JONES WALKER

Energy, Environment & Natural Resources Client Alert

July 2, 2015

MORE POWER TO POWER PLANTS?

On June 29, 2015, in a five-to-four vote, the U.S. Supreme Court in *Michigan v. Environmental Protection Agency (EPA)* struck down a new EPA rule under the Clean Air Act of 1990 ("Act") to regulate hazardous air pollutants, such as mercury, from power plants. The EPA's statutory mandate is to regulate power plants' hazardous air pollutants in the same way as other facilities are regulated under the Act, if, after a study of health hazards, the EPA finds that such power-plant regulations were, in general terms, "appropriate and necessary." Then, if such regulation is "appropriate and necessary," the EPA is expressly required to consider cost in choosing among standards (e.g., air emission limits) for power plants.

The EPA's statutory health study in 1998 is the basis for its "appropriate and necessary" finding in 2000 under the Supreme Court's review. The EPA found that power-plant–related health risks existed and that no available controls existed sufficient to mitigate that finding. The EPA interpreted the Act so as to not require its consideration of costs at the initial stage of regulation of power plants, and the EPA did not consider costs at that point. It did later consider costs in the following decade when determining emission limits for power plants.

The majority (Scalia et al.) found that, unless Congress clearly speaks otherwise (i.e., base regulation solely on "safety"), the words "appropriate and necessary" and agency practice require the EPA to consider costs at the initial stage of regulation of power plants and not just at the later stages. Those general words in context required the EPA to consider multiple factors, including costs, in deciding to regulate power plants. The majority held under the judicial analysis (i.e., the *Chevron* case test) of agency statutory interpretation that the EPA took license in an interpretative "gerrymander" by ignoring costs. The Act did not justify a cost-blind regulation of power plants' hazardous air emissions. The dissent (Kagan et al.) argued that cost consideration was premature at the initial stage of power-plant regulation and that the EPA did satisfy the Act when it later took cost into account in the more detailed stage of proposing power-plant emission standards. The majority responded by saying the EPA rule must be reviewed on what the EPA said, i.e., no costs were considered at initial stage of regulations, and EPA cannot be saved by its later cost/benefit action. This was a close issue.

The case illustrates that some of the Court's members are uncomfortable with an agency's statutory interpretative powers under the Chevron test (which allows judicial deference to

agency statutory interpretations or policy formulations, if a statute is unclear), and that the members are still trying to rein in that agency power on a case-by-case basis. Justice Thomas concurring accuses the EPA of exploiting Chevron deference to agencies. However, as even the majority said, the EPA does not have to do a formal cost-benefit analysis for a reconsidered power plant rule. The EPA is apparently still free to consider "ancillary benefits" (side effects of policy), e.g., hard to quantify but estimated multi-billions of dollars per year in saved lives, less illness, fewer hospital stays, fewer sick days, reduction in otherwise unregulated power-plant pollutants, etc. Otherwise, the hard costs to power plants was $9.6 billion a year and the hard benefits were only $4 to $6 million a year without the ancillary benefits (which some may say are soft or illusory in terms of a monetary value).

The case is not the end of the EPA rule. The EPA will need to reconsider its analysis now after a court remand in the D.C. Circuit. Meanwhile, most electric utilities have already largely complied with the power plant rule by installing scrubbers on surviving power plants.

For more information, please contact Stanley Millan.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

Stanley A. Millan
Special Counsel, Jones Walker LLP
201 St. Charles Ave
New Orleans, LA 70170
smillan@joneswalker.com
504.582.8328 *tel*

Jones Walker Energy, Environment & Natural
Resources Practice Group
www.joneswalker.com