COMMENTARY

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Integrating Environmental Policy With Everything Else

On Nov. 25, the U.S. Supreme Court agreed to review the U.S. Environmental Protection Agency's mercury standard for coal- and oil-fired electric power plants. The court limited review to the question "whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities." That raises the more general question of whether environmental standards ought to be judged for consistency with public policy generally. If the rule will, in fact, cause a significant number of older coal-fired power plants to close, should the court consider whether that decision makes sense instead? Is the focus on just costs too narrow? Is it too abstract?

Market failure provides one justification for environmental regulation—indeed, for many forms of regulation. In this view, the unregulated market would allow some costs to be unfairly imposed on some people and avoided by others. So, for example, burning coal causes air emissions of mercury. The mercury ultimately makes its way to water bodies where fish take it up. People eat the fish. Mercury causes health problems for those people. Therefore, the unregulated market will allow those that burn coal to ignore the cost of the health impacts of mercury imposed on anglers. A corrective regulation would require those that use coal to control mercury emissions or to switch to a different fuel, internalizing the externality of the air emission.

Regulation that matters changes behavior. If a rule prohibited the shooting of dinosaurs on the streets of Philadelphia, it would not matter; there are no dinosaurs to shoot. A regulation that changes behavior imposes costs on someone, and probably reduces costs or provides income to someone else. How much it costs really turns on who you ask.

One can also inquire, however, whether the shifts in costs or incentives or behavior align with public policy generally or whether they do not. Environmental regulation is just one form of government action and environmental protection is just one public objective. Most people also want other things: economic opportunity, education for their children, justice at home, peace in the world and the like.

Asking whether environmental regulators have properly aligned their rulemaking with public objectives generally becomes more significant as the effects of the environmental regulation become more pervasive. Superfund cleanups may cost a lot of money, they may affect important corporations, but they rarely have more than a local impact. On the other hand, major decisions about electricity generation and other energy issues have pervasive implications for the economy. Everyone uses electricity. Everything we have is made with or transported using energy. How electricity is generated and delivered, at what cost and with what externalities, makes a difference to whether we are moving toward or away from every other social objective we may have.

> An integrated approach to environmental regulation would consider all policies when considering any individual regulatory decision.

The Supreme Court case, *Michigan v. EPA*, Nos. 14-46, 14-47, 14-49, involves review of the EPA's decision to regulate hazardous air pollutants emitted by electric utility steam generating units (EGUs) under Section 112(n) of the Clean Air Act, 42 U.S.C. Section 7412(n). Section 112 governs emissions of hazardous air pollutants generally, calling for achievement of the maximum achievable control technology (MACT) for most sources. But under the Clean Air Act scheme, EGUs are regulated specially. Air pollution control devices imposed on EGUs for other reasons also control important hazardous air pollutants, like mercury, so Section 112(n) required the EPA to conduct a study of the need for further regulation of EGUs before calling for additional controls. Section 112(n)(1) provides: "The administrator shall regulate electric utility steam generating units under this section, if the administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph."

The EPA has been back and forth over whether regulation is "appropriate and necessary." The U.S. Court of Appeals for the D.C. Circuit rejected an effort by the second Bush administration to avoid regulation of EGUs under Section 112(n) in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), cert. denied, 555 U.S. 1169 (2009). The Obama administration reacted with issued regulations imposing technology-based standards in 2012 (77 Fed. Reg. 9303 (Feb. 16, 2012)), sometimes called "Utility MACT." In that rulemaking, the EPA concluded that regulation was "appropriate and necessary" because the utility study showed that existing emissions of mercury cause public health effects. The EPA further reasoned that Section 112(n) required technology-based limitations on emissions of mercury from coal- and oil-fired EGUs without regard to those limitation's costs, estimated at over $9 billion annually. The D.C. Circuit denied petitions for review, deferring to the EPA's interpretation of the statute, as in *White Stallion Energy Center v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014).

The Supreme Court has now agreed to review that decision, but only on the issue of whether the EPA was permitted to ignore cost in deciding whether to regulate. The immediate press reaction, however, had nothing to do with the cost question. Instead, news stories have focused on the implications of this case for the EPA's climate strategy. The Utility MACT rule will probably cause inefficient coal-fired power plants to close, advancing the EPA's goal of reducing carbon emissions. The Supreme Court will not consider that as a justification for the rule, nor will it consider the regressive redistributive consequences of an increase in electricity rates. That may be correct under the Clean Air Act, but is it a good idea?

The Clean Air Act provides peculiarly detailed and complicated direction to the EPA. National public policy may be too broad to require the EPA to comprehend in its rulemaking, although arguably the phrase "reasonable and appropriate" would allow the EPA to consider anything from redistributive justice to national security.

Pennsylvania, however, is a more compact entity. Pennsylvania wants to be more attractive economically, environmentally, educationally and esthetically so as to attract and to retain people and businesses. Pennsylvania should, therefore, attempt to integrate environmental regulatory policy with all other public policy so that the costs and incentives imposed by the Department of Environmental Protection further achieve the commonwealth's objectives generally.

For example, if the state were to decide that it wished to concentrate development and activity in and near cities as a way of bringing jobs to large populations, exploiting existing infrastructure, reducing encroachment on open space, reducing carbon footprint, and so on, then it would worry about conventional environmental permitting. Permits tend to limit air and water emissions when too many sources of the same pollutant are close together because they can cause the air or a receiving water to exceed an ambient quality threshold. Conventional air and water permitting tends to move sources apart. Most other policies tend to push them together. An integrated approach to environmental regulation would consider all policies when considering any individual regulatory decision.

We are at risk of going the other way. Courts are finding rights to environmental quality or to environmental regulatory decisions, rather than policy justifications. Regulators necessarily pick winners and losers, or at least spot one side or the other some points. Rather than consider whether regulators have chosen winners and losers sensibly, courts look to categorical rights and duties.

Notice that the EPA's justification of the Utility MACT rule depends on not considering cost or any other impact on any policy goal. The EPA reads Section 112(n) to impose an absolute duty to regulate when it can identify health effects from utility mercury emissions.

The more that the DEP or the EPA believes that it must act in a particular way, the less it has the flexibility to craft decisions that further economic development, redistributive justice, educational opportunity, or competitive advantage. The more courts agree, the less flexibility advocates have to challenge decisions on those bases.

In prior months I have written about the law that the Pennsylvania courts will be making under the Environmental Rights Amendment in the wake of *Robinson Township v. Public Utility Commission*, 83 A.3d 901 (Pa. 2013). We shall see whether the Pennsylvania Constitution creates only an anti-development right, or instead a duty to make regulatory decisions that are beneficial. We shall see what the Supreme Court does with the Utility MACT rule. We shall see whether integration gets any traction. •

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