, at 79,830.

91. *Id.*

address” the public health and environmental hazards.<sup>92</sup> The Regulatory Finding survived an initial judicial challenge in the D.C. Circuit.<sup>93</sup>

### 1. New Jersey v. EPA

Under the George W. Bush administration, EPA changed course, issuing a Delisting Decision stating that it was “neither appropriate nor necessary” to regulate power plants under § 7412.<sup>94</sup> In an attempt to circumnavigate the Regulatory Finding, EPA proposed an alternative rule, the Clean Air Mercury Rule (“CAMR”).<sup>95</sup>

In *New Jersey v. EPA*, a group of states and environmental organizations challenged CAMR and claimed that the Delisting Decision was inconsistent with the plain language of § 7412.<sup>96</sup> In defense of CAMR, the EPA explained that its decision to delist power plants was justified in light of the “entirely different structure and predicate” for listing power plants.<sup>97</sup> In addition, EPA claimed that the December 2000 Regulatory Finding “did not meet the statutory criteria for listing.”<sup>98</sup> The D.C. Circuit disagreed with EPA, finding EPA’s Delisting Decision to be improper because it did not fully satisfying the statutory delisting requirements.<sup>99</sup> Accordingly, the D.C. Circuit vacated the Delisting Decision and CAMR and remanded to the EPA to develop performance standards for power plants under § 7412.<sup>100</sup>

### 2. Development of the MATS

Following the election of President Barack Obama, EPA again turned its attention to regulating power plant HAPs. With CAMR vacated, EPA issued a Proposed Rule establishing emission standards for power plant HAPs on May 3, 2011.<sup>101</sup> EPA stated that its decision to regulate power plants remained

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92. *Id.*

93. *Utility Air Regulatory Group v. EPA*, No. 01-1074 consolidated with 01-1078, 2001 U.S. App. LEXIS 18436, at \*2 (D.C. Cir. July 26, 2001) (dismissing the lawsuit because “judicial review of the listing of a source category under section 7412(c) of the Act is not available until after emission standards are issued”).

94. Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 7412(c) List, 70 Fed. Reg. 15,994, 15,994 (Mar. 29, 2005) [hereinafter “Delisting Decision”].

95. *Id.*; Harley, *supra* note 61, at 284 (noting that the EPA proposed to removed power plants from the list of source categories under § 7412(c) and to establish a replacement regulatory program under § 7411 featuring a voluntary cap-and-trade program for new and existing power plants).

96. 517 F.3d 574, 577 (D.C. Cir. 2008).

97. *Id.* at 580 (quoting Delisting Decision, *supra* note 94, at 16,001).

98. *Id.*

99. *Id.* at 581. EPA may delist source categories only if the agency determines that, for sources that emit cancer-causing pollutants, “no source in the category . . . emits such hazardous air pollutants which may cause a lifetime cancer risk greater than one in a million.” § 7412(c)(B)(i)-(ii). EPA may delist sources emitting pollutants that cause health effects other than cancer or adverse environmental effects only if “no source in the category or subcategory concerned . . . exceed[s] a level which is adequate to protect public health with an ample margin of safety.” *New Jersey*, 517 F.3d at 577 (finding that EPA did not meet these requirements).

100. *New Jersey*, 517 F.3d at 583-84.

101. 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-

“appropriate and necessary,” was “wholly consistent” with the 2000 Regulatory Finding, and was supported by “additional technical analysis” conducted since the threshold decision of December 2000.<sup>102</sup> Accordingly, the Proposed Rule included several important modifications of EPA’s explanation of “appropriate and necessary.”<sup>103</sup>

First, EPA expanded the scope of its “appropriate” decision, stating that it was appropriate to regulate power plants because of hazards to public health and the environment “posed by HAP emissions from EGUs [electricity generating units] alone *or in conjunction with HAP emissions from other sources.*”<sup>104</sup> In other words, EPA stated that its decision could be based on the “cumulative impacts of HAP emissions from EGUs and other sources.”<sup>105</sup> Second, EPA clarified that its decision could be based on “any single HAP.”<sup>106</sup> Thus, the hazard posed by mercury alone could justify the decision to regulate.<sup>107</sup> Finally, EPA said cost had no bearing on its decision to regulate.<sup>108</sup> Similarly, EPA offered two reasons to explain why it was “necessary,” to regulate power plant HAPs under § 7412.<sup>109</sup> First, EPA said that it was necessary because it had already found it appropriate to regulate, and second, the “hazards to public health or the environment [would] not be adequately addressed by the imposition of the requirements of the [Clean Air Act].”<sup>110</sup>

#### IV. INSTANT CASE

In a 5-4 opinion, the Supreme Court held that EPA unreasonably refused to consider costs in its initial decision to regulate power plants.<sup>111</sup> Writing for the majority, Justice Scalia found that EPA erred by ignoring costs at the initial listing stage because such treatment of power plants failed to reflect the “unique” process for regulating power plant HAPs that Congress intended.<sup>112</sup> The majority decision invoked *Chevron*, but found that EPA’s refusal to consider

Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Proposed Rule, 76 Fed. Reg. 24,976, 24,986 (May 3, 2011) [hereinafter Proposed Rule].

102. *White Stallion*, 748 F.3d at 1232; *see also* Proposed Rule, *supra* note 101, at 24,986.

103. Proposed Rule, *supra* note 101, at 24,976.

104. Proposed Rule, *supra* note 101, at 24,988 (emphasis added).

105. Proposed Rule, *supra* note 101, at 24,987.

106. Proposed Rule, *supra* note 101, at 24,988.

107. Proposed Rule, *supra* note 101, at 24,988.

108. Proposed Rule, *supra* note 101, at 24,988 (“We further interpret the term ‘appropriate’ to not allow for the consideration of costs in assessing whether HAP emissions from EGUs pose a hazard to public health or the environment.”).

109. *White Stallion*, 748 F.3d at 1233; *see also* Proposed Rule, *supra* note 101, at 24,987.

110. Proposed Rule, *supra* note 101, at 24,977, 24,991 (stating that “[i]f we determine that the imposition of the requirements of the CAA will not address the identified hazards, EPA must find it necessary to regulate EGUs under section [7412]”) EPA took this one step further in stating that they may find it necessary to regulate even if there is uncertainty. “In addition, we may determine it is necessary to regulate under section [7412] *even if we are uncertain* whether the imposition of the requirements of the CAA will address the identified hazards.” (emphasis added)).

111. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015).

112. *Id.* at 2705, 2707.

industry's costs of implementing the MATS was unreasonable under *Chevron* step two.<sup>113</sup>

The majority opinion recognized that EPA's threshold decision to regulate did not consider the costs of the MATS-mandated emission control equipment for affected coal- and oil-fired plants.<sup>114</sup> Costs came into play later -- and then only indirectly -- when EPA calculated emission limits based on subcategories of regulated power plants.<sup>115</sup> The lack of upfront cost consideration, Justice Scalia wrote, went "far beyond [the] bounds" of reasonable interpretation.<sup>116</sup>

Justice Kagan, authoring the four-Justice dissent, argued that the later stage -- the lengthy process between the initial decision to regulate and the issuance of emission standards -- included an "exhaustive consideration of costs."<sup>117</sup> This, in the dissent's opinion, was enough.<sup>118</sup> Importantly, Justice Kagan stated that she "agree[d] with the majority . . . that EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought at all.'"<sup>119</sup> Thus, the dissent's principal disagreement with the majority is not *whether*, but *when* the EPA must consider cost in this particular context.<sup>120</sup> Finally, Justice Thomas's concurrence underscored the majority's concern that EPA exceeded the traditional limits of *Chevron* deference, but Justice Thomas took it one step further.<sup>121</sup> He opined that EPA's interpretation in this instance "raises serious questions about the constitutionality" of allowing broad deference to agency interpretations of federal statutes.<sup>122</sup>

#### A. Initial Challenge to the MATS: *White Stallion v. EPA*

State, industry, and labor petitioners challenged the MATS in the D.C. Circuit in *White Stallion v. EPA*.<sup>123</sup> In a 2-1 decision, the *White Stallion* court denied the petitioners' arguments and upheld the MATS as a permissible interpretation of the Clean Air Act.<sup>124</sup> In response to the petitioners' complaint that EPA unreasonably failed to consider costs in its "appropriate and necessary" determination, the court acknowledged that § 7412 "neither requires EPA to consider costs nor prohibits EPA from doing so."<sup>125</sup> Consequently, the court

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113. *Id.* at 2706-07.

