

Commentary

U.S. Supreme Court Addresses Availability Of Cost-Benefit Analysis In Environmental Laws

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On April 1, 2009, in the case of *Entergy Corp. v. Riverkeeper, Inc.*, the United States Supreme Court reversed the decision of the Second Circuit and held that when legislation does not clearly prohibit the use of a cost-benefit analysis, the U.S. Environmental Protection Agency (EPA) may set a regulatory standard on grounds that the costs outweigh the benefits of a higher, more protective, standard. Although the Supreme Court's holding was limited to regulations promulgated under the Clean Water Act, the holding may permit the EPA and other federal agencies to draft regulations that are based on a cost-benefit analysis so long as Congress does not prohibit the regulatory agency from doing so. But it is unclear whether and to what extent the Obama Administration will rely on a cost-benefit analysis when drafting new regulations, and as a result, the true impact of

the Supreme Court's holding may not be realized for some time. The more significant import of this decision may be the insight it provides into the thinking of several critical decision-makers, including Supreme Court nominee Judge Sonia Sotomayor, who authored the Second Circuit's opinion.

Background On *Entergy Corp. v. Riverkeeper Inc.*

This case involved the use of a "cooling water intake structure" at power plants to moderate the heat generated during operations. The intake structure extracts water from a nearby water source, and as the intake structure suctions water, the process kills fish, shellfish, and plankton that live in the water source. As a result, the structures are subject to regulation under the Clean Water Act, 33 U.S.C. §1251, *et seq.* Under Section 1326(b) of the Clean Water Act, the EPA is required to issue regulations over cooling water intake structures that "reflect the best technology available for minimizing the adverse environmental impact."

Interpreting Section 1326(b), the EPA, in a multi-phased process, first promulgated regulations for certain new large cooling water intake structures. These regulations, issued in 2001, required new facilities to restrict their water flow to a level that could only be achieved through a cooling system that recirculates the water, which results in much less water being drawn from a water source. *See* 66 Fed. Reg. 65256 (2001). In 2004, the EPA issued

regulations for existing power plants, and these regulations were less restrictive from those issued in 2001 for new power plants. The 2004 regulations set “national performance standards” for existing power plants with cooling systems that extract water from a water source. The 2004 standards established a mortality rate baseline and required power plants to reduce the number of fish and shellfish killed by certain percentages under that baseline. The EPA chose this approach because it allegedly achieved close to the same benefits as the more restrictive 2001 regulations “at less cost with fewer implementation problems.” 69 Fed. Reg. 41606. The 2004 regulations also permitted a power plant to seek a site-specific variance from the national performance standards if a plant can demonstrate either that the cost of compliance are “significantly greater than” the costs EPA considered in setting the standards or that the costs of compliance “would be significantly greater than the benefits of complying with the applicable performance standards.” 40 CFR § 125.94(a)(5)(i) and (ii).

Riverkeeper Inc. challenged EPA’s use of cost-benefit analysis in these regulations in the Court of Appeals for the Second Circuit. In an opinion authored by Judge Sotomayor, the Second Circuit held that Section 1326(b) did not permit the EPA to utilize a cost-benefit analysis in setting its national performance standards or in allowing for site-specific cost-benefit variances. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007). Judge Sotomayor wrote that the “best technology available for minimizing adverse environmental impact” standard articulated in Section 1326(b) “requires a technology-driven result.” *Id.* at 99. Following the United States Supreme Court’s decision in *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981), Judge Sotomayor wrote that when “Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.” *Riverkeeper, Inc.*, 475 F.3d at 99 (citing *Am. Textile Mfrs. Inst., Inc.*, 452 U.S. at 510.). By requiring “the best technology available” without explicit references to a cost-benefit analysis, the EPA could not draft a regulation on the basis of cost-benefit considerations.

Ultimately, the Second Circuit could not determine the basis for the EPA’s decision, so it remanded the

regulation for clarification of the basis. *Id.* at 105. Consequently, the EPA appealed the decision to the Supreme Court.

Analysis Of The Holding In Entergy Corp. v. Riverkeeper, Inc.

