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*United States Court of Appeals
for the Second Circuit*

SURFRIDER FOUNDATION, STATE OF RHODE ISLAND, STATE OF
CONNECTICUT, STATE OF DELAWARE, COMMONWEALTH OF
MASSACHUSETTS, STATE OF NEW JERSEY, STATE OF NEW YORK,
APPALACHIAN POWER COMPANY, RIVERKEEPER, INC., NATURAL RESOURCES
DEFENSE COUNCIL, SCENIC HUDSON, INC., SAVE THE BAY—PEOPLE FOR
NARRAGANSETT BAY, FRIENDS OF CASCO BAY, AMERICAN LITTORAL
SOCIETY, DELAWARE RIVERKEEPER NETWORK, HACKENSACK RIVERKEEPER,
INC., NEW YORK/NEW JERSEY BAYKEEPER, SANTA MONICA BAYKEEPER, SAN
DIEGO BAYKEEPER, CALIFORNIA COASTKEEPER, COLUMBIA RIVERKEEPER,
PSEG FOSSIL LLC, PSEG NUCLEAR LLC, ENTERGY CORPORATION, ILLINOIS
ENERGY ASSOCIATION, WATERKEEPER ALLIANCE, SOUNDKEEPER, INC.,
UTILITY WATER ACT GROUP

Petitioners,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MICHAEL LEAVITT,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Respondents

**ON PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**[PROPOSED] BRIEF OF *AMICUS CURIAE* OMB WATCH
IN SUPPORT OF ENVIRONMENTAL AND STATE PETITIONERS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, OMB Watch states that it is a non-profit organization. It does not have a parent corporation and it has not issued any stock.

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INTEREST OF AMICUS

OMB Watch is a nonprofit research and advocacy organization dedicated to promoting government accountability, citizen participation in public policy decisions, and the use of fiscal and regulatory policy to serve the public interest. OMB Watch was founded in 1983 to shed light on the activities and operations of the Office of Management and Budget (OMB). The organization also focuses on the substantive areas that OMB and an agency within it, the Office of Information and Regulatory Affairs (OIRA), oversee: federal regulatory policy; the federal budget, taxation and government performance; information and access; and nonprofit action, advocacy, policy and technology.

While OMB's actions have an enormous impact on agency operations, it often operates behind the scenes. By monitoring OMB and explaining governmental processes, OMB Watch helps the public to understand this powerful and secretive agency. In all of its work, OMB Watch is committed to improving access to decision-makers and energizing citizen participation to make government more just, equitable and accountable.

At the national level, OMB Watch is deeply engaged in policy debate and formulation, and is well-known for convening diverse coalitions comprising nonprofits that deal with environmental, low-income, health,

education, consumer, labor, religious, and other public interest issues. For example, in 1995, OMB Watch initiated Citizens for Sensible Safeguards with the endorsement of 300 organizations calling for the strengthening and vigorous enforcement of regulatory protections for public health, safety, civil rights, and the environment. Similarly, in 2004, OMB Watch launched OpenTheGovernment.org, an unprecedented coalition of journalists, environmentalists, labor, and consumer and good government groups seeking more open and accountable government. Over the last few years, OMB Watch has been especially active in numerous issues of government accountability, including the proposed balanced budget amendment to the Constitution, regulatory "reform" measures that would have undermined public protections, and proposals to silence the advocacy voice of nonprofit organizations. A good deal of OMB Watch's work during the past several years has involved monitoring and evaluating OIRA's increasing involvement in the administrative agencies' substantive decision making.

STATUTORY AND REGULATORY BACKGROUND

This brief focuses on the incompatibility between section 316(b) and cost-benefit analysis. The role of the Office of Information and Regulatory Affairs (OIRA) is relevant to this litigation because, we argue below, OIRA foisted upon the Environmental Protection Agency (EPA) an invalid interpretation of section 316(b). We argue that this interpretation is contrary to the unambiguous meaning of the Clean Water Act and thus deserves no deference. Even if the Act is found to be ambiguous, however, EPA's interpretation of section 316(b) is due no deference because that interpretation came from OIRA. We do not argue here that OIRA's involvement in this rulemaking proceeding was itself unlawful; rather, we argue that OIRA's deep involvement here changes the level of deference due to the interpretation of the Clean Water Act underlying EPA's rule.

