# Interpreting the Supreme Court's Mercury Emissions Decision

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By a vote of 5–4 (with Justice Kennedy in the majority), the Supreme Court has reversed and remanded a regulation issued by the Environmental Protection Agency (EPA) under the Clean Air Act that limited emissions of mercury and other airborne toxics from electric power plants, because the agency failed to consider the costs of regulation at the start of the rulemaking process.[1]

Issued under a unique provision of the Act regulating hazardous air pollutant (HAP) emissions from power plants, the decision is unlikely to have substantial long-term effects on the electric-generating sector or rules governing hazardous air pollution by other industry sectors.

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However, the decision is important on several grounds. First, it confirms the importance of prevailing on a motion to stay pending appeal while the courts consider an industry's challenge to an EPA rule. Second, both the majority and the dissenters discussed the role that the EPA's analysis of costs will play in the review of its rules, a factor of great significance as the agency prepares to promulgate a new generation of rules to address emissions of greenhouse gases (GHGs). Third, combined with several other decisions issued late in the Supreme Court's term, *Michigan* will reinforce the current debate among the justices concerning whether the practice of judicial deference to agency interpretations of governing law should be reconsidered.

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## WON'T CHANGE INDUSTRY IMMEDIATELY, BUT HAS LONG-TERM IMPLICATIONS

The unique provision of law governing regulation of toxic emissions from power plants, Section 112(n)(1)(A) of the Clean Air Act, has several steps. First, the EPA must make a threshold determination whether regulation of HAPs remains "appropriate and necessary" given other controls Congress imposed on power plants, including through 1990 amendments establishing acid rain requirements. Second, if the EPA determines that additional emission limitations should be imposed, the EPA must establish standards that require the maximum degree of HAP emissions reductions and consider the cost of achieving such reductions, among other factors.[2]

In 1998, the EPA concluded that regulation of HAPs emitted by coal- and oil-fired power plants was "appropriate and necessary." More than a decade later, it reaffirmed that finding but admittedly did not consider the costs of the controls in making that decision. In developing its proposed standard, however, the EPA gave extensive consideration to costs, including these

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considerations in the formal Regulatory Impact Analysis that the agency submitted to the Office of Management and Budget in conjunction with the present rule. In issuing the rule in 2012, the EPA estimated the quantifiable benefits of the reduction in hazardous air pollutants at $4–$6 million per year, and the costs to power plants at $9.6 billion per year (or 1,600 to 2,400 times the benefits from reduced emissions of hazardous air pollutants). However, the EPA calculated that the ancillary or cobenefits from reduction of nonhazardous pollutants (fine particulates and sulfur dioxide) raised the benefits to $37–$90 billion per year.

In *Michigan*, the majority held that the EPA violated the boundaries of reasonable interpretation of the statute by its failure to consider costs in the first stage of the process. While conceding that the term "appropriate and necessary" is extremely broad and confers a great deal of discretion, the Court held that it is unreasonable to read this phrase as an invitation to ignore cost, especially in a context in which agencies have long considered costs a centrally relevant factor when deciding whether to regulate. In essence, the majority would nearly require an express authorization from Congress in order for an agency to ignore the costs of its action. The dissenters, on the other hand, would have upheld the rule on the ground that the EPA properly found it "appropriate" to defer consideration of costs to the later stage of the proceeding, because the agency had conducted an extensive analysis of costs at that stage, and costs came into its calculus at nearly every turn in setting the actual emission standards.

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The direct effects of *Michigan* are likely to be limited:

