Although the Paris talks are justifiably getting the lion’s share of the attention, there have been other significant environmental actions recently. One of those involves the EPA’s effort to reduce toxic emissions from power plants (particularly coal-fired plants). The Clean Air Act gives special treatment to toxic emissions from power plants. Other sources are regulated whenever they pose a health risk. But in order to regulate power plants, EPA has to make a special finding that it is “necessary and appropriate” to do so. Last year, the Supreme Court ruled in *Michigan v. EPA* that EPA had to consider cost in making this determination, although cost is not a factor for any other industry.

EPA has now issued a new proposed finding that regulation of mercury and other toxic emissions from power plants is necessary and appropriate, taking into account cost. The proposal considers two dimensions of cost. The first is whether the cost would impair the power industry’s ability to perform its key function, providing electricity to power the nation. EPA concludes that the cost of compliance is only 3-4% of total costs, posing no problem. The second dimension is a cost-benefit analysis. EPA concludes that the benefits out way the costs by nine to one.

No doubt industry will try to pick apart EPA’s cost-benefit analysis. But that’s going to be difficult given that this doesn’t even seem to be a close case economically. There are two basic issues, however, that could have a major impact on the analysis. EPA took into account unquantifiable harm from mercury and other toxic metals. EPA may claim that only quantified impacts can be considered. These unquantified harms included the health effects of other hazardous metals, acid gases, and organic pollutants that EPA was not able to convert to precise numbers. There were also benefit to some groups from reducing mercury consumption that EPA was unable to quantify, presumably because of insufficient information about current consumption patterns. Industry argues that only quantified costs should be considered. But it would seem awfully hard to find such specificity in the broad “necessary and appropriate” language.

Industry also claims that ancillary benefits should not be considered. That point requires some further explanation. In order to reduce emissions of mercury and other toxics, it’s necessary to remove fine particulates from the emissions, simply because a lot of the toxic material is attached to the particulates. Removing particulates, however, has other major health benefits. So the question is whether EPA can count those benefits. I don’t think that industry is going to be successfully in arguing against this. The Court said in *Michigan v. EPA* that ignoring costs in making a decision violates common sense. The Court also insisted that “cost” has to be defined broadly, to include all harmful impacts of a decision. Excluding important health benefits from consideration seems equally in violation of common sense – all the more so in a statute whose primary purpose is protection of public health.

The Supreme Court viewed various reports that Congress required of EPA as indications of legislative intent. As EPA points out, Congress directed EPA to report on the extent of residual health effects emissions from other pollutants after the regulations went into effect. This confirms that Congress expected these regulations to reduce other harmful pollutants and viewed that as a regulatory benefit..

Notably, to accept either of these two industry arguments, the courts would have to change the long-standing practice of the federal government in performing cost-benefit analysis of all regulation. That would require an unusual degree of judicial activism when there is nothing at all in the statute that seems to directly address the subject.