



Case Law Regarding Cost-Benefit Analyses Under the Clean Water Act

Jeffrey S. Longworth, Partner
Barnes & Thornburg LLP
1717 Pennsylvania Ave, NW, Suite 500
Washington, DC 20006
(202) 408-6918
jlongworth@btlaw.com

Society of Benefit-Cost Analysis
8th Annual Conference,
Washington, D.C.
March 17, 2016



Common Debates Facing EPA

- When/how must EPA consider costs?
 - Individual or industry-wide?
- When/how must EPA consider benefits?
 - Monetized vs. unmonetized?
- When/how must EPA consider costs relative to benefits?
 - *i.e.*, a formal cost-benefit analysis?
- Is EPA ever statutorily prohibited from conducting cost-benefit analyses?
 - Compare to cost-effectiveness analyses?

Clean Water Act Technology Standards: Cost-Related Factors

- Best Practicable Control Technology Currently Available (**BPT**) [§ 301(b)(1)(A)]
 - EPA “shall include consideration of the total **cost** of application of technology in relation to the effluent reduction **benefits** to be achieved” § 304(b)(1)(B)
- Best Conventional Pollution Control Technology (**BCT**) [§ 301(b)(2)(E)]
 - “Factors...shall include consideration of the reasonableness of the relationship between the **costs** of attaining a reduction in effluents and the effluent reduction **benefits** derived” § 304(b)(4)(B)

CWA Standards Cost Factors

- Best Available Technology Economically Achievable (**BAT**) [§§ 301(b)(2)(A), (C), (D), (F)]
 - BAT for toxic pollutants, and for all other (i.e., non-conventional) pollutants “shall take into account...the **cost** of achieving such effluent reduction” § 304(b)(2)(B)
- Best Available Demonstrated Control Technology (**BADT**) [§ 306(a)(1)]
 - New Source Performance Standards “shall take into consideration the **cost** of achieving such effluent reduction” § 306(b)(1)(B)

CWA Standards Cost Factors

- Best Technology Available for Minimizing Adverse Environmental Impact (**BTA**)[§ 316(b)]
 - Silent regarding specific factors EPA should consider
 - But, relationship established between cooling water intake standards and § 301 and § 306 discharge standards for covered facilities

EPA Deference: Technology Standards

- The Clean Water Act technology standards factors generally do not limit EPA's authority to conduct various cost-benefit analyses
- But they also do not mandate that EPA conduct such analyses...
- EPA generally has broad discretion, but also has established its own patterns/precedents

When Do Courts Defer to EPA?

- *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)
- **Step 1:** Has Congress directly spoken to the precise question at issue?
 - If Congressional intent is clear, that is the end of the matter, the agency must give effect to the clear intent of Congress.
- **Step 2:** If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute.
- Rather, if the statute is silent or ambiguous with respect to the specific issue, the court must decide whether the agency acted based on *a permissible construction of the statute*.
- Not the *only* or even *best/most reasonable* permissible construction

Entergy v. Riverkeeper, 556 U.S. 208 (2009)

- § 316(b) Cooling Water Intake Structures Rulemaking
- Best Technology Available for Minimizing Adverse Environmental Impact (BTA)[§ 316(b)]
 - Silent regarding factors for EPA to consider, but reference to § 301 and § 306 technology standards is important
- Supreme Court took the opportunity to opine on EPA's various technology standards and the roles of costs and benefits in each standard

Entergy: Question before the Court

- Whether § 316(b) authorizes EPA to compare costs with benefits in determining the Best Technology Available for minimizing adverse environmental impact at the cooling water intake structures.
- *Chevron* step 2: was EPA's interpretation of the statute reasonable
 - Not whether it was the only possible interpretation nor even the interpretation deemed *most* reasonable by the courts

Entergy Majority Opinion

- BPT and BCT standards include factors related to costs and benefits, clearly authorizing cost-benefit analyses
- BAT and BADT expressly authorize consideration of the costs of effluent reduction
 - Effluent reduction relates to the benefits that result from implementing certain technologies
- Congress could not have meant to merely judge an industry's ability to afford any technology, especially if a cheaper technology achieves the same results
- Thus, the statute must permit at least some level of cost-benefit analyses in all of its CWA technology standards

But § 316(b) (BTA) Does Not Mention Either Costs or Benefits

- Congressional silence must be interpreted in context
 - *Whitman v. Am. Trucking Assn*, 531 US 457 (2001): silence can act as a cost-benefit prohibition
 - Compare *American Textile Mfrs Inst. v. Donovan*, 452 US 490 (1981): silence may prohibit an agency from being forced to conduct a cost-benefit analysis, but silence does not prohibit the agency from conducting such an analysis if it so chooses
- All Clean Water Act technology standards (except BTA) set forth factors for EPA that permissibly allow cost-benefit analyses
- Here, an absence of factors would prevent EPA from acting at all
- EPA's past 30 years of rulemakings help to illustrate its reasonable and legitimate use of discretion in weighing benefits against costs, even under § 316(b)

BAT Cases That Recognize EPA's Discretion to Compare Costs-Benefits

- *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980): EPA is not obligated to perform cost-benefit analyses
 - Often wrongly cited as a prohibition to cost-benefit analyses
- *Texas Oil & Gas*, 161 F.3d at 928 (5th Cir. 1998): “The EPA . . . has considerable discretion in evaluating the relevant factors and determining the weight to be accorded to each in reaching its ultimate BAT determination.”
 - *Nat'l Crushed Stone Ass'n* only stands for the proposition that EPA is not obligated to perform cost-benefit analyses
- *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d at 796 (6th Cir. 1995): “NRDC is wrong to contend that EPA is not permitted to balance factors such as cost against effluent reduction benefits.”

BAT Cases That Recognize EPA's Discretion to Compare Costs-Benefits

- *Waterkeeper Alliance Inc. v. EPA*, 399 F.3d at 516 (2nd Cir. 2005): “If the EPA determines, with adequate support in the record, that a given set of costs cannot reasonably be borne by a given industry, courts must defer to that determination.”
- *National Wildlife Fed’n v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002): “Appellate courts give EPA considerable discretion to weigh and balance the various factors required by statute to set NSPS.”

Closing Thoughts

- EPA is afforded wide discretion under sections 301, 304 and 306 to place significant weight to cost considerations.
- The agency is authorized, but not required, to assess those costs in relation to benefits even when determining BAT and BADT.
- EPA's past 30 years of rulemakings help to further define what is "reasonable discretion" in weighing benefits against costs.
- If, in new technology standards rulemakings, EPA radically departs from its past practices, it could expose itself to claims that such departures are "arbitrary and capricious."

Questions?

- Feel free to contact me:

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