

## Client Alert

---

June 30, 2015

# Considerable Costs—Supreme Court Requires EPA to Consider Cost Impacts of Power Plant Toxic Emissions Rules

By William Sloan, Michael Steel, and Dan Gershwin

A closely divided Supreme Court has determined that EPA must consider cost when regulating emissions of hazardous air pollutants from stationary sources. Under the Clean Air Act, EPA has authority to regulate toxic emissions from power plants if EPA finds such regulation “appropriate and necessary” following completion of a study of public health hazards caused by such emissions. EPA did so, and industry groups and 23 states challenged EPA’s new rule, arguing that EPA unreasonably interpreted the Clean Air Act by not considering cost in the initial decision to regulate.

In yesterday’s opinion in *Michigan v. EPA*, the Supreme Court agreed, and EPA will likely issue the rule again with an explicit consideration of costs. As a practical matter, many power plants have already begun to comply with the regulations, and the on-the-ground impact of the decision may therefore be somewhat limited, at least as to power plants and these specific rules. The requirement that EPA consider costs in regulating toxic emissions, however, is likely to affect future rulemaking.

EPA first made the “appropriate and necessary” finding in 1998, and reaffirmed it in 2012. EPA determined that regulation was “appropriate” because of the human health and environmental risks from power plant emissions and because emissions can be controlled, and “necessary” because other aspects of the Clean Air Act fail to eliminate these risks. In making these findings, EPA explicitly decided not to consider cost, although EPA did release a regulatory impact analysis estimating costs of \$9.6 billion per year, against direct benefits of \$4 to \$6 million per year, and ancillary benefits of \$37 to \$90 billion per year.

The Supreme Court determined that EPA, when it ignored cost in making its decision to regulate toxic emissions from power plants, acted outside the bounds of reasonable interpretation. According to the majority, the appropriateness determination should have included consideration of cost, even though the plain language of the relevant Clean Air Act section contains no reference to cost. EPA and the four dissenting justices argued that it was unnecessary to consider cost when making the initial decision to regulate toxic emissions, because EPA would consider cost when deciding how much regulation to impose at a later stage of the regulatory process. The majority rejected this argument, noting that the decision to regulate required issuance of certain minimum floor standards, so any later decision to factor in cost could only result in higher standards.

The majority’s opinion is also notable for the limits it imposes on the required cost inquiry. EPA will not be required to conduct a formal cost-benefit analysis, but rather must account for and consider costs—particularly costs of compliance—when deciding whether regulation is appropriate and necessary. Nonetheless, this case will undoubtedly motivate further efforts to secure cost consideration in the context of environmental regulation more generally.

# Client Alert

---

**Contact:**

**William Sloan**

(415) 268-7209

[wsloan@mofo.com](mailto:wsloan@mofo.com)

**Michael Steel**

(415) 268-7350

[msteel@mofo.com](mailto:msteel@mofo.com)

**About Morrison & Foerster:**

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 11 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*