In bringing the mercury rule to the Supreme Court, industry was hoping for a ruling that EPA had to balance costs and benefits (and could only include benefits relating to mercury). What they got was far less than that. Here, I'd like to address some key questions about the opinion.

1. When does EPA have to consider costs? The Court relied heavily on the "capaciousness" of the word *appropriate* and its ability to encompass all relevant factors. The broadest statement in the opinion is: "One would not say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." The Court also relied on the general administrative practice of considering cost as a factor in regulation. The Court found that this conclusion was reinforced by the specific of the statute, in particular its requirement that EPA conduct cost related studies. This suggests a presumption in favor of considering cost. But apparently it's not a terribly strong presumption The Court reads an earlier opinion (by Scalia himself) as saying that "expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway." It remains unclear how strong the presumption is or what it would take to overcome it. It's also not clear whether the presumption would apply to the intermediate case of statutory language somewhere between a listing of specific factors and an open-ended term like *appropriate*.

2. What counts as a *cost*? The definition is very broad. The Court says that cost more than the expense of complying with regulations; any disadvantage could be termed a cost." It then points to impacts on human health or the environment as costs. This could actually be a helpful holding for environmentalists in some situations involving non-environmental statutes.

3. What weight has to be given to costs? The opinion is conspicuously lacking in references to *balancing* or the term *cost-benefit analysis*. Throughout, the Court expresses concern about situations where costs are grossly disproportionate to benefits or at least "significantly exceed" benefits. Thus, the opinion seems to allow an agency to have a thumb on the scale in favor of regulation, but not a fist on the scale.

4. Do co-benefits count? The Court leaves this to EPA on remand, so long as EPA's resolution of the issue is reasonable. Unless something in a specific statute precludes consideration of co-benefits, the logic of the opinion requires considering them. First, if costs are defined as broadly as the Court suggests, it is hard to see why benefits should be defined more narrowly. Second, the Court relies in part on administrative practice, and cost-benefit guidelines have required consideration of co-benefits for many years. Third, :to

paraphrase the Court, one would not say that it is even rational, never mind "appropriate," to reject a rule where the benefits vastly exceed the costs simply they are the "wrong kind" of benefits. The "capaciousness" of the word *appropriate* again would seem to call for consideration for all factors that have policy significance.

5. Will the opinion preclude the mercury rule? No reason why it should. The co-benefits are enormous. Moreover, the costs of compliance have gone down, since so many plants have already installed the necessary equipment at this point. If necessary, EPA can also probably do more to identify and perhaps even quantity direct benefits of reducing toxic substances in the emissions. Thus, the Court's decision seems more like a bump in the road than a roadblock.