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## ENVIRONMENTAL LAW

### Supreme Court's *Riverkeeper* Decision and Cost-Benefit Analysis

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*Special to the Legal*

Since at least the beginning of the Reagan administration, federal regulations have been subjected to cost-benefit analysis, or CBA. Nevertheless, despite its use over several decades, CBA remains highly controversial among interest groups, academics and lawmakers. At times, Congress determines through statutory language whether CBA should be performed. In many instances, however, legislation is silent. Where express congressional direction is absent, administrative agencies, and courts reviewing challenges to regulations, must determine whether CBA is permissible and how it may be applied.

In this context, the recent U.S. Supreme Court decision in *Entergy Corp. v. Riverkeeper Inc.* provides insight into how the Supreme Court views use of CBA. In *Riverkeeper*, the Supreme Court examined the holding of the 2nd U.S. Circuit Court of Appeals that the Environmental Protection Agency is not permitted to use CBA in determining the content of regulations promulgated under Section 316(b) of the Clean Water Act. The court reversed the judgment of the 2nd Circuit on the ground that the EPA's decision to employ a form of CBA was a permissible interpretation of



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Section 316(b). The majority opinion expressed considerable deference to the EPA's decision to consider the results of CBA, while the concurring opinion and particularly the dissenting opinion were more critical of the usefulness of CBA.

Before looking in detail at how the *Riverkeeper* opinions viewed CBA, it is helpful to examine the nature of the vigorous debate over the propriety of using CBA in formulating regulations to implement environmental, safety and health statutes. In general, CBA is a methodology for determining the efficiency of a proposed regulation. Ordinarily a person performing CBA will attempt to identify all of the costs and all of the benefits that may result from a regulation. The costs and benefits are then monetized so that they may be aggregated and compared. Future costs and benefits are frequently reduced to present value based upon a discount rate, a process that is particularly controversial where the

benefits include future lives saved or the future health of the environment. A goal of CBA is to select the regulation with the greatest net benefits.

There is general agreement among scholars that performing an unbiased and accurate CBA is at best fraught with difficulties. Opponents of CBA go further by stating that the process has inherent biases against regulation and methodological flaws that essentially render it a useless tool. They note that in practice CBA has been used to stop regulations, or to make them less stringent, rather than to maximize environmental protection.

Perhaps the most prolific current proponent of CBA is Cass Sunstein, President Obama's nominee for administrator of the Office of Information and Regulatory Policy. In his numerous writings on CBA, Sunstein has advocated use of CBA by administrative agencies. He finds CBA a helpful methodology to examine the consequences of government action without distortions created by an individual's risk perception. Where the costs of a regulation are likely to exceed the benefits, he suggests that the agency should justify any decision to issue the regulation. Sunstein, however, acknowledges that a regulatory agency may not employ CBA where a statute precludes its use, that the agency should incorporate

qualitative considerations such as moral and distributive values into its decision and that CBA may not be the appropriate means to evaluate catastrophic risks that are difficult to quantify.

A recent, concise criticism of the use of CBA appears in a white paper prepared by The Center for Progressive Reform titled “Reinvigorating Protection of Health, Safety, and the Environment, the Choices Facing Cass Sunstein” by John S. Applegate. The scholars preparing the white paper note that historically cost estimates have been overstated, estimates of regulatory benefits understated, and some benefits that defy monetization have been dropped from the equation entirely. The white paper provides numerous examples of the significant uncertainties in a CBA including the difficulty of monetizing a non-market good based on “willingness to pay” for regulatory protections, the absence of adequate data for calculating regulatory benefits and the perils of using discount rates to measure future benefits. The white paper concludes that “cost-benefit analysis is neither sound in theory nor useful in practice.”

Despite the criticisms of CBA, in light of its longevity through administrations of both political parties, and the nomination of Sunstein, a CBA proponent, as administrator of the Office of Information and Regulatory Policy, it is reasonable to expect CBA to continue to be employed as one tool in selecting and evaluating potential regulations. Values and distributive fairness will no doubt require a separate look if they cannot be adequately incorporated into CBA. Absent a statutory mandate determining whether CBA may be used, the receptiveness of courts to

agency decisions to utilize CBA in the face of congressional silence will play a significant role in expanding or limiting use of CBA.

In *Riverkeeper*, the Supreme Court examined the language of the Clean Water Act designed to limit the destruction of aquatic organisms by cooling water intake structures. Section 316(b) requires “that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” On July 9, 2004, the EPA issued its final Phase 2 rule covering large electric power facilities — 40 CFR Part 125 subpart J. Unlike the

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Phase 1 rule, the Phase 2 rule does not mandate use of a closed-cycle cooling system. Rather it allows a facility to minimize impingement and entrainment of aquatic organisms by reducing flow commensurate with a closed-cycle recirculating cooling system or reducing maximum through-screen design intake velocity to a specified level.

