

EPA's aggressive environmental agenda gets boost

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The Feb. 13 death of [Justice Antonin Scalia](#) already has had consequences on rulings in some of the cases before the [Supreme Court of the United States](#).

The impact will continue to be felt, especially on an aggressive environmental agenda supported by the federal government. On no issue is this more apparent than whether President [Barack Obama](#)'s Clean Power Plan, which is intended to help cut carbon pollution from power plants, will be upheld.

Most recently, Chief [Justice John Roberts](#) denied an attempt to stay the enforcement of the Mercury and Air Toxics Standard, a contentious air pollution measure finalized in 2012 that was ruled illegal in an unprecedented decision last year by the court.

Twenty states, led by Michigan, had urged the high court to block the rule while the [U.S. Environmental Protection Agency](#) assessed how to pay for its cost. But last month the request was turned down by Roberts due, in part, to Scalia's death.

Before that, the odds looked to be turning against Obama's environmental agenda, even though the administration thought it would hold up without issue, said [David Flynn](#), a partner and practice team leader in the energy, environment, Marcellus Shale and nanotechnology teams at Phillips Lytle.

In a 5-4 vote, with Scalia delivering the majority's decision, the Supreme Court decided to halt the plan's implementation because of the cost to power plants.

Flynn said he is intrigued by how the fate of the overall federal agenda to move a clean-energy plan forward — by pushing out an old coal-based energy system — has changed in a relatively short period of time since Scalia died.

"It's an interesting twist that you don't often see," Flynn said.

After last year's ruling, he wondered if the government's clean-air agenda would be sidetracked or if it was simply a bump in the road. While the EPA downplayed the impact, others said the plan could have fatal flaws.

The Mercury and Air Toxics Standard limits emissions from mercury and other air toxics on newly built, coal-fired power plants, as well as those that undergo significant modifications or renovations. That makes it more difficult and costly for a power plant burning coal to meet the new standard.

Federal officials said a stay wasn't necessary because the EPA is conducting a study of the cost and working on issues brought up in the initial Supreme Court decision. Also, after Scalia died, the justices seemed bound for a 4-4 vote, which helped prompt Roberts' decision.

"It's really interesting how one person in the United States really can sort of make a change like that occur," Flynn said, referring to the late justice.

The coalition of states and stakeholders in *Michigan v. EPA* argued that Supreme Court precedent suggests that when a rule is declared illegal, it must be vacated. That's according to [Scott Turner](#), a partner and leader of the energy and environmental practice group of Nixon Peabody. They cited Clean Water Act cases to prove their point.

As it stands, utilities and power plants will have to comply by year-end with the standard imposed by the Mercury and Air Toxics Standard.

“Because of the Scalia death, at best, the petitioning states are looking at a 4-4 decision,” Turner said. “Because of the lack of the ninth justice, the underlying Circuit Court decision stays in place. It’s an uphill battle for the petitioning states. Whether they can muster enough support to get the court to even hear it is one thing. But even if they did, to win it I think is problematic because they’re lacking that Scalia vote.”

The federal clean power agenda now seems more able to survive a judicial challenge, at least until the end of the year when a new administration is in place.

These types of cases are reason enough for Obama to raise the issue of having a ninth justice in place sooner rather than later, according to Flynn.

He said he would be hard-pressed to characterize any 4-4 decision out of the Supreme Court as a mandate or clear direction. He can’t recall a time when potentially significant issues such as this were being hung up by the lack of action on appointing a Supreme Court justice, he added.

Obama nominated federal Appeals Court Judge Merrick Garland, but the Republican majority in the Senate has refused to conduct committee hearings on an appointment until the election of a new president.

“If (4-4 deadlocks) start to come up more in important situations, is that going to become a driver to move forward with a nomination and committee hearings and a vote or are people going to stick to their guns and continue not to act on any nominee this year?” Flynn said.

Case background

The petition on the Mercury and Air Toxins Standard has its genesis in a rule the EPA promulgated for a second time. The first time, which was during the George W. Bush administration, it ran into difficulty in the DC Circuit. The Obama administration took it upon itself to renew the effort and find a different way to deal with this matter, Turner said. Since the standard was promulgated four years ago, there have been a number of challenges to it.

At one point, Turner was representing one of the parties appealing to the DC Circuit. The decision in *White Stallion Energy Center v. EPA* upheld the Mercury and Toxics Standard, with Garland — now a Supreme Court justice nominee — being in the 2-1 majority in favor of the EPA.

A number of the parties, not including Turner’s client, appealed to the Supreme Court on the principal issue that the Circuit Court failed to chastise the EPA for not considering costs in promulgating the Mercury and Air Toxics Standard. The industry’s view is that the statute in the Clean Air Act requires that cost be a factor in setting standards.

After deeming the standard illegal in its decision, the Supreme Court remanded the case back to the DC Circuit. The Circuit Court decided to leave the rule in place while EPA considered the cost to power plants. It also considered the health ramifications to the public if the standard was not upheld.

“The issue has the potential for setting a major precedent for how administrative agencies have to deal with remands,” Turner said. “If, by some miracle, the 20 petitioning states were able to convince the court to take the case and convince five members to rule in their favor, they would come away with a decision that would say when the Supreme Court or a Circuit Court remands a rule because of improper rule making, the rule can’t continue to exist until the rule is fixed.”

New York’s stance

States like New York that have had an aggressive clean energy policy in place continued plans in support of elevating their standards even as last year’s Supreme Court decision came down, according to Flynn.

New York has one of the more robust clean energy agendas of any state, he said, noting that it has committed more than \$5 billion over two decades to a future powered by renewable energy and resources. The state has examined climate change and reducing its carbon footprint, while considering how to roll all of that into a single policy initiative, he added. The state also is phasing out the dirtiest power plants.

Flynn said he expects New York to continue an aggressive self-developed and self-implemented agenda. It’s an especially hot area for the state right now with all the renewable energy initiatives such as the commitment and investment being made in Solar City in Buffalo and other solar panel and wind turbine projects.

Gov. Andrew Cuomo has said he considers clean energy a business opportunity for the state.

New York was fighting against the stance of the 20 states in the Circuit Court and has been a supporter of the Mercury and Air Toxins Standard, according to Turner. In fact, Cuomo's administration has made a concerted effort to close coal plants, using tougher mercury and air toxins standards to make it increasingly difficult for these entities to exist in the current climate, he added.

What the future holds

The EPA may now be looking at more of a hybrid strategy, focusing on the path that is open and workable in moving forward with its clean energy agenda, according to Flynn.

Even after being temporarily shut down by the stay granted on the Clean Power Plan, the EPA seems to be encouraged that it did not face the same fate with the Mercury and Air Toxins Standard.

"There may be more emphasis placed on those initiatives that haven't been blocked," Flynn said. "The EPA is probably feeling very bullish now, given the makeup of the court allows them to do certain things that people may not like. And that may be challenged but it may be very difficult for anyone to get a stay on what the agency is doing."

He wonders what that may do to the pipeline of activity in environmental cases. If the possibility of a 4-4 decision is there, a stakeholder or party in these litigations must consider their next move very carefully, he said.

"Are you going to pull back and avoid going to the Supreme Court or delay to focus on doing something down the road when a ninth Supreme Court justice is finally added?" he said. "It's going to have a lot of strategic impact on rule making and challenges until there is a clear sign that the vacancy is going to be filled."