114. *Id.* at 2706.

115. *See id.* at 2710-11.

116. *Id.* at 2707.

117. *Id.* at 2714, 2716 (Kagan, J., dissenting) ("Cost is almost always a relevant -- and usually, a highly important -- factor in regulation.").

118. *Id.* at 2716.

119. *Id.* at 2714 (Kagan, J., dissenting) (second alteration and emphasis in original) (quoting *Michigan*, 135 S. Ct. at 2706 (majority opinion)).

120. *See id.* at 2718 (Kagan, J., dissenting).

121. *See id.* at 2712 (Thomas, J., concurring).

122. *Id.*

123. *White Stallion*, 748 F.3d at 1229.

124. *Id.*

125. *Id.* at 1237.

pointed out that there are many sections of the Clean Air Act where Congress explicitly intended EPA to consider costs, but § 7412 is not one of them.<sup>126</sup>

With this, the majority found that EPA's interpretation was permissible in the context of the 1990 amendments.<sup>127</sup> The court rejected the petitioner's arguments against EPA's interpretation of "appropriate," finding that EPA did not err in several key decisions.<sup>128</sup> The court also struck down several technical challenges to EPA's calculation of the floor standards and emission reporting requirements.<sup>129</sup> In doing so, the *White Stallion* court noted that it should "show particular deference 'where the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise.'" <sup>130</sup> The dissenting judge disagreed and stated that "it is unreasonable for EPA to exclude consideration of costs in determining whether it is 'appropriate' to impose significant new regulations on electric utilities."<sup>131</sup>

### *B. The Michigan Majority: Defining "Reasoned Decisionmaking"*

In *Michigan*, the Supreme Court disagreed with the *White Stallion* majority in deciding whether it was reasonable for EPA to ignore costs in the "appropriate and necessary" determination.<sup>132</sup> Here, the critical analysis under *Chevron* step two centered on "reasoned decisionmaking," in which an agency's rules must be within its scope of authority and derived from a "logical and rational" decision process.<sup>133</sup> While Congress undoubtedly gave EPA the authority to regulate HAP emissions from stationary sources in general, the Court questioned whether EPA improperly left costs out of its threshold determination that regulating power plants was "appropriate and necessary."<sup>134</sup>

In oral argument, EPA conceded that it "could have interpreted this provision to mean that cost is relevant to the decision."<sup>135</sup> But instead, since the statute does not expressly require an analysis of costs, EPA interpreted the term "appropriate" as allowing EPA to decide whether to consider costs in its initial decision to regulate, and EPA decided not to do so.<sup>136</sup> Further, EPA noted that

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126. *Id.*

127. *Id.* at 1239.

128. *Id.* at 1244-45. The EPA decisions approved in *White Stallion* included (1) considering environmental harms along with health harms posed by HAP emissions, (2) finding that it could consider cumulative, non-power plant HAP emissions, and (3) setting standards for all listed HAPs, "not for merely for those HAPs it has expressly determined to cause health or environmental hazards." *Id.* at 1244 (citing Final Rule, *supra* note 6, 77 Fed. Reg. at 9325-26).

129. *Id.* at 1248.

130. *Id.* at 1233 (quoting *Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997)).

131. *Id.* at 1259 (Kavanaugh, J., dissenting).

132. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

133. *Id.* at 2706 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

134. See *id.* (quoting 42 U.S.C. § 7412(n)(1)(A) (2012)).

135. *Id.* (emphasis in original) (quoting Tr. of Oral Arg. at 44, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (Nos. 14-46, 14-47, 14-49)).

136. *Id.* (citing Proposed Rule, *supra* note 101, at 24988; Final Rule, *supra* note 6, 77 Fed. Reg. at 9327).

the decision to regulate would be “appropriate” if any single HAP emitted by utilities “posed a hazard to health or the environment.”<sup>137</sup>

The *Michigan* majority followed the precedent set in *Utility Air Utility Group v. EPA*<sup>138</sup> in holding that EPA unreasonably decided to forgo consideration of power plants’ compliance costs.<sup>139</sup> Indeed, instead of ignoring costs, the majority found it reasonable -- and even compulsory in this case -- for EPA to consider the costs in the front-end of the regulatory decision.<sup>140</sup> Furthermore, the Court emphasized that in general, agencies should see the economic “reality that ‘too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.’”<sup>141</sup>

### 1. Power Plants are “Different”

The majority opinion opens with a brief history of EPA regulations for power plant HAPs, noting that the statutory procedures for making the threshold decision to regulate power plants are a “stark contrast” to the procedures for all other sources.<sup>142</sup> Congress established a bright-line test for determining whether to regulate non-power-plant sources but wrote a separate provision for power plants.<sup>143</sup> Power plants, then, are “different[.]”<sup>144</sup>

Once subject to regulation, EPA sets emission standards based on the levels that have already been achieved by the best-performing twelve percent of sources within each subcategory.<sup>145</sup> Because the standards are based on performance of plants succeeding in the market economy, cost considerations are “built right into” the process of calculating the floor-standards.<sup>146</sup> Here, once EPA listed power plants as a source under § 7412(c), the subsequent regulatory process amounted to exactly the same process used for other HAP sources.<sup>147</sup>

But Congress developed a special provision for power plants, § 7412(n)(1)(A), to require studies of the health effects of mercury before subjecting the already highly-regulated facilities to additional regulatory

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137. *Id.* at 2708 (quoting Proposed Rule, *supra* note 101, at 24,989).

138. *Utility Air Regulatory Group*, 134 S. Ct. at 2442 (noting that even under *Chevron* deference, “agencies must operate within the bounds of reasonable interpretation”).

139. *Michigan*, 135 S. Ct. at 2707.

140. *Id.*

141. *Id.* at 2707-08 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part)).

142. *Id.* at 2707.

143. *Id.*

144. *Id.*

145. *Id.* at 2705; *see also* 42 U.S.C. § 7412(d)(3)(A) (2012) (noting that emission limits will be at least as stringent as “the best performing 12 percent of the existing sources”).

146. *Id.* at 2715 (Kagan, J., dissenting).

147. *See id.* at 2716 (noting that EPA first determined the appropriate “subcategories” of power plants and calculated “floor standards” for each subcategory, and that EPA next decided whether to apply more stringent standards “beyond the standards”). In some circumstances, the EPA may impose more stringent emission regulations, known as “beyond-the-floor” standards; the statute expressly requires the agency to consider costs when imposing beyond-the-floor standards under § 7412(d)(2). *Id.* (quoting § 7412(d)(2)).

burdens.<sup>148</sup> In consideration of this provision, the Court observed that EPA's regulatory actions ignored the special treatment that Congress intended and amounted to treating power plants "on the same terms as ordinary major and area sources."<sup>149</sup> Accordingly, the majority noted that EPA's "preference for symmetry cannot trump an asymmetrical statute."<sup>150</sup>

## 2. No Reason to Ignore Costs

The majority took note of EPA's reasons for ignoring costs in its initial decision to regulate, and, in turn, explained why each was improper.<sup>151</sup> First, the Court reviewed EPA's position that costs were not compulsory in the "appropriate" analysis because § 7412(n)(1)(A) of the Clean Air Act does not mention cost while other sections do.<sup>152</sup> The Court found this to be an unreasonable inference on grounds that expressly requiring consideration of costs for some industries does not make costs irrelevant to other industries.<sup>153</sup>

Second, the Court distinguished EPA's reliance on *Whitman v. American Trucking Associations, Inc.*<sup>154</sup> The Court said that *Whitman* should not control here because the "appropriate and necessary" clause of § 7412(n)(a)(A) does not dictate particular factors and is "far more comprehensive" than the provisions analyzed in *Whitman*.<sup>155</sup>

Third, the Court faulted EPA's argument that it was acceptable to ignore costs in its initial decision to regulate on the premise that the later stages of establishing emission limitations included cost considerations.<sup>156</sup> Justice Scalia likened this decision to a driver who "decide[s] whether it is 'appropriate' to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system."<sup>157</sup>

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148. *See id.* at 2705 (majority opinion).

