Michigan v. EPA, No. 14-46, *Utility Air Regulatory Group v. EPA*, No. 14-47, and *National Mining Association v. EPA*, No. 14-49 (previously described in the November 25, 2014, Docket Report)

Section 112 of the Clean Air Act, as amended by the Clean Air Act Amendments of 1990 (42 U.S.C. § 7412),

requires the Environmental Protection Agency to list major sources of hazardous air pollutants and then to

promulgate emissions standards for those sources. Congress established a framework under this provision that

applies solely to electric-utility steam-generating units—i.e., power plants. Congress established a specific procedure for EPA to follow in order to determine whether power plants will be regulated (or "listed") under the hazardous-air-pollutants program. In § 112(n)(1)(A), Congress directed the Agency to conduct a study of hazards posed to the public health from power-plant emissions and then to regulate those plants "if [it] finds such regulation

is appropriate and necessary after considering the results of the study."

Applying this provision, EPA determined that power plants should be listed for regulation when the emissions from

them pose a hazard to public health or the environment and when controls are available to reduce the hazardous

emissions—despite the fact that the controls would cost approximately $9.6 billion and yet would yield only $4 to $6 million in annual benefits. Today, in *Michigan v. EPA*, No. 14-46, *Utility Air Regulatory Group v. EPA*, No. 14-47, and *National Mining Association v. EPA*, No. 14-49, the Supreme Court held that "EPA interpreted [§ 112(n)(1)(A)] unreasonably when it deemed cost irrelevant to the decision to regulate power plants."

The petitioners sued EPA to challenge the final rule that listed the plants, contending that the Agency read the word

“appropriate” out of the statute when it refused even to consider the mammoth costs associated with implementing

emissions standards. The D.C. Circuit disagreed in a split decision, with the majority holding that EPA’s

interpretation that § 112(n)(1)(A) does not require the consideration of costs when determining what regulations are

“appropriate and necessary” was reasonable and entitled to deference under *Chevron U.S.A. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837 (1984).

In an opinion by Justice Scalia, the Supreme Court reversed the judgment of the D.C. Circuit and remanded. The court recognized that “appropriate and necessary” is a broad term but held that EPA’s interpretation was nonetheless not entitled to *Chevron* deference because the agency failed to consider the costs of compliance. “No regulation is ‘appropriate’ if it does significantly more harm than good.” Because, unlike other sections of the Act,

§ 112(n)(1)(A) does not limit EPA to considering only specifically enumerated, non-cost factors, the Court held that there was no basis in the statute for ignoring the costs of compliance. The Court also rejected EPA's suggestion that its interpretation was reasonable because costs were considered when making the secondary determination of the proper level of regulation once the power plants were listed. Because the annual cost of $9.6 billion would be

imposed automatically by the “minimum or floor standards” that apply once the power plants are listed, costs are considered only “when imposing regulations *beyond* these minimum standards.” The Court likened the agency’s analysis to a consumer’s decision to purchase “a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system.” In conclusion, the Court instructed that, on

remand, EPA “must consider costs . . . before deciding whether regulation is appropriate and necessary”; but the

Court declined to direct EPA “how to account for cost.”

Justice Thomas filed a concurring opinion to reiterate his long-standing opposition to the constitutionality of

Chevron deference to agency interpretations of statutes.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented. The dissent argued that EPA had

considered costs at multiple points in the regulatory process, so the Agency's failure to analyze costs explicitly at

the first step should not doom the rulemaking. The dissent also noted that, according to subsequent analysis during the rulemaking process, the annual benefits of the power-plant regulations would exceed the costs by up to $80 billion.

Although the Court left considerable discretion with EPA regarding how to take costs into account, today's decision is important for EPA-regulated entities and those that do business with them. The decision confirms that unless the language of the authorizing statute specifically directs EPA to consider only factors other than cost, the Agency generally will be required to consider the costs of compliance when proposing new environmental regulations. In

addition, this principle may be applicable to other federal agencies and their rulemaking processes insofar as they do not already consider compliance costs.

Any questions about the case should be directed to Timothy S. Bishop (+1 312 701 7829) in our Chicago office or

Lauren R. Goldman (+1212 506 2647) in our New York office.