In a 6-3 decision, the Supreme Court overturned the Second Circuit’s decision and held that the statute authorizes the EPA to compare costs and benefits. Writing for the majority, Justice Antonin Scalia concluded that the Clean Water Act did not prohibit the EPA from adopting a regulation that costs less to comply with, even though that regulation may be less beneficial to the environment. Applying the deference standard articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), Justice Scalia found that because the statute did not preclude a cost-benefit analysis, it was reasonable for the EPA to consider the “benefits derived from” the regulations “and the costs of achieving” compliance. (Slip at 9.) “It seems to us, therefore, that the phrase ‘best technology available,’ even with the added specification ‘for minimizing adverse environmental impact’ does not unambiguously preclude cost-benefit analysis.” (*Id.*) Alternatively, if the legislation’s omission “implies prohibition, then the EPA could not consider *any* factors in implementing §1326(b) — an obvious logical impossibility.” (Slip at 12.)

Writing for the dissent, Justice John Paul Stevens argued that congressional silence meant that the EPA could not employ a cost-benefit analysis under §1326(b). “Congress granted the EPA authority to use cost-benefit analysis in some contexts but not others” and in so doing, Congress intended “to control, not delegate, when cost-benefit analysis should be used.” (J. Stevens dissent Slip at 6.) And §1326(b)’s omission of cost-benefit analysis did not permit the EPA to decide “for itself which factors should govern the regulatory approach.” (*Id.*)

Impact Of Entergy Corp. v. Riverkeeper, Inc.

The extent to which this holding applies to future regulatory actions depends largely on specific statutory language regarding the use of cost-benefit analysis. Under the *Entergy Corp.* decision, Congress presumably will have to preclude cost-benefit analysis with clarity and specificity; otherwise Congressional silence on an issue may allow a federal agency to pro-

mulgate regulations that were not anticipated. Taken further, Congress may be required by *Entergy Corp.* to legislate a laundry list of clear and specific mandates to avoid agency regulatory discretion.

In the area of environmental laws, for example, clear and specific Congressional mandates could include design or performance standards requiring a company to utilize a specific control technology or achieve a specific emissions objective. A downside to design and performance standards are that they "lock-in" a regulatory standard at the time the legislation is passed and therefore, cannot take into account improving and evolving technology that makes compliance easier and cheaper in the future. Moreover, design and performance standards provide little incentive for regulated actors to do anything more than meet the standard, even if cost-effective technology is available that can reduce the environment harms further than required.

With the Obama Administration in control of federal agencies, the Democrat-controlled Congress may choose not to adopt specific and clear legislative mandates. Congress may continue deferring to the regulatory agencies, and allowing the Obama Administration to determine whether a cost-benefit analysis is appropriate even when the result is lessened regulatory protections. It is an open question whether the Obama Administration will consider using a cost-benefit analysis in the development of new federal regulations. On May 20, 2009, a Senate Committee approved the nomination of Cass Sunstein to be the

administrator of the White House Office of Information and Regulatory Affairs. Sunstein is a leading proponent of using cost-benefit analysis to identify appropriate policy options. And his position in the Obama Administration means that all major regulation will pass his desk. It is conceivable, therefore, that with Sunstein as its champion, the Obama Administration will utilize cost benefit analysis to impose new regulations that maximize public benefits while minimizing costs to regulated industry and the public at large.

But how that analysis will impact environmental regulations depends on the EPA and its Administrator, Lisa Jackson, who formerly served as the Commissioner of the New Jersey state Department of Environmental Protection. While she served in that position, the State of New Jersey, presumably with Ms. Jackson's input, filed a brief with the Supreme Court in support of the Second Circuit's holding in *Entergy Corp.*

Because it is unclear how Sunstein, Jackson, and others in the Obama Administration will utilize cost-benefit analysis when promulgating new regulations, the true impact of *Entergy Corp.*, particularly in the environmental regulatory context, may not be realized for some time. Indeed, the only significance of the decision may be the insight it offers into how the views of Judge Sotomayor might fit in with the current Supreme Court. In the end, we may look back at *Entergy Corp.* and conclude that it significantly changed how regulated industries interact with Congress and federal agencies. ■