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Mercurial Regulators Making Fishy Calculations

On Wednesday, the Supreme Court will hear a challenge to a costly EPA rule limiting power-plant emissions.

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How many pregnant women do you know who fish—not recreationally, but to feed themselves? According to the Environmental Protection Agency, a whopping 15% of all pregnant women in Wisconsin subsist primarily by catching and eating as much as six pounds of lake fish a week. The EPA says the percentage is 21% in neighboring Minnesota and 6% nationally. To put these numbers in perspective, the average American consumes about five ounces of fish from oceans and lakes a week, and the EPA recommends that pregnant women eat less than 12 ounces a week.

This large number of hungry, pregnant fisherwomen is one of the many outlandish assumptions that the EPA made when calculating the health benefits of its most expensive rule ever: the Mercury and Air Toxics Standards for power plants. Although the EPA completed its mercury rule in 2012, various industry groups and states challenged it in federal court, and the case, *Michigan v. EPA*, has finally reached the Supreme Court.

The mercury rule requires approximately 1,400 U.S. power plants to emit about 75% less mercury starting in 2016. Though mercury is a nasty substance, American power plants account for only 0.3% of global emissions. And unlike most conventional pollutants, mercury emissions stay in the atmosphere for months (and sometimes years), traveling thousands of miles before drifting back to earth.

Cutting mercury emissions from American power plants therefore won't have much, if any, impact on mercury deposition in this country—a fact the EPA admits. But to justify the rule, the EPA needed to show that it will benefit Americans' health.

Enter the EPA's fishy math. The EPA assumed that about 6% of all pregnant women in America fish for food and eat as much as 300 pounds of lake fish a year. The EPA then assumed that consuming all of this lake fish would pass mercury from power plants on to these soon-to-be mothers, expose their unborn children to mercury in utero, and lower the children's IQs by an

average of 0.009 points. As the Cato Institute's brief to the Supreme Court points out, this is a minuscule amount: The average IQ test has a margin of error of about 5 points.

Based on a few Education Department lead-exposure studies, the EPA then speculated that each IQ point lost would reduce each exposed child's future earnings potential by between \$892 to \$1,958 annually. Add it all up, and what's the EPA's result? A maximum total annual benefit, thanks to the EPA's mercury reductions, of \$6 million.

Six million dollars sounds like a lot, until you compare that figure with the rule's annual cost—about \$9.6 billion, according to EPA estimates. You might be wondering: Given this 1600:1 cost-benefit ratio, how could the EPA possibly justify this rule to the public or to the D.C. Circuit Court of Appeals, which upheld the rule last year? The answer is that Congress has given the EPA almost carte-blanche authority to regulate these emissions.

The relevant statutory language is in the Clean Air Act, which says that the EPA can regulate mercury from power plants if the agency determines that it is “appropriate and necessary” to do so. This language is—as the D.C. Circuit court noted—incredibly broad and ambiguous. So broad, in fact, that the EPA told the court it didn't even consider the rule's price tag of \$9.6 billion a year when determining whether its regulation was “appropriate and necessary.” The EPA argued, and the D.C. Circuit Court agreed, that the agency can base its determination solely on the rule's benefits to public health, without considering cost.

What's more, the EPA argued that the rule's benefits should include not only the \$6 million a year associated with reduced mercury emissions, but also other “co-benefits.” You see, when power plants install technology to remove mercury from an emissions stream, that technology also removes another pollutant—particulate matter, a mixture of tiny particles and liquid droplets. The EPA argued that reducing those emissions would add another \$33 billion to \$90 billion in annual public-health benefits.

Inclusion of these “co-benefits” might sound reasonable, but it isn't. The EPA has acknowledged that more than 90% of the mercury rule's “co-benefits” occur at air-quality levels that the EPA itself says are already safe. In other words, the agency is talking out of both sides of its mouth.

The irony is that if the Supreme Court decides the EPA can ignore the rule's cost, then EPA's fishy calculations won't matter. All the agency will need to establish is that some portion of its \$6 million estimate for mercury—or \$33 billion to \$90 billion for particulate matter—is real. And that shouldn't be too difficult to do, even for the EPA.