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*The Appropriate Role of Costs in Environmental Regulation*

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Abstract by Heather Sidwell

This article discusses the issues raised by the Supreme Court's decision in *Whitman v. American Trucking Ass'ns* (ATA) and the Environmental Protection Agency's (EPA) actions that were the subject of that opinion. The author contends that the Court's decision raises a host of difficult and important issues, for example, what is the scope of the holding, how should agencies that fall within the scope of the holding make regulatory decisions, and how should courts review agency decisions that fall within the scope of the holding?

The author focuses attention on the canons of statutory construction used by courts to interpret ambiguous statutory language. Specifically, the author questions whether any of the prior canonical approaches, the "pro-cost" canon, the "be reasonable" canon, or the "anti-cost" canon, survive *ATA* or whether the opinion creates a new canon of construction that will have the effect of prohibiting many agencies from considering costs in many circumstances. The author concludes that the courts should apply neither a pro-cost canon nor an anti-cost canon, but instead should assume that Congress has permitted an agency to consider any factor that is logically relevant to a decision unless Congress clearly prohibited the agency from considering a particular decisional factor.

Further, the author questions what a court should do when it is required to review a regulatory decision made by an agency that is not allowed to consider costs in any way. Focusing on the two EPA decisions at issue in *ATA*, the author concludes that a court will often have no choice but to reverse and remand an agency decision as arbitrary and capricious if the agency is prohibited from candidly explaining its decision with reference to its consideration of costs. To reduce this residual damage, the author argues that two actions are necessary to encourage candor and transparency in regulatory decision-making. First, minimize the scope of the holding in *ATA* through careful choice of applicable canons of construction; and second, allow agencies to provide a more candid description of their decision-making processes by encouraging them to consider the potential health costs of actions that are motivated by a desire to improve public health.