149. *See id.* (citing Final Rule, *supra* note 6, at 9330).

150. *Id.* at 2710 (quoting *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 296 (2011)).

151. *Id.* at 2708-09.

152. *Id.* at 2709.

153. *Id.* Justice Scalia explained his reasoning by drawing a comparison to environmental effects. *Id.* For example, "[o]ther parts of the Clean Air Act also expressly mention environmental effects, while § 7412(n)(1)(A) does not. Yet that did not stop EPA from deeming environmental effects relevant to the appropriateness of regulating power plants." *Id.*

154. *Id.* (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001)). In *Whitman*, the Court held that the provision requiring EPA to set National Ambient Air Quality Standards ("NAAQS") at levels "allowing an adequate margin of safety . . . requisite to protect the public health" did not allow consideration of cost. *Whitman*, 531 U.S. at 465, 472 (quoting 42 U.S.C. § 7409(b)(1) (2000)). There, the statute compelled EPA to consider only public health protection with an adequate margin of safety. *Id.* at 495-96 (Breyer, J., concurring). Because the statute directed EPA to use particular factors in developing NAAQS, cost was correctly precluded from this analysis. *See id.* at 496

155. *Michigan*, 135 S. Ct. at 2709.

156. *Id.*

157. *Id.*



### 3. The Regulatory Impact Analysis: Not Relevant to EPA's Decision

A central principal of administrative law is that “a court may uphold agency action only on the grounds that the agency invoked *when it took the action*.”<sup>158</sup> Here, EPA did not consider cost prior to publishing the Listing Decision.<sup>159</sup> Instead, EPA's Listing Decision noted that the agency would not consider costs until the emission limits stage.<sup>160</sup> With this, the majority held EPA to its original basis: “cost is irrelevant to the decision to regulate.”<sup>161</sup>

An Executive Order requires agencies to assess the costs and benefits of proposed rules that have an economic impact of at least \$100 million.<sup>162</sup> MATS fell under this requirement and EPA published their Regulatory Impact Analysis (“RIA”) in December 2012.<sup>163</sup> The RIA quantified direct benefits of mercury reduction to mercury's effects on aquatic environments and human consumption of fish.<sup>164</sup> Yet EPA's brief to the Supreme Court stated that the RIA did not influence its threshold listing decision.<sup>165</sup>

Writing for the majority, Justice Scalia remarked that the annual costs of \$9.6 billion outweighed the direct benefits worth \$4 to \$6 million per year by a factor of 1,600 to 2,400.<sup>166</sup> The dissent cited RIA estimates of the anticipated health benefits (between \$37 and \$90 billion) resulting from ancillary benefits.<sup>167</sup> But ultimately, the Court found it unnecessary to decide which set of benefits was the best valuation of the Final Rule since those cost projections did not “form the basis for the appropriate and necessary finding.”<sup>168</sup>

### 4. Majority Disposition: Remand Without Vacatur

Resting on this analysis, the Court remanded the MATS to the D.C. Circuit without vacating the standards.<sup>169</sup> Courts have used remand without vacatur in cases where agency action has repairable flaws or when the consequences of vacating the action would be disruptive.<sup>170</sup> In the D.C. Circuit, treatment of a case under such disposition is typically based on factors from *Allied-Signal v. United States Nuclear Regulatory Commission*, in which a regulation under

158. *Id.* at 2710 (emphasis added) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

159. *Id.*

160. *See id.* at 2710-11.

161. *Id.* at 2710.

162. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738, 51,741 (Oct. 4, 1993).

163. *See Michigan*, 135 S. Ct. at 2705 (Kagan, J., dissenting).

164. RIA, *supra* note 31, at 4-1 – 4-3..

165. Brief for the Federal Respondents, *supra* note 30, at 53, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (Nos. 14-46, 14-47, 14-49) (“EPA concedes that the regulatory impact analysis ‘played no role’ in its appropriate-and-necessary finding.”)

166. *Michigan*, 135 S. Ct. at 2706.

167. *Id.* at 2721 (Kagan, J., dissenting) (noting that the RIA estimated that the implementation costs would likely increase ratepayers' electricity costs by about three percent).

168. *Id.* at 2711 (majority opinion) (quoting Final Rule, *supra* note 6, 77 Fed. Reg. at 9323).

169. *Id.* at 2712.

170. Stephanie J. Tatham, *The Unusual Remedy of Remand Without Vacatur*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,1 (January 3, 2014), <https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20Final%20Report.pdf>.

judicial review remains in effect when the consequences of invalidating a regulation are “disruptive.”<sup>171</sup>

*C. The Dissent: Considering Costs Down the Road is Enough*

Justice Kagan opined that EPA’s decision to regulate was reasonable “[a]t the outset”<sup>172</sup> because later actions included costs “again and again.”<sup>173</sup> In addition, the dissent postulated that it would not have been possible for EPA to estimate costs in its initial decision with any accuracy because the steps that facilities would be required to take to comply with an undetermined standard were unknown at that point.<sup>174</sup>

After endorsing EPA’s decision to exclude costs from its threshold listing decision, Justice Kagan found it “inequitable” to apply a regulatory regime to every industry except for power plants, especially since such plants are “a significant part of the air toxics problem.”<sup>175</sup> Further, she pronounced that after the Utility RTC found that the acid rain provisions had failed to provide the collateral effects that Congress hoped for, the reasons for regulating power plants differently “went up in smoke.”<sup>176</sup> Justice Kagan advocated for a holistic view of the “entire regulatory process,” rather than looking only at the first step through “blindness.”<sup>177</sup> This, she said, was the correct way to interpret whether regulation was “appropriate.”<sup>178</sup> Thus, the dissent approved of EPA’s “appropriate and necessary” finding -- even though it did not consider costs -- because “EPA knew when it made [the] finding that it would consider costs at every subsequent stage.”<sup>179</sup>

To support her conclusion, Justice Kagan highlighted components of EPA’s development process that show cost considerations, including the categorization and sub-categorization of power plants, the reporting requirements, and the RIA.<sup>180</sup> For example, when EPA made its initial decision to regulate power plants, EPA intended to divide facilities to be regulated into two categories: coal-fired and oil-fired.<sup>181</sup> Later when developing floor-standards, EPA subdivided the categories into five subcategories intended to “affect the ease of attaining a given emissions level.”<sup>182</sup> The additional categories accommodated costs and

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171. *Allied-Signal v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 151 (D.C. Cir. 1993); *see also infra* notes 258-62 and accompanying text.

172. *Michigan*, 135 S. Ct. at 2714 (Kagan, J., dissenting).

173. *Id.*

174. *Id.* at 2724 (Kagan, J., dissenting) (“[C]alculating costs before starting to write a regulation would put the cart before the horse.”).

175. *Id.* at 2723 (Kagan, J., dissenting) (quoting Final Rule, *supra* note 6, at 9322 (quoting 136 Cong. Rec. 3602 (1990) (statement of Sen. Durenberger))).

176. *Id.* (Kagan, J., dissenting).

177. *Id.* at 2718 (Kagan, J., dissenting).

178. *Id.*

179. *Id.* at 2721 (Kagan, J., dissenting).

180. *See id.* at 2718-22 (Kagan, J., dissenting).

181. *Id.* at 2719 (Kagan, J., dissenting); citing Regulatory Finding, 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000).

182. *Id.* at 2720 (Kagan, J., dissenting); citing Proposed Rule, *supra* note 101, at 25,036-37 (defining the

generated floor-standards with cost consideration “baked right in.”<sup>183</sup> By definition, floor standards incorporate costs because they use real-world data for the best-performing twelve percent of existing sources which “have had to consider costs in choosing their own emissions levels” while operating successfully.<sup>184</sup> Finally, EPA included additional caveats that made it easier for plants to comply<sup>185</sup> and report<sup>186</sup> to the regulatory agency.