Significantly, for our purposes, the Phase 2 rule also provides that a site specific determination may be used to select the best technology available if the compliance costs are significantly greater than the costs considered by the EPA in establishing

the applicable performance standards, or if the compliance costs will be significantly greater than the benefits of complying with the performance standards. Thus the EPA allowed a facility to implement less stringent and less expensive controls based upon the results of a CBA, but only if the cost would be “significantly greater” than the benefits of complying with the performance standard.

The 2nd Circuit held that §316(b) precludes use of CBA. The EPA may only look at whether the cost of a technology can be reasonably borne by the industry, or whether a technology is the most cost effective to reach a specified level of benefit at the lowest cost. The EPA was not authorized to use CBA to select the end with the best net benefits or to allow a site specific cost-benefit variance.

On review, the Supreme Court rejected the 2nd Circuit’s analysis. Writing for the majority, Justice Antonin Scalia started with the *Chevron* principle that a court should uphold a regulation if it constitutes a reasonable interpretation of the statute. In the court’s view, when mandating best technology available, i.e., “the best technology available for minimizing adverse environmental impact,” Congress did not necessarily require the greatest possible reduction. Rather, a technology that reduces impacts most efficiently could plausibly be consistent with the statutory language. Therefore, the EPA had the discretion to employ CBA to select an efficient technology even if industry could afford to deploy a more protective technology.

The court took pains to differentiate its holding from the ruling in *Whitman v. American Trucking Assn. Inc.* The *Whitman* court held that statutory

silence regarding costs in Section 109 of the Clean Air Act, when viewed together with other provisions in the Clean Air Act that expressly authorized consideration of costs, signified that Congress rejected consideration of costs when setting standards under Section 109. In contrast, the *Riverkeeper* court found the Clean Water Act to be less prescriptive in its use of CBA. The court recognized that unlike §316(b), the “best practicable control technology” standard in §301(b) and §304(b)(1)(B) requires a comparison of total costs to effluent reduction benefits. This might suggest that Congress did not want the type of CBA specified in §301(b) to be used in § 316(b) regulations. The EPA’s §316(b) regulations did not, however, impose a traditional CBA. Rather, they only sought to avoid extreme disparities between costs and benefits by limiting variances to circumstances where the costs are “significantly greater than the benefits” of compliance. The court majority held that this test employed by the EPA to avoid large disparities between costs and benefits was permissible.

In his concurring opinion, Justice Stephen Breyer examined the legislative history. He noted that the act’s sponsors were concerned about the time needed to prepare a formal CBA and the possibility that such an analysis would emphasize easily quantifiable factors over environmental and other qualitative factors (e.g., it is difficult to quantify the value of preserving non-marketable species of fish). Breyer was therefore sensitive to the criticism that CBA does not fully assess benefits. He nonetheless concluded that the act recognized the need for the decision maker to weigh advantages against disadvantages,

including disadvantages that constitute quantifiable costs. He found this to be “particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.”

Breyer further noted that for 30 years the EPA interpreted Section 316(b) to require use of technology with costs not “wholly disproportionate” to the environmental benefit conferred. The EPA had reasonably read the statute to describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge. In Breyer’s view, the EPA’s change of the applicable regulatory standard from “wholly disproportionate” to “significantly greater than the benefits of complying” required the case to be remanded for explanation of the change.

Justice John Paul Stevens’ dissent, joined by Justices David Souter and Ruth Bader Ginsburg, expressed a greater skepticism regarding the value of CBA. The dissent noted that in the environmental context, the financial costs of implementing a regulation are often more obvious and easier to quantify than environmental benefits. In performing CBA, for purposes of its Phase 2 rule, the EPA counted only those aquatic species that are commercially or recreationally harvested, i.e., only 1.8 percent of all affected fish and shellfish. Thus a complete comparison of costs and benefits had not been undertaken.

The dissenters would place the onus on Congress to specify when it is appropriate for an agency to engage

in CBA. Particularly where Congress has decided to protect public health, silence should not be construed as authorization to perform CBA. Indeed, by expressly granting the EPA authority to use CBA in certain provisions of the Clean Water Act (e.g. best practicable control technology requirements), in the dissenters’ view, Congress intended to control and not delegate to the EPA the occasions under which CBA could be undertaken.

The differences among the *Riverkeeper* opinions regarding the usefulness and propriety of CBA reflects the ongoing debate among academics and among interest groups. Because the resources that can be applied to environmental protection are finite and subject to competing environmental as well as other priorities, evaluation of costs and benefits by Congress or administrative agencies is likely to continue. Courts may regard CBA more favorably where it incorporates the full range of benefits, including qualitative factors, and where it looks for gross disparities in costs and benefits. The president’s forthcoming new executive order on federal regulatory review may also help shape the CBA debate. In light of the critical role that regulations play in protecting human health and the environment, and the significant costs imposed by environmental regulations, the debate over use of CBA is likely to persist. •