THE WINDS OF CHANGE: COST CONSIDERATION IN THE CLEAN AIR ACT IN MICHIGAN V. EPA

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This week, the Supreme Court struck down EPA's decision to regulate power plants under the Clean Air Act (CAA). The demise of the regulation is significant. Compliance was costly and complicated, but the basis for this holding is more fair-reaching. The Court held the EPA can regulate power plants under the CAA only if the "regulation is appropriate and necessary." The loose standard set by *Chevron* and the interpretive deference typically afforded agencies has led to EPA regulations costing nearly $9.5 billion. Yet the public benefits yielded from these regulations are only valued at "$4 to $5 million a year" when measured in terms of eliminated hazardous air pollutants." The States have challenged the EPA, and the days of Chevron deference appear to be over.-

In reversing the CAA deference, the Court held that "[r]ead naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost." But EPA had disclaimed considering any harm, not just monetary costs. There is an obvious tension between that and the *Whitman v. American Trucking Assns., Inc.* CAA jurisprudence. There, the Supreme Court did not allow consideration of costs when levels where to be set "to protect the public health" and with "adequate margin of safety." The Court distinguished by holding the "appropriate and necessary" mandate "a far more comprehensive criterion[.]"

The decision is arguably limited and one of process. The clause at issue applied to power plants, not CAA regulations generally.– Even then, the Court did not require a formal "cost-benefit analysis," only that EPA consider cost in some defensible way. Nevertheless, the decision on CAA may raise the profile of costs as a consideration of regulation under the CAA and environmental statutes more generally. No doubt Justice Scalia's retort that "[i]t 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," will find a home in many briefs challenging EPA regulations.