#### D. The Concurrence: Outside the Lanes of Chevron Deference

As previously stated, the Court reviewed EPA’s decision under the standard established in *Chevron*.<sup>187</sup> The majority found that EPA’s decision to consider two factors (health and environmental effects and availability of controls) while leaving out the third factor (cost of controls) did not merit *Chevron* deference.<sup>188</sup> On the other hand, the dissent interpreted *Chevron* as a mandate to review EPA’s actions with “caution and care,” stepping in only if the result becomes “something Congress would never have allowed.”<sup>189</sup>

This division compelled Justice Thomas to write separately in support of the majority, concluding that “EPA’s interpretation deserves no deference.”<sup>190</sup> The concurrence further questioned the broad practice of deferring to an agency’s interpretation of ambiguous federal statutes, finding that it raises “serious separation-of-powers questions.”<sup>191</sup> The concurrence went on to argue that when *Chevron* deference prevents judges from ruling based on “what they believe is ‘the best reading of an ambiguous statute,’”<sup>192</sup> it is in tension with

categories based on the fuels burned: high-rank coal, low-rank virgin coal, low-rank virgin coal, and liquid oil, and solid oil, and separately categorizing gasification combined cycle (IGCC) facilities).

183. *Id.* at 2719 (Kagan, J., dissenting).

184. *Id.* at 2715 (Kagan, J., dissenting); *but see id.* at 2710-11 (majority opinion). The majority criticized this argument because it ignores the fact that many power plants are regulated by other state and federal requirements that require high-performing emissions equipment, invalidating the premise that top-performing plants were not constrained by costs. Also, the majority pointed out that EPA itself said costs did not play a role in the categorization process. While EPA listed many other factors included in the categorization process (size of facility, fuel type, plant type, and geographic conditions), costs were not among them.

185. *Id.* at 2720 (Kagan, J., dissenting) (citing Final Rule, *supra* note 6, at 9401) (establishing a separate subcategory for power plants in Hawaii, Puerto Rico, Guam, and the Virgin Islands because these locations have “minimal control over the quality of available fuel”); *id.* at 2719, n.3 (Kagan, J., dissenting) (quoting Regulatory Finding, *supra* note 27, at 79,831) (choosing not to regulate natural gas plants because these plants emit only negligible amounts of HAPs); *id.* at 2725 (Kagan, J., dissenting) (quoting Final Rule, *supra* note 6, at 9331) (choosing not to adopt “beyond-the-floor standards” for all but one of the subcategories because standards lower than the twelve percent floor would “not be ‘reasonable after considering costs’”).

186. *Id.* at 2020-21 (Kagan, J., dissenting) (noting that the Final Rule allowed power plants to choose from two reporting methods: either “input-based” (“emissions per unit of energy *used*”) or “output-based” (“emissions per unit of useful energy *produced*”), and allowed facilities to average the emissions for multiple units located on the same site—so that individual units would not have to meet standards as long as the site average met them).

187. *Id.* at 2606-07 (majority opinion) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

188. *Id.* at 2708 (“*Chevron* . . . does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.”).

189. *Id.* at 2718 (Kagan, J., dissenting).

190. *Id.* at 2712 (Thomas, J., concurring).

191. *Id.*

192. *Id.* (Thomas, J., concurring) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*,

Article III's Vesting Clause.<sup>193</sup> When this occurs, Justice Thomas sees EPA's efforts to regulate power plants as an attempt to pursue its own policy goals instead of simply making judgments that are needed to implement Congressional policies.<sup>194</sup>

## V. ANALYSIS

The outcome of *Michigan* demonstrates the problem created when a court remands regulations without vacatur, a mandate for the regulated community to comply with requirements that may or may not be upheld. The *Michigan* majority found it impermissible for EPA to regulate power plant HAPs without first considering costs, yet the court left the regulation in force under remand.<sup>195</sup> The MATS had required power plants to collectively spend close to an estimated \$9.6 billion dollars before challenges to the regulation reached the Supreme Court.<sup>196</sup> But the *Michigan* remand did nothing to ebb additional spending. Consequently, the Court's disposition of MATS -- remand without vacatur -- exposes a noteworthy gap in the judicial system's handling of regulations under such disposition. Because the regulated community may not be able to recover the costs of complying with environmental regulations later found to be illegal, remand without vacatur penalizes utilities.<sup>197</sup>

Traditionally, courts analyze regulations on remand without vacatur using the two-step test established in *Allied-Signal*, which determines the fate of such regulations based on: (1) "the seriousness of the order's deficiency" and (2) "the disruptive consequences of an interim change that may itself be changed."<sup>198</sup> During the period following a remand without vacatur, there is uncertainty about both the retrospective and prospective enforcement of a regulation.<sup>199</sup> Whether or not the court will allow agencies to enforce a regulation during the period after remand without vacatur rests on the outcome of the *Allied-Signal* test.<sup>200</sup>

Once a court has remanded a regulation, it has already recognized a serious deficiency, and so the most important work comes in the second step of *Allied-Signal*.<sup>201</sup> At this step, courts have considered, for example, the effect of vacatur

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545 U.S. 967, 983 (2005)).

193. *Id.* (Thomas, J., concurring) (citing U.S. CONST. art. III, § 1).

194. *See id.* at 2713 (Thomas, J., concurring).

195. *See id.* at 2712 (majority opinion).

196. *See, e.g.,* Wehland, *supra* note 11 (noting that most facilities, with the exception of the approximately 160 units that have an extended compliance date of April 15, 2016, have already come into compliance with MATS).

197. Jonas J. Monast and Sarah K. Adair, *Article: A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals*, 38 COLUM. J. ENVTL. L. 1, 3 (2013).

198. *Allied-Signal*, 988 F.2d at 150-51 (quoting *International Union, UMW v. FMSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

199. Kristina Daugirdas, *Note: Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 303 (2005).

200. *Id.* at 281.

201. *Id.* at 294.

on the affected agency's ability to retain fees<sup>202</sup> or whether vacatur would "defeat the enhanced protection of the environmental values covered by the EPA rule at issue."<sup>203</sup> Courts have also upheld regulations under remand without vacatur to protect the reliance interests of the regulated community when the mandated actions were already implemented.<sup>204</sup> However, few applications of *Allied-Signal* have considered the interim costs of the regulation during judicial review.<sup>205</sup>

Even though courts have generally not considered the regulated community's compliance costs, such costs should be incorporated into the *Allied-Signal* analysis going forward for two reasons. First, because, as the *Michigan* decision indicates, traditional deference to agency rulemaking under *Chevron* is under attack and reviewing courts may increasingly call for remand without vacatur.<sup>206</sup> Second, EPA has a record for changing course in accordance with the political climate,<sup>207</sup> and it is reasonable to believe that this trend will continue. And so it is all the more important for courts to use *Allied-Signal* in a consistent manner to reduce the uncertainty for the regulated community that follows remand without vacatur. When the factors indicate significant costs to industry, courts should allow relief in the form of extended compliance deadlines for affected facilities that are unable to comply with uncertain regulatory directives. The current stay of the Clean Power Plan, which was poised to require significant investments by the regulated community,<sup>208</sup> is an unmistakable signal that the Supreme Court recognizes this uncertainty and will take decisive action to prevent it.<sup>209</sup>

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202. *E.g.*, *id.* at 151 (noting that vacatur would require the NRC to refund collected fees.).

203. *Homer City*, 696 F.3d at 37-38 (quoting *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008)).

204. *E.g.*, *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (declining to vacate a USDA payment in kind program for sugar crops because the effected crops had already been plowed under, the "egg [had] been scrambled," and "there [was] no apparent way to restore the status quo ante"); *contra Humane Society of the United States v. Jewell*, 76 F. Supp. 3d 69, 137 (D.D.C. 2014) (vacating a rule governing federal management of gray wolves because the disruption of the "regulatory regime" does not outweigh substantive errors in the rule).

205. A rare example in which the court considered the implications of vacatur to an individual regulated facility can be found in *Sierra Club v. United States*, 841 F. Supp. 2d 349, 363 (D.D.C. 2012) (declining to vacate previous EIS approvals because doing so would cause parties not subject to the lawsuit to "serious financial loss").

206. *Prestes*, *supra* note 17, at 109.

207. See *supra* text accompanying note 94.

208. *Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants*, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, EPA Report no. EPA-452/R-14-002 (June 2014), <http://www3.epa.gov/ttnecas1/regdata/RIAs/111dproposalRIAfina10602.pdf> (projecting that the costs of compliance in 2020 will range from \$7.3 to \$8.8 billion dollars).

