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The U.S. Supreme Court Holds EPA Must Consider Costs in Deciding to Regulate Power Plants

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The U.S. Supreme Court's June 29th decision in Michigan v. EPA, *taken together with another significant CAA opinion from last term,* Utility Air Regulatory Group v. *EPA,*[1] *demonstrates the Court's proclivity for subjecting agency interpretations to more rigorous scrutiny under* Chevron *deference. This approach could influence the Court's analysis in other challenges to environmental regulation, including expected lawsuits regarding EPA's "Clean Power Plan" rule,*[2] *which would require reductions in carbon dioxide emissions from power plants.*

Background

The Clean Air Act (CAA) authorizes the U.S. Environmental Protection Agency (EPA) to establish standards for hazardous air pollutant emissions from stationary sources.[3] With regard to power plants, the CAA directs EPA to conduct a study of "the hazards to public health reasonably anticipated to occur as a result of emissions" and to regulate hazardous air pollutant emissions from power plants if, based on the study, EPA determines "such regulation is appropriate and necessary."[4]

[1] No. 12-1146 (June 23, 2014). In that case, the Court ruled that EPA exceeded its statutory authority under the CAA when it interpreted the law to require stationary sources to obtain CAA Title V permits solely on the basis of their greenhouse gas emissions.

[2] http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule.

[3] *See* 42 U.S.C. § 7412 *et seq.* The standards are known as the National Emissions Standards for Hazardous Air Pollutants (NESHAP).

[4] 42 U.S.C. § 7412(n).

EPA released the results of that study in 2000.[5] The agency concluded that regulating oil- and coal-fired power plants was "appropriate and necessary."[6] Subsequently, in 2012 EPA promulgated hazardous air pollutant emissions standards for mercury emissions from certain categories of power plants (the Mercury and Air Toxics Standards, or MATS, rule).[7] In doing so, EPA concluded that "costs should not be considered" in deciding whether regulation is appropriate.[8]

D.C. Circuit Court of Appeals Upholds EPA's Interpretation

Various states and industry representatives challenged the MATS rule, in particular EPA's interpretation of the phrase "appropriate and necessary" in the CAA. Those challenges were consolidated before the D.C. Circuit Court of Appeals, which ruled in 2014 that EPA was reasonable in concluding that it need not consider costs in making its "appropriate and necessary" determination.[9] The challengers petitioned the U.S. Supreme Court for review, and the Court granted certiorari on the issue of "whether the EPA unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities."[10]

U.S. Supreme Court Reverses

On June 29, 2014 the Supreme Court held that EPA interpreted section 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the initial decision to regulate power plants.[11] In so ruling, the Supreme Court applied the analysis established by *Chevron v. Natural Resources Defense Council*,[12] known as "*Chevron* deference." Under *Chevron* deference, an agency's interpretation of an ambiguous statutory term will be upheld so long as the agency's interpretation is reasonable.

The Court noted that the phrase "appropriate and necessary" is ambiguous, and that EPA acknowledged that the phrase could have been interpreted to require consideration of cost.[13] In finding that EPA's interpretation was unreasonable, the Court stressed that the CAA treats power plants differently than other sources, and Congress prescribed certain standards that *must* be met before hazardous air pollutant emissions from power plants could be regulated.[14] The reason for this separate treatment is that the 1990 amendments to the CAA subjected power plants to various regulatory requirements, including the Acid Rain Program, that were expected to have the collateral effect of reducing emissions of hazardous air pollutants.[15] Because it was unclear whether additional hazardous air pollutant regulation would be necessary, Congress directed EPA to conduct the studies specified in section 7412(n) before deciding to regulate. The Court therefore rejected EPA's argument that power plants should be treated similarly to other CAA sources, asserting that "the Agency's preference for symmetry cannot trump an asymmetrical statute."[16]

[5] 65 Fed. Reg. 79825 (Dec. 20, 2000).

