

Supreme Court justices appear split over EPA powers

By Michael Doyle - McClatchy Washington Bureau
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WASHINGTON — Some environmental protections could face a hazier future after a Supreme Court argument Wednesday in an important clean-air case that's already divided states and leading energy companies.

Justices, too, appear split over whether the Environmental Protection Agency must take cost into account in deciding to regulate mercury and other toxic emissions from coal- and oil-fired power plants. All smoke signs suggest an eventual 5-4 decision, though it's unclear in which direction it will blow.

Conservative justices made clear Wednesday they want costs considered from the very start of the regulatory process.

"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 achieved," said Justice Antonin Scalia.

Liberal justices countered that the EPA acted reasonably in putting off questions of cost until officials were setting specific standards.

"Is there any case in all of our decisions where we have said even though there was no instruction to cover costs, EPA is required to consider costs?" asked Justice Ruth Bader Ginsburg.

It was a rhetorical question. The answer is no.

The case heard Monday involves the recurring cost-vs.-benefit dilemma in controlling pollution, as well as the court's equally familiar challenge in interpreting an ambiguous term written by members of Congress. In particular, the case centers on the meaning of the word "appropriate."

The federal Clean Air Act requires the EPA to decide whether it is "appropriate and necessary" to regulate hazardous air pollutants emitted by electric utilities. This is the regulators' threshold question and precedes the actual setting of power plant emission standards. Everyone essentially agrees "necessary" means protecting health. "Appropriate" is less obvious.

"Appropriate is a capacious term," noted Justice Anthony Kennedy, whose questions suggest he could prove the deciding vote.

Citing the dangers of pollution, the EPA argues the initial decision under the Clean Air Act to regulate need not consider cost but instead can turn strictly on health effects.

Mercury emissions from power plants fall into water and accumulate in fish, while other toxins like arsenic and hydrochloric acid also taint the environment and endanger public health. Regulators estimate strict emissions controls can prevent between 4,200 and 11,000 premature deaths and 4,700 non-fatal heart attacks annually.

"The only step that is a prerequisite (to regulation) is studying of human health hazards," said Justice Sonia Sotomayor.

Solicitor General Donald Verrilli Jr., representing the Obama administration, added that Congress could "have expressly ordered EPA to study costs (but) they did not do that."

Challengers, citing the estimated \$9.6 billion in annual costs imposed by tighter emission standards, contend that figuring out what's appropriate includes weighing what industry and consumers will pay for tougher rules. The annual estimate covers the amortized cost of new equipment installation as well as operating expenses.

“We thought that a cost-benefit analysis is normally the way that a reasoned agency decision-making happens,” said Michigan Solicitor General Aaron D. Lindstrom.

The divisions revealed during the unusually long 90-minute oral argument Wednesday mirror those found in the outside world.

Twenty states have joined Michigan in challenging the EPA regulations, including Idaho, Kansas, Kentucky, South Carolina and Texas. From the other side, the attorneys general for 16 states including California and North Carolina are rallied behind the EPA.

Further complicating the narrative, some big energy companies including the Texas-based Calpine Corp. support the EPA while coal giant Peabody Energy and others oppose it.

Through their questions and asides, most justices Wednesday provided clues about their own inclinations.

Chief Justice John Roberts Jr., for one, tipped his hand as he raised doubts about how the EPA calculated likely health benefits, and as he characterized as “very unusual” some of the EPA’s decision-making.

Justice Elena Kagan appeared even more vehement from the other side, pushing back hard against the idea of reading too much into the word “appropriate.”

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

Justice Clarence Thomas, in keeping with his customary practice, was the only one of the nine justices not to speak or ask questions during the oral argument. A decision is expected by the end of June.