

Cost-benefit analysis has become a ubiquitous part of regulation, enforced by the Office of Management and Budget. A weak cost-benefit analysis means that the regulation gets kicked back to the agency. Yet there is no statute that provides for this; it's entirely a matter of Presidential dictate. And reliance on cost-benefit analysis often flies in the face of specific directions from Congress about how to write regulations. There are a few exceptions, such as regulations involving pesticides, bans on toxic substances, and thermal water pollution, where Congress called for EPA to balance costs and benefits equally. But almost all environmental laws direct agencies to use some standard other than cost-benefit analysis. The statutes generally place a greater weight on environmental quality and public health than on cost.

For example, it's fairly obvious that Congress did not contemplate much of a role for cost-benefit analysis when it passed the Clean Air Act. Some key provisions of the Act are based completely on health risks and do not allow consideration of costs. When costs *are* a factor, Congress carefully specified factors to be taken into account and provided different standards for different situations. All of the fine distinctions in the table below would be erased if all regulations are simply based on the same cost-benefit standard.

CAA Standards (in order of increasing stringency):			
Standard:	Applies to:	Statute §:	Impact:
RACT (Reasonably Available Control Technology)	Existing sources in nonattainment areas	§ 172(c)(1)	Requires all such sources to use average existing technology (not cutting-edge "best" technology)
BDAT (Best Demonstrated Available Technology)	Stationary sources under NSPS (New Source Performance Standards)	§ 111(a)(1)	Specifically considers cost, but can require matching reductions of best-controlled similar source
BACT (Best Available Control Technology, sometimes given as BAT)	New major sources in PSD (prevention of significant deterioration) areas	§ 165(a)(4)	Requires maximum feasible pollution reduction, considering cost and other factors on case-by-case basis; must be at least as stringent as NSPS under § 111
MACT (Maximum Achievable Control Technology)	Major sources of hazardous air pollutants	§ 112(d)(2) § 112(d)(3)	Requires existing major sources to match best 12% of industry; new major sources to match best-controlled similar source
LAER (Lowest Achievable Emissions Reduction)	New or modified major stationary sources in nonattainment areas	§ 171(3) § 173(a)(2)	Requires most stringent existing emissions limit, whether achieved in practice or included in any SIP, for the applicable source category

How does OMB get away with strong-arming agencies into violating their legal mandates by using cost-benefit analysis rather than the true legal standard? Basically, the trick is accomplished through a legal fiction — or more bluntly, through a transparent falsehood.

The falsehood is that the cost-benefit analysis is merely informational and is not really the basis for the ultimate decision. If this were true, OMB wouldn't pay any attention to the bottom-line of the cost-benefit analysis, only to making sure the methodology is OK.

Everyone knows this is false. OMB cares a great deal about the balance between costs and benefits. But this legal fiction allows the executive branch to continue to maintain that it is executing the laws made by Congress rather than flouting them.

Legally, OMB gets away with this fairly transparent veil over its activities because of the limits of judicial review. The final decision is written up in terms of the statutory standard, and courts don't look past the written document. Judges don't want to inquire into whether the agency *really* based the regulation on the true legal standard or merely rationalized a decision made on other ground like cost-benefit analysis or a desire to placate voters in swing states.

Maybe it seems a little naive to worry about this situation, but our society does claim to believe in the rule of law. The disconnect between EPA's legal mandates and the standards imposed by OMB is troubling, at least if we think the role of the executive branch is to carry out the law rather than to rewrite it to favor a different view of public policy.