Even the Benefit of the Doubt Won't Save EPA's Mercury Rule

by Andrew M Grossman
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Challenging an agency's assessment of scientific research in court is typically seen as a fool's errand. The courts may keep the regulatory state on a close leash where matters of constitutional law are concerned, and will give challenges regarding the proper interpretation of statutes a fair hearing before (usually) deferring to the government's view. But an agency has to go seriously off the rails before the courts will second-guess its assessment of the scientific record underlying a regulation.

That's what makes EPA's super-expensive Mercury and Air Toxics Standards (MATS) rule so interesting: the agency's own assessment of the scientific research shows there was no good reason to regulate in the first place. The Supreme Court is now reviewing EPA's decision to plow ahead regardless, irrespective of the costs of doing so.

The Cato Institute's amicus brief in *Michigan v. EPA* unpacks EPA's own scientific assessment to show that regulation certainly is not (as the statute requires) "appropriate and necessary."

Power plants emit trace amounts of mercury, and mercury poses a risk to human neurological development when pregnant women consume fish tainted by it. But, as EPA has explained, mercury deposition in the United States "is generally dominated by sources other than U.S. [power plants]." In fact, the agency's figures show that those plants are responsible for only about one half of one percent of airborne mercury.

Common sense would therefore suggest that reducing or even eliminating emissions from U.S. plants could have little or no appreciable effect on public health. And EPA actually agrees, finding that "even substantial reductions in U.S. [power-plant] deposition…[are] unlikely to substantially affect total risk."

To escape that seemingly inescapable conclusion, the agency had to assume the existence of "women of child-bearing age in subsistence fishing populations who consume freshwater fish that they or their family caught" in enormous quantities. And not just any fish, but the most

contaminated fish. And even then, placing its thumb on the scale at every step of the way, EPA still struggled to find any real risk, ultimately concluding that mercury from domestic power plants might cause the hypothetical children of these hypothetical women to suffer a hypothetical loss of 0.00209 IQ points apiece—an amount that cannot be meaningfully distinguished from zero.

Why would EPA go through all this trouble to contrive a risk worthy of regulation, while ignoring costs that the agency projects to hit $10 billion per year? The answer is that EPA has long wanted to comprehensively regulate power plants but (due to the cooperative-federalism structure of the Clean Air Act) has been forced to defer to the states on whether and how to address individual sources. Minimizing Section 112's "appropriate and necessary" requirement allows EPA to circumvent the statutory limitations on its authority and directly achieve its intended goal: imposing new requirements on power plants.

So what seems like a complicated statutory case actually boils down to a familiar story: a federal agency twisting statutory language to aggrandize its own power at the expense of the states'. The Supreme Court can take EPA's evaluation of the science at face value and still reject this power-grab.

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