 What, exactly, is EPA up to by changing the underlying analysis of the Mercury and Air Toxics Standard (known as the MATS rule), as it announced yesterday? Is it the first step in gutting the use of cost-benefit analysis to support strong environmental regulations? Is it a gift to Murray Energy in its lawsuit seeking to invalidate the MATS rule without actually withdrawing the rule, which would anger many utilities? Is it both?

First, some background. The 1990 amendments to the Clean Air Act required the Environmental Protection Agency to decide whether it is "appropriate and necessary" to regulate toxic emissions, including mercury, from power plants. Even though the requirement has been in place for almost thirty years, answering the question has taken decades to resolve. The Clinton Administration first determined in 2000 — in response to a lawsuit filed in the early 1990s after EPA failed to act — that power plant regulations to control toxic pollutants were "appropriate and necessary." The Bush Administration then withdrew that finding, tried to establish a cap-and-trade program for mercury from power plants under a different provision of the CAA (Section 111), but saw its efforts struck down by the D.C. Circuit Court of Appeal in *New Jersey v. EPA*. In 2011, the Obama Administration again determined that mercury and toxics regulation was "appropriate and necessary". In doing so, EPA had to decide what to take into account when determining what "appropriate and necessary" means. More specifically, does "appropriate and necessary" require the agency to take into account the costs of regulating toxic pollution before deciding *whether* to regulate? The Obama EPA decided that the phrase did not require it to consider costs at the "appropriate and necessary" stage. Instead, the agency reasoned, once it decided whether to regulate the emissions, it would take costs into account in actually setting the standards to be applied to power plants to reduce their emissions. The Supreme Court struck down the agency decision to exclude consideration of costs at the "appropriate and necessary" stage in a 5-4 decision. Justice Scalia wrote the majority opinion over a stinging dissent written by Justice Kagan.

There are at least three important things to note about the Supreme Court decision. First, by the time the case was decided, many utilities had already made massive investments to comply with the rule. Even if the rule is rescinded, the investments are in place. Second, the Court remanded the case back to EPA to determine whether the regulation was "appropriate and necessary," taking cost into account. EPA, in April of 2016, decided that, even taking cost into account, the MATS rule was "appropriate and necessary." EPA found that the costs on industry alone were reasonable given the public health harms regulation would avoid but as a back up also relied on a more formal cost-benefit analysis. This cost-benefit analysis is the third important point: it showed that the benefits of the rule totaled about $80 billion while the costs utilities would incur to comply with the rule would be between $7 and $9 billion. Importantly, however, the quantifiable benefits from reducing mercury total only about $4-6 million; the remaining benefits come from other pollutants that will be reduced as a result of the installation of the equipment necessary to comply with the MATS rule, principally reductions in particulate matter. This distinction between direct and co-benefits is at the heart of the Trump Administration's new proposal.

Because so many utilities have already complied with the rule, many of them oppose its repeal. But Murray Energy's CEO, Robert Murray, included its repeal in his wish list to President Trump and Murray's former lobbyist, Andrew Wheeler, is now the acting head of EPA. EPA is proposing to split the difference between the utilities and Murray Energy.

Murray didn't get an outright repeal of the rule. Instead, he got a big benefit for a lawsuit that his company filed to challenge the Obama Administration's supplemental analysis after the Supreme Court remand saying that the MATS rule is still "appropriate and necessary". The lawsuit, pending in the D.C. Circuit Court of Appeal, is on hold at the request of the Trump Administration as it reevaluates the Obama EPA decision that the "appropriate and necessary" finding is justified even after taking cost into account.