209. *West Virginia v. EPA*, No. 15A773, 2016 U.S. LEXIS 981 (Feb. 9, 2016).

### *A. Chevron Deference Does Not Allow the EPA to Ignore Costs*

The Supreme Court's flexibility under *Chevron* appears to be on the decline or at least under attack, and the *Michigan* decision continues this trend.<sup>210</sup> Recent cases show that the Court is moving towards more rigorous standards than those used in the past in order to comply with *Chevron* step two.<sup>211</sup> To be clear, this Note does not suppose that *Chevron* is going away. Instead, this Note proposes that the Court's decision in *Michigan* shows that *Chevron* step two is becoming more difficult to satisfy.<sup>212</sup>

The *Michigan* majority clarified that, although EPA is not necessarily required to conduct a formal cost-benefit analysis, the decision to refute any consideration of costs was unreasonable under *Chevron* step two.<sup>213</sup> Although it is not so plainly stated, the reasoning may be summarized as this: EPA must consider costs under a statutory directive to regulate "if appropriate" unless costs are otherwise precluded.<sup>214</sup> This directive sets *Chevron* "on its head," as it looks at whether Congress *has* clearly spoken on cost rather than deferring to EPA's discretion when Congress *has not* spoken clearly.<sup>215</sup>

#### 1. Costs of the MATS to the Regulated Community

The *Michigan* majority embraced the presumption that reasoned decisionmaking should include consideration of costs. An Executive Order issued by President Barack Obama requires agencies to analyze the benefits and costs of a proposed "significant regulatory action."<sup>216</sup> EPA fulfilled this requirement for the MATS with a Regulatory Impact Analysis (RIA). The RIA estimated compliance costs for affected power plants alongside projected health benefits.<sup>217</sup> More than ninety percent of the health benefits were derived from reductions of particulate emissions, which are ancillary benefits.<sup>218</sup> The balance came from quantifiable estimates of developmental neurological effects from

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210. Wehland, *supra* note 11.

211. See Jody Freeman, *Symposium: Why I Worry about UARG*, 39 HARV. ENV. L. REV. 9, 16 (2015). An important development in *UARG* was its resurrection of the so-called "major questions" canon derived from *FDA v. Brown & Williamson Tobacco Corp.* that required a direct and clear statement that Congress has delegated authority to an agency rule of major social and economic importance. *Brown & Williamson*, 529 U.S. 120, 160 (2000). Meanwhile, *Michigan* sets forth a rigorous requirement for "reasoned decisionmaking" in expansive regulatory decisions. See *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown, Serv., v. NLRB*, 522 U.S. 359, 374 (1998)). Although the logic of "major questions" is fundamentally different than "reasoned decisionmaking," the two combined have the potential to stop the rulemaking momentum of President Obama's EPA.

212. See *Michigan*, 135 S. Ct. at 2706-07.

213. See *id.* at 2711.

214. See Grossman, *supra* note 88 (opining that "Michigan establishes as a baseline principle of administrative law that agencies must give some consideration to costs when regulating under statutes that do not preclude them from doing so").

215. Cf. Christine Kexel Chabot, *Article: Selling Chevron*, 67 ADMIN. L. REV. 481, 497 (2015).

216. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (defining a "significant regulatory action" is one that has an annual effect on the economy of \$100 million or ore or raises a novel legal or policy issue); see also Caroline Cecot and W. Kip Viscusi, *Article: Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 575 (2015).

217. RIA, *supra* note 31, at 1-12 to 1-13.

218. RIA, *supra* note 31, at ES-18.

consumption of fish with accumulated methyl mercury.<sup>219</sup> It is striking that such a small portion of the quantifiable benefits (mercury and other HAP emission reductions) actually rested on the statutory directive. For now, the Court has not forbidden EPA from using ancillary benefits in its cost analysis, but it may do so in future cases.<sup>220</sup>

According to the U.S. Energy Information Administration (“EIA”),<sup>221</sup> 64.4% of coal-fired power plants were already equipped with the technology needed to comply with the MATS before EPA promulgated the Final Rule.<sup>222</sup> The remaining power plants were required to upgrade their facilities with emissions control equipment, change fuel, or shut down.<sup>223</sup> In response, power plants in at least thirty-seven states have made plans to close or convert to another fuel type in response to the MATS and other EPA regulations.<sup>224</sup> It is worth mentioning that plant operators, for the most part, did not make such decisions based on the MATS alone.<sup>225</sup> Such decisions were made based upon multiple regulatory directives from EPA, such as regional haze and cross state pollution rules coupled with the current depressed natural gas prices.<sup>226</sup>

It is difficult, then, to calculate a cumulative nationwide cost of MATS to oil- and coal-fired power plants that have upgraded their emission control systems. Overall, the cost of retrofitting each plant to comply with MATS will depend on its existing equipment, type of fuel, and operation frequency.<sup>227</sup> To add complication, power plants in states with regulated utility rates must show that capital expenditures for retrofits meet certain criteria.<sup>228</sup> Then, utility regulators must decide whether a facility may pass the cost of installing and operating pollution control equipment on to their customers in the form of increased rates.<sup>229</sup> For example, the Mississippi Public Service Commission allows inclusion of operating expenses in ratemaking if they are “necessary,

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219. RIA, *supra* note 31, at ES-6.

220. See *The Supreme Court 2014 Term: Leading Case: Federal Statutes and Regulations: Clean Air Act—Cost-Benefit Analysis—Michigan v. EPA*, 129 HARV. L. REV. 311, 320 (2015).

221. About EIA, <https://www.eia.gov/about/> (last visited January 31, 2016). The U.S. Energy Information Administration (EIA) is an independent and impartial energy information organization funded by Congress.

222. Michael Leff, *Coal-Fired Power Plant Operators Consider Emissions Compliance Strategies* U.S. ENERGY INFO. ADMIN., March 28, 2014, <http://www.eia.gov/todayinenergy/detail.cfm?id=15611>.

223. *Id.*

224. *Coal Unit Retirements*, AM. COAL. FOR CLEAN COAL ELECTRICITY, Dec. 2015, <http://www.americaspower.org/wp-content/uploads/2015/10/Coal-Unit-Retirements.pdf> (last visited January 31, 2016).

225. Neil Copel and Debashis Bose, *Impact of Coal Plant Retirements on the Capacity and Energy Market in PJM*, <http://bv.com/docs/reports-studies/impact-of-coal-plant-requirements-on-the-capacity-energy-market-in-pjm.pdf> (last visited January 31, 2016).

226. *Id.*

227. Michael Leff, *Coal-Fired Power Plant Operators Consider Emissions Compliance Strategies*, U.S. ENERGY INFO. ADMIN., March 28, 2014, <http://www.eia.gov/todayinenergy/detail.cfm?id=15611>.

228. Monast & Adair, *supra* note 195. Utility rates in most states are approved by state public utility commissions or public service commissions through a ratemaking approval process. Approval of consumer rates in regulated states is typically a state process that considers reliability and affordability.

229. *Id.*

prudent and reasonable expenses incurred or to be incurred in the rendition of the utility's service."<sup>230</sup>

Utility companies are obligated to deliver electricity in a "cost-effective manner"<sup>231</sup> and must plan for capital expenditures ten to twenty years in advance.<sup>232</sup> Thus, uncertain environmental regulations are disruptive and require utility managers to compare the risks of investing in emissions equipment in anticipation of regulatory deadlines with waiting until there is regulatory certainty before acting.<sup>233</sup> If anticipated regulations do not come to fruition -- or worse, if uncertainty continues -- utilities may be put in the position of being unable to account for capital investment in states that do not allow rate adjustments for prospective regulations.<sup>234</sup> For example, the Kentucky Public Service Commission did not allow a utility company to increase rates to cover investments in renewable energy because regulations requiring such investments were not yet "known and measurable."<sup>235</sup>

With the initial deadlines of April 15, 2015, and April 15, 2016, (for facilities granted one-year extensions),<sup>236</sup> many plants required to install new equipment had already done so prior to the *Michigan* decision. However some plants have yet to install retrofits and struggle with ongoing uncertainty of the MATS after *Michigan*. For example, a utility group in Indiana has not yet installed scrubbers on their coal-fired plants at an estimated cost of \$70 to \$90 million.<sup>237</sup> The Indiana Regulatory Commission approved installation of the scrubbers, but environmental groups challenged the decision, as they would rather see the money spent to replace coal plants with natural gas-powered plants instead of to retrofit coal plants.<sup>238</sup> As a second example in regard to direct consumer costs, a utility authority that serves Montana and South Dakota reported that its rates will increase an average of twenty percent after spending \$384 million to install controls needed to comply with MATS and regional haze rules.<sup>239</sup> There are also supply-chain effects; for instance, MATS has spurred litigation over a long-term coal supply contract for a Pennsylvania power plant.<sup>240</sup>

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230. CODE MISS. R. 39-1-1:21.

