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

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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 a 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?

- **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.

• § 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
  – 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

  – 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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