

Among the many ramifications of the current vacancy on the bench, its effect on the EPA's mercury rule seems to have escaped much attention. It may already have helped EPA defeat an effort by states to get a stay from Chief Justice Roberts. But it has much broader significance.

Some background: The Supreme Court, in a 5-4 decision written by Scalia, vacated the rule and sent it back to EPA. The Court directed EPA to determine whether regulating toxic emissions from coal was "appropriate" in light of the costs and benefits. One of the key issues that the Court kept open was whether EPA could consider other health benefits of its rule due to elimination of particulates, or just the proven effects of eliminating mercury.

Industry vowed to make this issue a centerpiece of the litigation, and there were signs that some of the Justices were sympathetic. EPA has promised a decision by mid-April, which will surely be taken back to court.

Given that the Court was already familiar with the issue, there was real reason for concern about whether EPA would be allowed to consider co-benefits. That's an issue that transcends this particular rule, since the general practice in cost-benefit analysis is to consider *all* costs and benefits. It was certainly easy to imagine that there would be four votes to grant cert. on this issue if the lower court agreed with EPA, and from that point, the outcome would be quite unclear.

The rule's future now looks much rosier. There are three possible scenarios:

1. The Scalia seat remains empty. There's no reason to think that any of the four liberals would want to overturn EPA's view. It's still possible that the Court would grant cert., if Kennedy joined with Roberts, Alito, and Thomas on this. But it's hard to see the point of doing so, since the lower court would just be affirmed by an equally divided Court.

2. President Obama or a Democratic successor appoints a replacement. In this scenario, affirming EPA would be almost a sure thing if the Court did take the case, so why would the conservatives want to take the risk of setting a bad precedent?

3. President Trump or some other Republican appoints a successor. Even in this scenario, the chances for cert. may not be high. A new appointee would not be familiar with the case and probably not with the Clean Air Act generally. There would probably also be a backlog of high priority cases that the Court was unable to decide without a ninth Justice. And in the meantime, since the D.C. Circuit has not stayed the enforcement of the rule, the practical consequences of reviewing the case would not be dramatic compared to the many other issues facing the Court.

When you put all this together, it seems very unlikely that the Court will take the case if the D.C. Circuit sides with EPA. This is important for two reasons. First, although the absence of a stay does limit the practical consequences, there are still likely to be some coal-fired power plants that will be forced to install scrubbers or close if the rule is upheld. Second, a Supreme Court ruling against EPA would have had broader repercussions for other EPA rules, and it would also have been a strong signal of an aggressive campaign by conservative Justices to clip EPA's wings. So the improved prospects for the rule are a significant boost to environmental protection.