231. Monast & Adair, *supra* note 195, at 5 (emphasis in original).

232. Interview with Chuck D. Barlow, Vice-President, Environmental Strategy & Policy, Entergy Services Inc., Jackson, Miss. (Jan. 15, 2016).

233. Monast & Adair, *supra* note 197, at 35.

234. *Id.* at 43.

235. *Id.* (quoting Application of Ky. Power Co., No. 2009-00545, slip op. at 1 (Ky. Pub. Serv. Comm'n, June 28, 2010), at [http://psc.ky.gov/order\\_vault/orders\\_2010/200900545\\_06282010.pdf](http://psc.ky.gov/order_vault/orders_2010/200900545_06282010.pdf) (order denying request for wind contract)).

236. Final Rule, *supra* note 6, at 9407 (noting that permitting authorities have the authority to grant extensions of up to one year on a case-by-case basis when plants need additional time to install controls).

237. Darren Sweeney, *Indiana Appeals Court Remands IURC Approval of Vectren Plant Upgrades*, SNL FINANCIAL, Oct. 30, 2015, <https://www.snl.com/interactiveX/article.aspx?ID=34352010&KPLT=2>.

238. *Id.*

239. Lauren Bellerio, *Montana-Dakota Utilities Seeks Rate Hikes to Cover Plant Upgrades, Transmission*, SNL FINANCIAL, July 8, 2015, <https://www.snl.com/interactiveX/article.aspx?ID=33187035&KPLT=2>.

240. Michael Niven, *Alliance, FirstEnergy Square Off Over Coal Contract Breach Blamed on EPA*



EPA's cost estimate of \$9.6 billion was calculated using the agency's Integrated Planning Model ("IPM"), which is a tool that EPA uses to estimate the cost of air pollution control policies for mercury, nitrogen oxides, and sulfur oxides.<sup>241</sup> The IPM uses a number of assumptions related to the performance efficiency of pollution control equipment, future fuel prices, and growth in electricity demand.<sup>242</sup> Thus, there is inherent, unquantifiable error in the cost predictions. Even so, the *validity* of EPA's cost predictions was not at issue in *Michigan*. Instead, it was the *lack of utilizing* cost predictions that led to the majority's remand.

Since *Michigan*, EPA has not calculated the actual expenses incurred by industry to comply with the MATS. However, in its post-*Michigan* defense of the rule, EPA has released several cost metrics that estimate annual capital expenditures at 2.7% to 5.7% of total annual power sector capital expenditures and annual compliance costs at 2.7% to 3.5% of annual electricity sales.<sup>243</sup>

## 2. The Timing of EPA's Cost Consideration

Past decisions show that EPA may consider costs in the face of statutory silence.<sup>244</sup> *Michigan* follows this precedent and adds the additional element of timing. From the viewpoint of a regulated entity, EPA was inconsistent in its consideration of the costs of MATS. On one hand, the Final Rule stated that "EPA does not believe that it is appropriate to consider costs when determining whether to regulate EGUs under [Clean Air Act] section [7412]."<sup>245</sup> But in the *Michigan* oral argument, EPA conceded that it "*could* have" used costs to support the rule.<sup>246</sup> Notwithstanding this, the dissent praised EPA for its implicit "exhaustive consideration of costs" throughout the development of MATS<sup>247</sup> and noted that compliance costs were less than the ancillary benefits.<sup>248</sup>

The majority, however, disagreed and insisted that the agency should not be permitted to change position on its consideration of costs.<sup>249</sup> Relying on the

Rules, SNL FINANCIAL, March 3, 2015, <https://www.snl.com/interactiveX/article.aspx?ID=31506250&KPLT=2>.

241. RIA, *supra* note 31, at 3-1, 1-13.

242. RIA, *supra* note 31, at 3-31.

243. U.S. EPA, *Fact Sheet: Consideration of Cost in the Appropriate and Necessary Finding for the Mercury and Air Toxics Standards for Power Plants*, <http://www3.epa.gov/mats/pdfs/20151120fs.pdf> (last visited Jan. 31, 2016).

244. *See, e.g.*, *Natural Res. Def. Council, Inc. v. EPA*, 824 F.3d 1146, 1163 (D.C. Cir 1987) (en banc) (holding that under § 7412 "EPA is allowed to consider cost unless the statute expresses a clear congressional intent to preclude consideration of costs"); *EME Homer City Generation, L.P.*, 134 S. Ct. at 1607 n.21 (allowing EPA to consider costs because the statutory provision under review was silent on the issue of whether costs should be considered); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009) (endorsing EPA's position to consider costs because the statute did not designate any factors to be considered).

245. Final Rule, *supra* note 6, 77 Fed. Reg. at 9323-24.

246. *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (citing Tr. of Oral Arg. at 44, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (Nos. 14-46, 14-47, 14-49)) ("I don't think the statutory text unambiguously forbids [EPA] from considering costs.").

247. *Id.* at 2714 (Kagan, J., dissenting).

248. *Id.* at 2722 (Kagan, J., dissenting).

249. *See id.* at 2710 (majority opinion).

“foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action,” Justice Scalia deemed that EPA’s reasoning for the threshold decision was flawed.<sup>250</sup> With this, the majority found that EPA erred in its refusal to consider costs in the threshold decision to regulate mercury and other power plant HAPs and remanded the MATS without vacating it.<sup>251</sup>

### B. *Allied-Signal Ahead*

*Allied-Signal* is the most frequently cited case guiding treatment of rules under remand without vacatur in the D.C. Circuit.<sup>252</sup> But under *Allied-Signal*, the court rarely considers how much regulations under this treatment may cost those with the most at stake: the regulated community. What is more, when a court remands without vacating, it often provides little guidance to the lower court on whether the remand should govern retrospectively and how the court and regulating agency should proceed while correcting the flaws that led to remand in the first place.<sup>253</sup> Such decisions are typically left to the lower court.<sup>254</sup>

Remand without vacatur is a controversial treatment, but courts have often used it to give agencies a second chance to explain their rationale for a regulatory decision.<sup>255</sup> Some judges have questioned whether remand without vacatur is legal under the Administrative Procedure Act.<sup>256</sup> Even so, courts today continue to remand administrative regulations without vacating.<sup>257</sup>

The *Allied-Signal* case originated from a requirement that recipients of the Nuclear Regulatory Commission’s (“NRC’s”) services pay an equally

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250. *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

251. *Id.* at 2712.

252. *Allied-Signal*, 988 F.2d 146; *see also*, Tatham, *supra* note 170, at 12.

253. *Comcast Corp. v. FCC*, 579 F.3d 1, 11 (D.C. Cir. 2009) (noting that remand without vacatur “often seems to occur without analysis and, perhaps, inadvertently”).

254. *Id.*

255. *See, e.g.*, *Checkosky v. SEC (In re Checkosky)*, 23 F.3d 452, 462 (D.C. Cir. 1994) (Silberman, J., separate opinion) (allowing the SEC to explain the reason for its ruling on “improper professional conduct” on remand); *see also* Tatham, *supra* note 170, at 8 (noting that “the D.C. Circuit and other appellate courts have continued to use the remedy . . . despite concerns noted by some of the D.C. Circuit judges”).

