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Supreme Court: EPA Should Have Considered Cost When Deciding Whether Mercury Limits for Power Plants Were Appropriate

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Case Commented On: United States Supreme Court, Michigan v. United States Environmental Protection Agency (June 29, 2015)

On Monday the United States Supreme Court held that the Environmental Protection Agency (EPA) improperly refused to consider costs when determining whether it was "appropriate and necessary" to regulate mercury emissions from power plants under the *Clean Air Act*. Ultimately, the EPA may be able to keep the same rules after going back and explaining why the cost of the regulations is justified in the circumstances. But the decision is an important victory for advocates of cost-benefit analysis and those who think environmental agencies should pay more attention to the costs of regulation.

Section 112 of the *Clean Air Act* directs the EPA to regulate hazardous air pollutants from power plants if it finds "regulation is appropriate and necessary." 42 U.S.C. §7412. The EPA said that regulation was "appropriate and necessary" even without considering costs because 1) power plant emissions posed risks to human health and the environment that were not eliminated by other provisions of the *Clean Air Act* and 2) there were controls available to reduce those dangerous emissions. So there was no need for the EPA to consider costs to make its initial decision to regulate, but it promised to consider costs when adopting the actual final regulations for power plants.

Although the EPA said it ignored costs when it made its initial decision to regulate, it still estimated the costs and benefits of the final rules that it adopted. The EPA estimated that its rules would cost power plants $9.6 billion dollars a year. The EPA couldn't estimate all the possible benefits of limiting mercury emissions, but the little it could quantify came to about $5 million dollars a year—less than 0.1% of the cost of the rule. On the other hand, the EPA said that cleaning up mercury would have massive side benefits: it would lower sulfur dioxide emissions and these reductions would be worth between $37 and $90 billion per year. So if you counted these ancillary benefits, they far outweighed the costs of the EPA's rule, but if you didn't count them, the EPA's rule imposed costs far in excess of its benefits.

Justice Scalia, writing for a 5-4 majority, held that the EPA must consider costs of regulation before making its initial decision to regulate, reasoning that "No regulation is 'appropriate' if it does significantly more harm than good." The four dissenters agreed that, generally speaking, "an agency must take costs into account in some manner before imposing significant regulatory burdens" but agreed with EPA's argument that the agency could consider those costs later, when adopting regulations for specific source categories.

The Supreme Court's decision may not have much impact on mercury regulation. Power utilities are already complying with the mercury rules that the Court struck down in this case. And the

case will now go back to the appellate court, which could decide to leave the rules in place while the agency rethinks whether these rules are "appropriate and necessary" factoring in the costs that they impose. The EPA already determined that the benefits of the rules far outweighed their costs if you consider ancillary benefits, so it will probably reach the same decision. On the other hand, the Court's decision raises very important questions for the future.

First: Can agencies consider ancillary benefits? The Court left the question open, but at oral argument, some justices seemed to suspect it was inappropriate to consider the benefits associated with pollutants other than mercury. After all, if the other pollutants are the problem, why not adopt regulations aimed at the other pollutants? On the other hand, it has long been standard practice for agencies to consider ancillary or "co-benefits" of reducing pollutants other than the main target of regulation. If an agency is going to consider all the important costs of a regulation, why shouldn't it consider all the important benefits? In some ways, the mercury rule may just be an outlier case because EPA estimated that the co-benefits of reducing sulfur dioxide were 10,000 times greater than the direct benefits of reducing mercury itself. But over half of the benefits of EPA's Clean Power Plan come from co-benefits in reducing pollution other than greenhouse gases, so the question does have wider importance.

Second: How much cost-benefit analysis will the Court require for other regulations? Today's decision may be seen as part of a trend that is making cost-benefit analysis a kind of default background principle for agency decision-making. Just fourteen years ago, Justice Scalia wrote an opinion for eight justices, holding that EPA *could not* consider the cost of regulation when the Clean Air Act demanded a standard at the level "requisite to protect the public health." In that case, Justice Scalia explained that EPA could consider costs later when it implemented the standard. Last year, the Court held that EPA *could* consider the cost of emissions controls when it decided whether a State "contributed significantly" to air pollution in another state; Justice Scalia dissented. Now, the Court holds that EPA *must* consider the cost of regulation when it determines whether regulation is "appropriate and necessary." Justice Scalia writes the opinion, and all justices agree that EPA must consider costs at some stage. Observing this trend, litigants will feel increasingly bold to demand that EPA consider the costs at each stage of adopting new environmental regulations.

This post originally appeared on James Coleman's blog Energy Law Prof.

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