

Supreme Court invalidates federal air pollution rules for power plants

By John Burton
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On Monday, the Supreme Court invalidated the regulatory scheme adopted recently by the Environmental Protection Agency (EPA) to minimize emissions of hazardous air pollutants from older coal- and oil-burning power plants. The new regulations, which began taking effect earlier this year, were expected to reduce certain toxic wastes spewed into the air by as much as 90 percent.

The sole legal basis cited in support of the 5-4 decision was that the EPA did not first make an explicit finding that the public benefits derived from cleaning up power plant emissions outweigh the expenses the new regulations impose. Instead, the EPA made a single finding that regulating power plants to reduce toxic air pollution is “appropriate and necessary,” and then balanced the costs against benefits when it deliberated on the individual regulations.

Congress first enacted the Clean Air Act more than 50 years ago. The regulations at issue here arose from a 1990 amendment that gives the EPA additional jurisdiction over stationary-source emissions. Because of the complexity involved in regulating pollution, the EPA must conduct studies and make findings before promulgating new regulations. The EPA then implements and enforces the new rules.

According to well-established high court precedents, the judiciary must defer to the EPA’s interpretations, findings and actions so long as they are “reasonable” and “within the bounds of” the Clean Air Act.

The EPA determined that regulating oil- and coal-burning power plants was “appropriate and necessary” because emissions of mercury and other airborne toxins “posed risks to human health and the environment,” and “controls were available to reduce these emissions.”

Based on those two major findings--neither of which

can be seriously disputed--the EPA categorized various power plants, using criteria such as size, location, type of fuel, and age. By referring to the lowest pollution levels achieved at the best performing plants within each category, the EPA developed standards and timetables for different power plants. In doing so, the EPA balanced the public health benefits against the costs of implementing new procedures and technology within each category and subcategory of power plant.

Twenty-three state governments, along with an array of mining, utility, and other industry groups, filed cases challenging the new power plant regulations. After the DC Circuit Court of Appeals upheld the EPA’s position, various cases were consolidated, with the State of Michigan as the lead petitioner in the Supreme Court.

Antonin Scalia wrote the decision in *Michigan v. Environmental Protection Agency*, joined by the three other arch-conservative justices, John Roberts, Clarence Thomas and Samuel Alito, together with the conservative “swing” justice Anthony Kennedy.

It is hard to read the decision as anything short of deliberate sabotage of environmental regulations. Scalia’s opinion rests solely on the strained contention that the EPA “refused to consider whether the costs of its decision [to regulate power plant emissions] outweighed the benefits” before making its initial decision to regulate power plants.

“It is not rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits,” Scalia wrote.

What Scalia derided as “a few dollars in health” savings was based on the EPA’s finding that with the new regulations, as many as 11,000 fewer premature deaths would occur annually and countless people

compelled to breathe air near power plants could avoid serious illnesses.

Air pollutants, including mercury and arsenic, are associated with birth defects, cancer and other illnesses, especially for the aged, pregnant women and children. Coal- and oil-burning power plants are the single biggest contributor to mercury contamination of rivers and lakes, especially in the South and upper Midwest regions of the United States.

Moreover, Scalia ignores the EPA's balancing of costs against benefits that occurred when the individual regulations were adopted.

"The EPA did exactly what the Clean Air Act requires," Neil Gormley, one of the lawyers who filed a brief in support of the EPA, told CNN. "When you add up all the costs and all the benefits," Gormley said, "the health benefits of this rule dwarf the costs to the industry. The public gets nine dollars of health benefits for every one dollar the industry spends."

The EPA is already well on the way to implementing new regulations in power plants. According to EPA spokesperson Melissa Harrison, "This rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance."

"More than 70 percent of power plants already have installed controls to comply with the rules," said Vicki Patton, an attorney at the advocacy group Environmental Defense Fund.

The immediate effect of Monday's ruling is unclear. The case is being sent back to the lower courts for further proceedings. From a purely legal standpoint, it is difficult to imagine that the EPA will not be able to hold the requisite hearings and make findings that the estimated \$10 billion in expenses for implementing the regulations at power plants nationally are significantly outweighed by the projected \$30 to \$90 billion in health and other public benefits.

Sean Donahue, a lawyer representing environmental and public health groups in the case, told the *New York Times*, "The EPA will have to do more homework on costs. But I'm very confident that the final rule will be up and running and finally approved without a great deal of trouble."

Whether that occurs or not remains to be seen. The EPA is preparing to release more regulations over the next few months to mitigate climate change. Monday's

decision is no doubt intended as a warning shot to insure that any changes the EPA attempts to implement must not seriously interfere with the profit interests of major US corporations.

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