Wheeler's EPA has now completed its reevaluation of the Obama decision. It has proposed amending the Obama supplemental analysis to say that the original cost analysis took the wrong benefits into account. Rather than weighing the direct benefits from reducing mercury and air toxins from power plants ($4-6 million) against the costs of compliance (roughly $7-9 billion), the Obama Administration's "flawed" analysis erroneously included the co-benefits from the reduction of other pollutants (most of the monetized benefits come from the reduction of particulate matter). Even taking into account the non-monetizable benefits from reducing mercury — which include preventing IQ losses and other neurological harms to children — Trump's EPA concluded that there is a "gross imbalance" between the costs on industry of compliance versus the benefits to human health and the environment. The result, says Wheeler's EPA, is that regulations to control mercury and

other toxins from power plants are not "appropriate and necessary." Logically, it would seem that if the regulations are not appropriate and necessary, they should be withdrawn. But perhaps because so many utilities have already spent the money to install the necessary pollution control technology — and thus oppose the rule's repeal — EPA is choosing to leave the rule in place.

So what is the point of going through this exercise, saying that the rule isn't needed but EPA will leave it in place in any event? There are several possibilities. The first is to help Murray Energy in its litigation to invalidate the MATS rule without actually directly repealing the rule. The D.C. Circuit will be asked to decide whether EPA's decision to limit benefit considerations in deciding whether the regulation is "appropriate and necessary" is a reasonable interpretation of the statutory language. Presumably, if EPA's interpretation is upheld, Murray Energy will ask the court to strike down the rule. Murray Energy's legal position that the rule is invalid is far stronger if it is defending EPA's interpretation than if it is seeking to invalidate EPA's interpretation. The legal question is whether the agency's interpretation of the appropriate and necessary language is a reasonable one under the Chevron doctrine. Though Murray Energy could well lose — there are many reasons that excluding co-benefits as well as unquantifiable benefits is not only an unreasonable interpretation of the law but also against the intent of Congress, and the original Obama determination relies on the fact that the costs to the industry are appropriate in and of themselves, with or without a formal cost-benefit analysis — if it wins, the Trump Administration can use the cover of a court decision to defend the elimination of the MATS rule.

Second, even if the MATS rule is upheld and remains in place, EPA is laying the groundwork for reducing or eliminating the use of co-benefits to justify stringent environmental regulation. The regulation of toxic pollutants is not the only area where large co-benefits occur. The co-benefits that occur from the reduction of greenhouse gases is the most obvious Trump target. The Clean Power Plan, for example, would have produced co-benefits from the reduction of conventional pollutants that exceeded the benefits from reducing carbon dioxide and other GHGs, though not by the large magnitude the MATS rule produced (only about 1.5 times the GHG benefits, according to Table ES-7 of the analysis that accompanied the Clean Power Plan.) The Trump Administration has a multi-pronged attack on the benefits side of the equation for reducing greenhouse gases. First, it is attacking the direct benefit numbers of GHG reductions by dramatically reducing what is known as the social cost of carbon; the attack on co-benefits means that in combination the Administration could produce cost-benefit analyses that make it seem as if any stringent GHG regulations will seem too expensive to justify.

One interesting question in the Trump/Wheeler MATS proposal, though, is why not just refuse to count co-benefits at all? Why say only that the agency shouldn't have taken co-benefits into account when deciding whether regulating toxics from power plants is "appropriate and necessary" rather than saying they shouldn't count at all? I suspect that the Administration internally concluded that to ignore the co-benefits produced by the regulation entirely was far less legally defensible than ignoring them only at the "appropriate and necessary" stage. There is a long-standing history of EPA considering not only co-benefits but, importantly, the indirect costs of proposed regulations. This history is supported by federal government guidance from the Office of Information and Regulatory Affairs (OIRA) and the Office of Management and Budget (OMB) that requires considering both indirect co-benefits and costs. Many courts, too, have required EPA to consider indirect benefits and costs (this history is laid out in an important forthcoming article by Kimberly Castle and Richard Revesz that you can find here). Thus the strategy of focusing only on the "appropriate and necessary" stage gives Robert Murray better legal ammunition and doesn't risk a court ruling that requires taking co-benefits into account more broadly. Instead, the proposal chips away at considering co-benefits but leaves for future actions the wholesale elimination of the inclusion of co-benefits in rule-makings.