256. *E.g.*, *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) (opining that the Administrative Procedure Act requires the court to “hold unlawful and set aside” an arbitrary and capricious agency action (quoting 5 U.S.C. § 706(2)(A))). It is beyond the scope of this Note to fully evaluate whether remand without vacatur is legal under the Administrative Procedure Act, but additional discussion of this topic is available in Daniel B. Rodriguez, *Symposium: We’ve Only Just Begun: The Impact of Remand Orders From Higher to Lower Courts on American Jurisprudence: Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599 (2004).

257. *E.g.*, *NRDC v. United States EPA*, 804 F.3d 149, 176 (2d Cir. 2015) (remanding without vacating a vessel general permit because its standards and monitoring requirements were not sufficient to maintain water quality standards in the Great Lakes and leaving the permit in effect during the remand period); *Pollinator Stewardship Council v. United States EPA*, No. 13-72346, 2015 U.S. App. LEXIS 19945, at \*33 (9th Cir. Nov. 12, 2015) (deciding to vacate EPA’s registration of a pesticide under an *Allied-Signal* analysis because the pesticide could harm bee populations and the regulation was not protective enough); *see also* Daniel H. Conrad, Article: Filling the Gap: The Retroactive Effect of Vacating Agency Regulations, 29 PACE ENVTL. L. REV. 1, 23 (2011).

apportioned amount for such services.<sup>258</sup> The petitioner in *Allied-Signal* was a uranium hexafluoride converter that questioned the NRC's refusal to grant a fee exemption for their particular industry.<sup>259</sup> The court acknowledged that due to deficiencies in NRC's reasoning, the agency's action did not constitute "reasoned decision-making."<sup>260</sup> However, the court did not vacate the rule because the consequences of vacating would be "disruptive" to the NRC, requiring it to refund fees to the entities it regulated.<sup>261</sup> In other words, costs to the regulator -- not to the regulated industry -- were the key to the court's reasoning in *Allied-Signal*.<sup>262</sup>

Though it did not rely directly on *Allied-Signal*, the D.C. Circuit's treatment of the Clean Air Interstate Rule (CAIR)<sup>263</sup> in *North Carolina v. EPA* is another recent application of remand without vacatur. There, the D.C. Circuit initially vacated CAIR upon finding "more than several fatal flaws in the rule."<sup>264</sup> However, the court reconsidered and remanded the rule to EPA without vacating after EPA convinced the court that vacating the rule would compromise health benefits already achieved by the rule and disrupt energy markets.<sup>265</sup>

In *Michigan*, the remand of MATS after the compliance deadline has caused uncertainty for the power plants that have been unable to finalize or implement their plans for compliance. EPA extended the original April 15, 2015, compliance deadline by one year for many facilities<sup>266</sup> but for some, this is not enough time. For instance, the Federal Energy Regulatory Commission (FERC) recommended that EPA allow five additional coal-fired power plants extra time to comply with the MATS in order to maintain electricity reliability and avoid shut-down.<sup>267</sup>

The disposition of the MATS after the *Michigan* decision has been especially difficult for small plants such as the Nucla Station, a small coal-fired unit located in Nucla, Colorado, and owned by Tri-State Generation and Transmission Association, Inc. (Tri-State). Tri-State asked the D.C. Circuit for relief from the MATS-mandated requirements at Nucla Station.<sup>268</sup> The unit already meets mercury limits and lacks compliance only for acid gas.<sup>269</sup> Tri-State petitioned the D.C. Circuit to vacate the MATS after the majority in

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258. *Allied-Signal*, 988 F.2d at 151.

259. *Id.* at 149.

260. *Id.* at 150.

261. *Id.* at 151.

262. *Id.*

263. *North Carolina v. EPA*, 531 F.3d 896, 903 (D.C. Cir. 2008). CAIR was developed to reduce the impact of upwind states contributing to non-attainment of air quality standards for particulate matter and ozone in downwind states using a regional cap-and-trade approach.

264. *Id.* at 901.

265. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

266. *E.g.*, Wehland, *supra* note 11.

267. Marcy Crane, *FERC Recommends Three More Utilities be Given '5th Year' Extensions of MATS Compliance Deadline*, SNL FINANCIAL, Dec. 3, 2015, <https://www.snl.com/interactivex/article.aspx?id=34725625&KPLT=6>.

268. Tri-State Generation and Transmission Ass'n Inc.'s Mot. to Govern Proceedings on Remand from the U.S. Supreme Court 6, Sept. 24, 2015.

269. *Id.*

*Michigan* found that the “sole legal basis for the rule was unlawful.”<sup>270</sup> In the alternative, Tri-State requested that the court suspend compliance deadlines for the Nucla Station while the MATS is under review, asserting that “industry should not have to build expensive new [equipment] until the standard is finally determined.”<sup>271</sup> Since Nucla Station managers had not yet determined how to comply, Tri-State called it “manifestly unfair” to require the facility to make a decision about new equipment or shut down before EPA has responded to the Supreme Court’s ruling in *Michigan*.<sup>272</sup>

On the other hand, some facilities that already meet the MATS oppose a stay for Nucla Station<sup>273</sup> and now back EPA in its defense of the MATS to protect the investments that they have already made.<sup>274</sup> Consequently, commenters have referred to the Nucla Station as the “Trojan Horse,” claiming that it will open the door to stays for many other plants.<sup>275</sup> This shift comes after facilities wanting to protect their reliance investments now believe that vacating after so many have already invested in retrofits would be detrimental to plants that have already complied.<sup>276</sup>

### 1. The *Allied-Signal* Test Should Consider Industry’s Costs

Nucla Station’s situation exemplifies the need for courts to consider all angles of a regulation on remand, including costs to the regulated community. The timing of the Supreme Court decision in *Michigan* in concert with the MATS deadlines leaves power plants with two choices: (1) purchase and install equipment to comply with a rule that may be invalidated or (2) risk future non-compliance or a mandate to shut down. But under *Allied-Signal* the negative consequences of such choices have rarely been considered.

Instead, courts applying *Allied-Signal* analysis to environmental regulations typically place emphasis on disrupting the “enhanced protection” of environmental regulations with little thought to the costs of such protection.<sup>277</sup> What is more, remand without vacatur favors agencies because it often allows

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270. *Id.* at 1.

271. *Id.* at 12 (quoting *Portland Cement Association v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011)).

272. *Id.* at 12. As of the publication date of this Note, the D.C. Circuit has declined to stay the regulation in response to Tri-State’s petition.

273. Stuart Parker, *EPA Outlines Plan for Utility MACT Remand In Opposition to Stay Request*, INSIDE EPA, August 10, 2015, at 1.

274. Annalee Grant, *Utilities Urge Court to Ignore ‘Idiosyncratic’ Efforts to Create MATS Turmoil*, SNL FINANCIAL, November 12, 2015, <https://www.snl.com/interactiveX/article.aspx?ID=34482448&KPLT=2>.

275. *Id.*

276. See Monast & Adair, *supra* note 197, at 7 (noting that many state public service commissions review utility investment decisions under two standards: (1) a “prudent” investment standard and (2) a “used and useful” test to ensure that a utility charges ratepayers only for necessary investments that directly benefit rate payers, thus utilities that have invested in emissions control equipment that is no longer mandated by law may not be able to recoup their costs).

277. See, e.g., *North Carolina*, 550 F.3d at 1178; but see *California Communities Against Toxics v. United States EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (holding that rulemaking activities under the Clean Air Act that allowed construction of a new power plant should be upheld because the only errors in the process were due to procedural errors and not substantive errors).

them another chance to explain their reasons for a rule.<sup>278</sup> Thus, agencies get another “bite at the apple” while industries are stuck with a possibly illegal rule.<sup>279</sup> And unless the reviewing court says otherwise, the rule remains in effect.<sup>280</sup> Lack of cost consideration can have serious practical implications for industries and their customers. Thus, a shift in the courts’ standard practice is needed. Remanding courts should consider the effect of a remand without vacatur on the regulated community and issue clear instructions to the lower court regarding the treatment of affected facilities in the interim.

