The Court has just now decided the Michigan case, involving EPA's mercury regulation. As Ann Carlson explained in an earlier post, a lot was at stake in the case. The Court ruled 5-4 against EPA. This passage seems to be key to the Court's reasoning:

One would not say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. In addition, "cost" includes more than the expense of complying with regulations; any disadvantage could be termed a cost. EPA's interpretation precludes the Agency from considering any type of cost— including, for instance, harms that regulation might do to human health or the environment.

The Court then continued that "[t]here are undoubtedly settings in which the phrase "appropriate and necessary" does not encompass cost. But this is not one of them."

Some background may help in understanding the ruling. In 2011, EPA issued a rule limiting mercury pollution from power plants. It estimated that the rule would save thousands of lives annually and prevent hundreds of thousands of heart and asthma attacks per year, easily passing cost-benefit analysis. The large majority of these benefits stemmed from reduction in particulate pollution, because the technology needed to control mercury would automatically cut particulates. Taking those benefits into account, EPA concluded that the benefits of regulation would be three to nine times larger than the cost.

The Michigan case involved the interpretation of several subsections of section 112 of the Clean Air Act, which covers EPA regulations of hazardous air pollutants. For most pollution sources, cost would be clearly be irrelevant to EPA's decision to regulate a pollutant (and in fact, Congress itself included "mercury compounds" on the list of toxic substances). But there are special provisions relating to the power industry under subsection (n). In particular, subsection 112(n)(1)(A) provides a thee-step process before the power industry can be regulated under section 112. Step 1 is a study of the public health hazards from emissions of the listed pollutants, along with two other reports. Step 2 is transmission of the report to Congress, along with one of the other reports. Step 3 — the most important — is a decision to regulate power emissions "if the Administrator finds such regulation is appropriate and necessary after considering the results of the [Step 1] study."

EPA decided that it didn't have to consider the cost of controlling emissions in deciding *whether* to regulate under this provision, although it did have to consider cost in deciding *how* to regulate. EPA argued that the term "appropriate" is ambiguous but that it was reasonable to view the decision as based only on public health. Two key supporting arguments were that the study itself is not required to consider cost, although that study is

supposed to be the basis for EPA's determination. Also, the statute makes it clear that cost is never a consideration in removing something from the list; EPA argued that the standards for putting things on the list and taking them off should be the same. Under *Chevron*, EPA didn't have to prove that it's interpretation of the statute was correct, only that it was reasonable. The D.C. Circuit found the reasonableness of EPA's decision obvious.

In arguing against this interpretation, the dissenter in the D.C. Circuit argued that the term "appropriate" inherently requires a cost-benefit analysis. In addition, industry relies on subsection (B), which calls for another study that includes costs. Basically, industry argues that it successfully lobbied Congress for a better deal than it got from EPA.

In the background are a confusing series of cases about when EPA is prohibited from considering costs. Justice Scalia wrote one opinion that strongly disavowed EPA's right to consider costs in setting air quality standards, wrote another decision allowing consideration of costs under the Clean Water Act, and dissented vociferously from a decision last year that allowed EPA to consider cost in regulating interstate air pollution. But Scalia has also indicated increasing discomfort with the *Chevron* rule of deference to agencies, although he used to be one of its most vocal supporters. Today's decision did not address these broader issues.

EPA also argued that if consideration of cost was necessary, the requirement should be considered satisfied because of the cost-benefit analysis it did when it issued the rule. Industry argued,however, that EPA should only be entitled to consider the direct benefits of reducing mercury, not the beneficial side-effect of particulate reductions. The Supreme Court punted on this argument, leaving it to the agency to decide just how to factor in cost.

The outcome of the case is also important because it relates to one of industry's main arguments against the Clean Power Plan, EPA's proposed major climate change initiative under section 111. There is a link because of language in section 111(d) that limits its use for activities that are covered by section 112. There is a dispute about the breadth of the preclusion, but under industry's interpretation, section 111(d) would be knocked out by the section 112 mercury regulation.

One final point. There could be a pro-environmental aspect to this decision. The Court said it was not rational to ignore costs entirely, but it included environmental harms as part of costs. This suggests that agencies have a general duty to consider those harms in making those decisions unless precluded by statute. (That conclusion is also supported by the language of NEPA, but some prior decisions by the Court suggested that NEPA is purely procedural.) This might provide a wedge for environmentalists in other kinds of cases.

Presumably, on remand, EPA will stick to its guns since it plainly considers the regulation to be justified by cost-benefit analysis. One important question will be whether the D.C. Circuit allows EPA to keep the regulation in effect pending further analysis by the agency. (The technical term for this is remand without vacature.) My guess is that they will do so, but that remains to be seen.

In short, this isn't a great decision for EPA, but it could have been a lot worse.