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High Court Split Over EPA's Need To Consider Costs

By **Keith Goldberg**

Law360, New York (March 25, 2015, 6:30 PM ET) -- U.S. Supreme Court justices appeared split Wednesday over whether the U.S. Environmental Protection Agency had to consider costs before issuing its landmark rule limiting mercury and other toxic emissions from power plants, with the court's liberal wing backing the agency's decision to ignore costs amid skepticism from the conservative wing.

States and industry groups challenging the 2012 Mercury and Air Toxics Standards, or MATS, claim its $9.6 billion annual compliance costs far outweigh the benefits they will produce. The EPA argues that it reasonably construed Section 112 of the Clean Air Act as directing it to consider compliance costs when establishing the appropriate level of any power plant regulation, but not when deciding whether to regulate those plants in the first place.

At Wednesday's oral arguments, the ideological divide was focused on the EPA's determination that it was "appropriate and necessary" under Section 112 of the CAA to regulate mercury emissions without considering costs, since the provision doesn't expressly require it to consider them.

Addressing Michigan Solicitor General Aaron Lindstrom, who was arguing on behalf of the states challenging the rule, Justice Ruth Bader Ginsburg said: "You are saying that appropriate necessarily embodies a cost calculation, and yet this is a statute that uses cost, directs EPA to consider costs, multiple, multiple times. Is there any case in all of our decisions where we have said even though there was no instruction to consider costs, EPA is required to consider costs?"

Lindstrom admitted there wasn't but argued that the EPA has an obligation to consider something as important as multibillion-dollar compliance costs.

"I don't think this issue has arisen the same way where Congress has given broad discretion to an agency, told them to look at all of the circumstances, and the agency has said, we're going to ignore what is an important part of the problem," Lindstrom said. "Agencies are supposed to not ignore an essential part of the problem as they engage in reasoned decision making."

Justice Elena Kagan sided with Justice Ginsburg, saying that requiring cost considerations where the statute is silent on the subject is a far cry from the court's conclusion in the 2001 case Whitman v. American Trucking Associations Inc., in which it held the EPA wasn't required to consider costs when setting national ambient air quality standards.

"If Congress wanted to require something — and clearly, Congress required this in other places —

Congress knows how to require consideration of costs. To get from silence to this notion of a requirement seems to be a pretty big jump," Justice Kagan said.

That reasoning drew a sharp dissent from Justice Antonin Scalia.

"I would think it's classic arbitrary and capricious agency action for an agency to command something that is outrageously expensive and in which the expense vastly exceeds whatever public benefit can be can be achieved," Justice Scalia said. "I would think that's — that's a violation of the Administrative Procedure Act."

He and the other members of the court's conservative wing pressed U.S. Solicitor General Donald Verrilli to justify the EPA's decision not to consider costs before issuing MATS.

"I think the phrase appropriate and necessary doesn't, by its terms, preclude the EPA from considering cost," Verrilli said. "But under [Chevron v. Natural Resources Defense Council], what the EPA has got to do is explain the justification for its reading of the statute, and that's what it did."

However, Chief Justice John Roberts said it doesn't make sense then for the EPA to "deliberately tie its hands" in issuing a rule and say it's not going to consider costs when it could do so otherwise.

"Agencies usually like to maintain for themselves as much discretion as they can," Justice Roberts said. "And it strikes me as unusual — maybe the agency could go ahead and consider and not consider costs, but to say that we're prohibited from considering costs under the phrase 'appropriate,' it strikes me as very unusual."

Case watchers say the oral arguments point to a close decision, with Justice Anthony Kennedy in his usual swing vote capacity.

"It's an ideological divide, and like the Cross-State Air Pollution Rule case, I think this is going to come down to what Justice Kennedy will do and, to a lesser extent, what Justice Roberts will do," Day Pitney LLP partner Harold Blinderman told Law360 Wednesday.

The high court has been similarly divided in recent cases interpreting the EPA's authority under the CAA, and Mayer Brown LLP Supreme Court and appellate partner Timothy Bishop said the court is still wrestling with how much deference the agency should be granted, especially as more focus is paid to combating climate change.

"The statute is so complex, and its scientific underpinnings are so difficult to grasp," Bishop told Law360. "I think the court is more content to leave it to the agency and the scientific experts than it is to intervene, given the health effects and the complexity of the regulatory scheme Congress has enacted."

Bishop said there's merit to Justice Scalia's point that agencies must consider a rule's costs even if there's no express statutory requirement they do so. But given the broad implications of that conclusion on federal agency rulemaking, it might be a bridge too far for a Supreme Court that doesn't like to make new law if it doesn't have to, experts say.

"It wouldn't surprise me if it was a carefully crafted opinion narrowly focused on the MATS rule and the [CAA] statutory rule," Blinderman said.

The state petitioners were represented at oral arguments by Michigan Solicitor General Aaron D. Lindstrom.

The industry petitioners were represented at oral arguments by F. William Brownell of Hunton & Williams LLP.

The EPA was represented at oral arguments by U.S. Solicitor General Donald B. Verrilli Jr.

Energy companies intervening on behalf of the EPA were represented at oral arguments by Paul M. Smith of Jenner & Block LLP.

The cases are State of Michigan et al. v. EPA, case number 14-46, Utility Air Regulatory Group v. EPA, case number 14-47, and National Mining Association v. EPA, case number 14-49, in the Supreme Court of the United States.

--Editing by Mark Lebetkin and Kat Laskowski.
