



The U.S. Supreme Court Invalidates EPA's Power Plant Mercury Emissions Regulation

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On June 29, 2015, the U.S. Supreme Court in *Michigan v. Environmental Protection Agency* invalidated the U.S. Environmental Protection Agency's Mercury and Toxic Air Standards (MATS) regulation by a 5 to 4 vote, finding that EPA failed to consider compliance costs before adopting the regulation. The key question for the Court was whether Clean Air Act section 112(n)(1)(A) authorizes EPA to regulate hazardous air pollutant emissions from power plants without first considering the cost of such regulation. The majority, in a decision authored by Justice Scalia, answered this question in the affirmative.

Section 112(n)(1)(A) provides that EPA may regulate power plant emissions if, after performing a study of the reasonably anticipated hazards to public health from power plant emissions after the imposition of the Clean Air Act's other requirements, EPA "finds such regulation is appropriate and necessary." EPA completed the study in 2000 and concluded that power plant regulation was "appropriate and necessary" because mercury and other hazardous air pollutant emissions from power plants pose a risk to human health and the environment and that there are controls to reduce these emissions. Significantly, EPA concluded that section 112(n)(1)(A) did not require EPA to consider costs when deciding whether to regulate power plant emissions. A Regulatory Impact Analysis prepared by EPA at the time it adopted MATS showed that regulation would cause the power plant sector to incur an annual compliance cost of \$9.6 billion, while also resulting in direct and indirect health benefits amounting to an estimated \$4 to \$6 million and \$37 to \$90 billion, respectively, annually. EPA, however, did not rely on the Regulatory Impact Analysis when it adopted MATS.

Applying the two-step analysis established by the Court's seminal opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Justice Scalia determined that EPA's interpretation of its rulemaking authority under section 112(n)(1)(A) was unreasonable and, therefore, must be set aside. The *Chevron* decision directs courts to uphold an agency's interpretation of ambiguous statutory text if the agency's interpretation is reasonable, even in the face of other potentially more reasonable interpretations. The Court concluded that the phrase "appropriate and necessary" is so broad that it necessarily requires "at

least some attention to cost," which, the Court observed, is a central tenet of administrative rulemaking.

Writing for the dissent, Justice Kagan urged upholding the MATS regulation because EPA reasonably concluded that it could consider costs before adopting specific emissions limits for power plants. Justice Kagan also asserted, in the alternative, that even if a cost analysis was required, EPA complied with that requirement by preparing the Regulatory Impact Analysis, which showed that the direct and indirect benefits exceeded compliance costs. The majority rejected both of these positions. With respect to the Regulatory Impact Analysis, the majority stated that it "may uphold agency action only upon the grounds on which the agency acted." Therefore, because EPA stated that costs were irrelevant to the adoption of the MATS regulation, the Regulatory Impact Analysis could not justify its adoption. \

In rejecting EPA's statutory interpretation, the Court distinguished its earlier decision in *Whitman v. American Trucking Association, Inc.*, 531 U.S. 457 (2001), holding that Clean Air Act section 109 authorized EPA to disregard cost considerations when setting National Ambient Air Quality Standards necessary to protect public health. The Court resolved the apparent inconsistency in the statutory scheme, stating that the Clean Air Act does not allow EPA to consider costs where the Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost. Since the phrase "appropriate and necessary" subsumes cost considerations, the Court noted, the *American Trucking* decision does not apply.

The Supreme Court's holding in *Michigan v. Environmental Protection Agency* is not a complete defeat for EPA. The decision requires EPA to modify its rulemaking procedure to consider costs prior to regulating power plants, but the decision does not reach the merits of MATS. As such, EPA may propose a substantially similar regulatory package. Exactly what EPA must do to comply with Congress's implicit cost consideration requirement, however, is unclear. Because the only issue before the Court was whether costs had to be considered in some context prior to rulemaking, the Court elected not set any definite parameters for EPA, stating that it will be up to EPA to decide how to account for cost if it determines to reissue the regulation. Thus, if the EPA decides to reissue MATS regulation, which is likely, it will be forced to grapple with the uncertainty left by the majority's decision, all the while knowing that future legal challenges are on the horizon.