The *Michigan* case provides a fitting example of why relief for the regulated community is necessary and will benefit both the regulator and the regulated. Here, the majority and dissent noted that EPA must consider costs; the opinions simply disagreed on the timing.<sup>281</sup> Given this disagreement, costs to regulated power plants should be a factor included in the D.C. Circuit’s review of the MATS. Opinions may differ on how to assess the “disruptive consequences”<sup>282</sup> of the remanded rule. But at minimum, the court should consider the plants’ ability to incorporate the costs of mercury-reducing equipment in their ratemaking, particularly since EPA has committed to review such costs in the court proceedings after *Michigan*.<sup>283</sup>

## 2. Courts Should Extend Compliance Deadlines for Affected Industries

This Note concludes that the court must balance the costs to the regulated community and the expected health and environmental benefits in its treatment of regulations under a remand without vacatur. The important questions, then, are how should these factors be weighed and when should these factors affect implementation of a rule while under judicial review. If costs are not significant and the health and environmental benefits are substantial, regulatory deadlines should remain in place. After all, granting extended deadlines merely because a state or industry challenges a regulation is an unreasonable result, one that is detrimental to environmental protection. But in the opposite situation, when the costs significantly outweigh the benefits and there are significant, substantive challenges to a regulation, the court should allow relief to the regulated community earlier in the judicial review process.

The Court in *West Virginia v. EPA* found this burden was great enough to warrant a complete stay at the onset of judicial review for the Clean Power Plan.<sup>284</sup> In contrast, the *Michigan* court did not allow an emergency stay of the compliance deadline requested by Nucla Station after the Court’s remand without vacatur.<sup>285</sup> Here, the D.C. Circuit said that a stay was not needed since

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278. Daugirdas, *supra* note 199, at 279.

279. Rodriguez, *supra* note 256, at 635.

280. *Id.*

281. See *Michigan v. EPA*, 135 S. Ct. 2699, 2706, 2714 (2015).

282. *Allied-Signal*, 988 F.2d at 150-51 (quoting *International Union*, 920 F.2d at 967).

283. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (No. 12-1100) (Dec. 15, 2015) (per curiam).

284. *West Virginia v. EPA*, No. 15A773, 2016 WL 502947, at \*1 (U.S. Feb. 9, 2016).

285. Parker, *supra* note 273, at 1.

EPA was “on track” to complete an assessment of the costs of MATS by April 15, 2016.<sup>286</sup> With this date, it is possible but not likely that EPA will complete its analysis before Nucla Station’s deadline for compliance with MATS.<sup>287</sup>

However, the D.C. Circuit’s decision to enforce the MATS regulatory deadlines on remand does not offer an adequate remedy for Nucla Station and other similarly affected facilities. Even though EPA may be able to complete the mandated cost assessment before the compliance deadline, it is unlikely that the D.C. Circuit will make its final determination on the fate of the MATS before April 15, 2016. In the meantime, facilities that have not yet complied with the MATS will have to decide whether to invest in the equipment needed to comply or shut down, and such decisions usually require years of planning.<sup>288</sup> Power plants in particular must plan ahead, and so a last-minute court decision will not leave facilities with enough time to comply.

The Clean Air Act imposes penalties on facilities that are unable to meet regulatory standards: operators that emit HAPs may be subject to administrative fines and to civil penalties<sup>289</sup> along with and criminal sanctions under the Clean Air Act’s endangerment provision.<sup>290</sup> Also, private citizens may bring civil suits against any person who violates an emission standard or against the EPA for failure to enforce a provision of the Clean Air Act.<sup>291</sup> Courts have allowed EPA to use regulatory discretion in enforcing some policies.<sup>292</sup> A similar concept, called enforcement discretion, allows agencies to work cooperatively with violators in order to obtain compliance using methods of persuasion rather than monetary penalties.<sup>293</sup> Allowing enforcement discretion for violations based on rules on remand without vacatur could provide relief for affected facilities. But enforcement discretion alone is not enough because it would not protect facilities from citizen suits and would not give the regulated facilities any certainty about whether or when EPA would enforce penalties.

Thus, courts should consider allowing additional time for industries that face uncertainty while the governing regulations are under review. The *Allied-Signal* analysis model with inclusion of costs to the regulated community would provide an appropriate framework for determining when a stay of a regulatory deadline is appropriate during the remand without vacatur period. Under this analysis, when the regulation has serious deficiencies (such as costs that

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286. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (No. 12-1100) (D.C. Cir. Dec. 15, 2015) (per curiam).

287. *Parker*, *supra* note 273, at 1.

288. See *supra* notes 228 through 235 and accompanying text.

289. James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281, 287 (1992) (discussing the expansion of civil enforcement authority under the 1990 CAA amendments).

290. § 7413(c)(5)(A) (proscribing fines and imprisonment to anyone who knowingly releases any hazardous air pollutant that places a person in danger of serious bodily injury or death), see also Kyle Crawford et. al., *Environmental Crimes*, 53 AM. CRIM. L. REV. 1159, 1178 (2016) (noting that the CAA includes criminal sanctions).

291. § 7604(a).

292. *Center for Biological Diversity v. United States EPA*, 794 F. Supp. 2d 151, 162 (D.D.C. 2011).

293. Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1191 (1988).

outweigh the benefits) and keeping the regulation in force has disruptive consequences, the court must allow more time.

Finally, this Note urges the court to consider whether a stay of compliance deadlines is appropriate earlier in the process of legal challenges to avoid mootness for the larger regulated community. When regulations impose significant costs or call for expansion of an agency's regulatory reach, as did the Clean Power Plan, earlier consideration of a stay is appropriate. This did not happen for the MATS. Thus, a determination made immediately following the ruling in *Michigan* would not have avoided the present situation because the compliance deadline preceded the Court's decision. Though some may argue that delayed deadlines would be a disincentive -- justifying environmental compliance that lags behind others in the same industry -- it would not excuse plants from complying with regulations after the agency has corrected the errors that led to remand without vacatur. Instead, it would give the regulated community the time it needs to develop compliance plans that balance EPA mandated environmental protections with required cost-efficiency.

## VI. CONCLUSION

Despite EPA's efforts to downplay the decision, *Michigan* heralds an important shift in the Supreme Court's application of *Chevron* deference. Although the decision in *Michigan* came too late for most oil- and coal-fired power plants, it was not too late for facilities like Nucla Station. Even though the court chose not to grant relief for that particular facility, Nucla Station stands as an example of the difficulties industries face when they are regulated under rules whose future "rests on thin air."

The *Michigan* Court has spoken regarding the mandate of upfront cost consideration. It is clear after *Michigan*, that courts will not allow agencies to ignore the costs of significant new regulations under *Chevron* analysis. Yet no court has addressed this gap -- regulations under remand without vacatur adversely affect the facilities subject to them. Incorporating costs to the regulated community in an *Allied-Signal* analysis is a logical way to achieve this result, particularly for rules that are costly and controversial. This will become even more important as litigation of the Clean Power Plan progresses.<sup>294</sup> To ignore the effects of uncertainty during judicial review of Clean Air Act regulations is not only imprudent, but will be detrimental to the power industry's ability to provide its rate payers with a cost-effective source of power.

Some believe that the regulated community is so entrenched in EPA's rulemaking process, that environmental rules are usually in industry's favor at

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294. Although a full discussion is beyond the scope of this Note, it is worth mentioning that if the D.C. Circuit upholds MATS on remand, MATS may become an argument for parties opposing the Clean Power Plan. This is because the Clean Power Plan was developed under § 7411(d), which allows performance standards for existing sources "for which air quality criteria have not been issued . . . or emitted from a source category which is regulated under section 7412." Some commenters have noted that facilities regulated under MATS may not be subject to regulation under § 7411(d) since they are already regulated under § 7412. *E.g.*, Roger R. Martella Jr., *The Legal Scrutiny Surrounding §111(d): Will It Survive or Stumble?*, 44 ELR 11058 (2014).

the expense of public health. As of late however, this trend is changing—evidenced by the Court’s holding in *Michigan*. As a result, courts are tightening deference afforded to the EPA.<sup>295</sup> In the uncertainty that follows remand without vacatur, a stay of compliance deadlines strikes the appropriate balance between protecting the environment and regulating power plants in a cost-effective manner.

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295. Justice Antonin Scalia, upon his death on February 13, 2016, left an important legacy in environmental law. In his absence, there is significant uncertainty about the future of pending environmental cases. See, e.g., Dan Farber, Justice Scalia and Environmental Law, Feb. 15, 2016, <http://legal-planet.org/2016/02/15/justice-scalia-and-environmental-law/>.