- The statutory provision governing regulation of hazardous air pollutant emissions from power plants is unique and does not apply to such emissions from other industry sectors, nor does it apply to the emissions of other types of air pollutants, such as greenhouse gases, from power plants.
- The decision will not apply directly to questions concerning the EPA's obligation to consider costs under other sections of the Clean Air Act. The courts will have to consider each provision of the Act separately in order to determine whether it authorizes the EPA to ignore costs in setting standards, as it has found with regard to other sections of the Act.[3] In particular, the EPA's forthcoming rule regulating GHG emissions from power plants will be promulgated under Section 111(d) of the statute, rather than Section 112. *Michigan* thus will not serve as a direct precedent if the Court reviews the EPA's consideration of costs in setting power plant GHG limits.
- The practical effects of the decision may also be fairly constrained. An estimated 75 percent of affected power plants have either already installed the required control technology or closed. While it is impossible to predict what the rule that will emerge from the remand process will look like, that rule will impact the minority of power plants (the estimated 25 percent that sought and obtained an additional year to come into compliance with the rule's requirements). Regardless, the decision may have less effect on these plants than will the present dynamic of replacing power plant *coal*-firing capacity with natural gas.
- On remand, the EPA may be able to issue a revised rule promptly. While several of the EPA's assumptions will surely need updating—for example, to reflect the fact that the revised rule will impact only 25 percent of the industry, or to reflect data generated by the plants that came into compliance showing that they spent substantially less than the EPA projected, the EPA already has compiled the bulk of the facts and analyses on which to base a reissued rule.

The principal issue would appear to be whether the EPA lawfully may rely upon the ancillary or cobenefits of regulating pollutants other than mercury and air toxics in justifying the cost of a rule issued under Section 112(n). The majority recognized but explicitly did not address this issue, which may play a significant role in judicial review of future


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rules. The decision did note in dicta that in a cost-benefit assessment, the decision as to which benefits to quantify would be "up to the Agency to decide (as always, within the limits of reasonable interpretation)."

However, several points presented by *Michigan* are likely to prove significant.

- The case identifies the critical nature of the preliminary fencing when a challenger seeks a stay of an EPA rule pending review. In *Michigan*, many of the parties commenced efforts to comply with the rule, so that they would be finished by the effective date if the rule were upheld. Many of the estimated 75 percent of the industry that already installed the required controls were sympathetic to the EPA's position by the time this reached the Supreme Court, because they did not want the slower starters to obtain a competitive advantage. This lesson on the importance of an injunction will not be lost on clients and counsel in future cases.

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- The briefs discussed what factors should be taken into account in consideration of costs in a proper regulatory impact analysis. Both the majority and the dissenters discussed these factors at some length, albeit in dicta. Indeed, the dissent recognized that without clear direction from Congress, an agency acts improperly in establishing a rule that ignores economic considerations. The EPA will correctly interpret this exchange as providing advance guidance on the standards to which it will be held in assessing the reasonableness of its consideration of costs in future rulemakings. The bottom line is that there currently appears to be a majority that is prepared to take a critical look at how the EPA conducts its cost assessments.
- Finally, Justice Thomas's separate, but solo, concurrence in *Michigan* will add to the continued debate that the Court needs to rethink its practice of broadly deferring to agency interpretations of statutes and their own regulations, which practice has governed for the last three decades. In *Perez v. Mortgage Bankers Association*, decided in March 2015, Justices Alito, Scalia, and Thomas submitted concurrences that questioned the courts' deference to agency interpretations of their own rules and, in Justice Thomas's case, deference to their interpretation of their authorizing statutes.

Concurrence in *Michigan* will add to the continued debate that the Court needs to rethink its practice of broadly deferring to agency interpretations.

In late June, Chief Justice Roberts's decision in *King v. Burwell*, upholding payment of subsidies to persons who bought insurance from state exchanges established under the Affordable Care Act, had the effect of undermining the legitimacy of *Chevron*. He concluded that ambiguous statutory language implicitly delegates to agencies the authority to "fill in the gaps," except in extraordinary cases, which include cases posing questions of deep economic and political significance. The chief justice found that in such cases, it is the Court's responsibility to interpret congressional ambiguity itself, by evaluating the language in light of the context of the statute as a whole.

Within days of issuance, parties challenging agency actions have seized upon the *King* decision and have already filed letters with courts submitting *King* as supplemental authority in pending cases. These parties argued that the statute involved in their cases has such great economic and political significance that the reviewing court should follow the chief justice's lead, ignore *Chevron*, and interpret the statute de novo.

## CONCLUSION

For these reasons, *Michigan v. EPA* is a case well worth reviewing. In several dimensions it is a harbinger of potential changes that may affect judicial review of agency actions over the next few years.

## NOTES

1. *Michigan v. EPA*, No. 14-46 (June 29, 2015).
2. See Section 112(n)(1)(A) (referencing "this Section").
3. See, e.g., *Whitman v. American Trucking*, 531 U.S. 457 (2001).

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