[6] *Id.* at 79829.

[7] 77 Fed. Reg. 9304 (Feb. 16, 2012).

[8] *Id.* at 9326.

[9] *White Stallion Energy Ctr., LLC v. EPA* 748 F.3d 1222, 1241 (D.C. Cir. 2014).

[10] *Michigan v. EPA*, Case No. 14-46. The case was consolidated with No. 14-47, *Utility Air Regulatory Group v. EPA,* and 14-49*, National Mining Association v. EPA.*

[11] *Michigan v. EPA*, No. 14-46, slip op. at 15.

[12] 467 U. S. 837 (1984).

[13] *Michigan v. EPA*, No. 14-46, slip op. at 5.

[14] *Id.* at 6, 12.

[15] *Id.* at 2.

[16] *Id.* at 11–12.

The Court also looked to the plain meaning of "appropriate and necessary," stating that "it is not even rational, never mind 'appropriate' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[17] The Court pointed to other provisions of the CAA, which expressly require consideration of costs in regulating power plants, reasoning that a broad reference to "appropriateness" in section 7412(n) encompasses such directives.[18]

The Court rejected EPA's argument that it could consider cost at a later stage, i.e. in deciding *how much* to regulate, rather than during the initial stage of determining *whether* to regulate. The Court explained that the "appropriate and necessary" standard governed the decision of whether to regulate, and that EPA may very well need to consider costs at both phases.[19] The Court also declined to follow *Whitman v. American Trucking*,[20] in which the Court held that provisions of the CAA requiring EPA to set air quality standards at levels "requisite to protect public health" did not allow consideration of cost. The Court distinguished *Whitman* on the ground that "appropriate and necessary" is "a far more comprehensive criterion."[21]

Consequences of Court's Decision for EPA's Future Rulemaking

The Supreme Court's opinion does not vacate the MATS rule. On remand, the Court of Appeals may vacate the rule or remand it to EPA for further proceedings. The EPA estimated that the cost to power plants to comply with the MATS rule would be approximately $9.6 billion per year.[22] Those compliance costs will now need to be more thoughtfully considered if the agency decides to re-adopt its regulation in light of the Supreme Court's opinion. The Court also clarified that "'cost' includes more than the expense of complying with regulations" and "any disadvantage" of the regulation needs to be accounted for by EPA.[23] However, the Court stopped short of requiring "a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value," leaving it "up to the Agency to decide how to account for cost."[24] The Court also left open whether EPA may consider ancillary benefits in its future analysis.[25] Depending on the action taken by the Court of Appeals, it is possible that EPA may promulgate the same or a similar rule, after adding an analysis of all costs and benefits, not just the costs of compliance.

Broader Implications for the Regulated Community

The D.C. Circuit Court of Appeals recently dismissed challenges to the Clean Power Plan proposed rule as premature,[26] but similar arguments about EPA's authority to issue the regulations under section 111(d) of the CAA will likely go back to the D.C. Circuit and ultimately the Supreme Court after the final rule is issued. Taking into consideration the Court's analysis in *Michigan* and *UARG*¸ a Supreme Court decision on the Clean Power Plan rule could potentially lead to another setback for EPA as it continues to broadly interpret its authority under the CAA.

[17] *Id.* at 7.

[18] *Id.* at 8–10.

[19] *Id.* at 11.

[20] 531 U. S. 457 (2001).

[21] *Michigan v. EPA*, No. 14-46, slip op. at 10.

[22] 77 Fed. Reg. at 9306.

[23] *Michigan v. EPA,* No. 14-46, slip op. at 7.

[24] *Id.* at 14.

[25] *Id.* at 14–15.

[26] *Murray Energy Corp. v. EPA*, Nos. 14-1151, 14-1112, 14-1146 (June 9, 2015), http://www.cadc.uscourts.gov/internet/opinions.nsf/E432B66C9D6FA18885257E5F0051085E/$file/14-1112-1556371.pdf

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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