In this background section, we describe the role of OIRA in the regulatory process; the general framework of the Clean Water Act; and the role of cost-benefit analysis in the Phase II rulemaking process.

A. The Office of Information and Regulatory Affairs

OIRA is situated within the Office of Management and Budget (OMB). OIRA was created by the Paperwork Reduction Act, passed in

1980.¹ The Paperwork Reduction Act gives OIRA authority to keep track of and to reduce the paperwork burden of the federal government and private entities.² Other statutory responsibilities given to OIRA are oversight of compliance with the Unfunded Mandates Reform Act, which creates special procedural rules for Congress's consideration of legislation having certain specified effects on obligations of states and local governments;³ implementation of the Information Quality Act, which aims at ensuring the reliability of information disseminated by the federal agencies;⁴ and the Small Business Regulatory Enforcement Fairness Act, which requires agencies to consider the effects of their action on the nation's small businesses.⁵ OIRA has also been given the duty, under the Regulatory Right-to-Know Act, of publishing a yearly report on the costs and benefits of federal regulation.⁶

It seems fair to say, however, that none of OIRA's statutory obligations has surpassed, in terms of influence, the authority that has been

¹ Paperwork Reduction Act of 1980, 45 U.S.C. §3503.

² *Id.* §3504.

³ Unfunded Mandates Act of 1995, 2 U.S.C. §§1501, 1501.

⁴ Information Quality Act of 2000, Pub. L. 106-554, 114 Stat. 2763, §515.

⁵ The Small Business Regulatory Enforcement Fairness Act, Pub.L. 104-121, 110 Stat. 847, §201.

⁶ Regulatory Right-to-Know Act of 2000, Pub. L. 106-554, 114 Stat. 2763, §624.

given to it under two different Executive Orders. The first, Executive Order 12,291, issued by President Reagan soon after he took office in 1981, required OIRA to oversee compliance with the Executive Order's new requirement that agency regulations costing \$100 million or more be subject to a cost-benefit analysis.⁷ Executive Order 12,291 was superseded in 1993 by President Clinton's Executive Order 12,866.⁸ Executive Order 12,866 is similar in many respects to the Order it displaced; it, too, requires cost-benefit analysis for major agency regulations, and it also gives OIRA oversight authority regarding agencies' cost-benefit analyses.⁹ Moreover, Executive Order 12,866, like Executive Order 12,291 before it, specifically states that it does not displace any statutory requirements the agencies otherwise face.¹⁰

In its memorandum concluding that Executive Order 12,291 did not unconstitutionally interfere with other agencies' prerogatives, the Office of Legal Counsel in the Department of Justice emphasized that the Executive Order did not undo agencies' obligations under existing law, including

⁷ Executive Order 12,291 §2(b), February 17, 1981, *reprinted at* 46 Fed. Reg. 13193.

⁸ Exec. Order No. 12,866, Sec. 6(b), 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (2000).

⁹ *Id.* §2(b); Exec. Order 12,291 §2(b).

¹⁰ Exec. Order 12,291 §8(a)(2); Exec. Order 12,866, Main text, second paragraph.

congressional enactments:

[I]t is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress. . . . This Office has often taken the position that the President may consult with those having statutory decisionmaking responsibilities, and may require them to consider statutorily relevant matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority.... The Order [E.O. 12,291] does not empower the Director [of OMB] ... to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions.... [The Director's] power of consultation would not ... include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation....¹¹

Likewise, OIRA's first Administrator, James C. Miller III, testified before Congress that

President Reagan's Executive order imposes on the agencies only "to the extent permitted by law" and only to the extent that its terms would not "conflict with deadlines imposed by statute or by judicial order." The limited application of [EO 12,291] is a crucial point, one that insures [its] legality and the legality of actions pursuant to it.¹²

¹¹ Memorandum for Honorable David Stockman, Director, Office of Management and Budget, Re: Proposed Executive Order on Federal Regulation (Feb. 12, 1981), printed in full in *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess.* 152-69 (1981).

¹² Testimony of James C. Miller III, in *Role of OMB in Regulation: Hearing Before the Subcomm. On Oversight and Investigation of House Comm. On Energy & Commerce, 97th Cong., 1st Sess.* 46 (1981).

From the beginning, therefore, it has been clear that, in reviewing the regulatory initiatives of its sister agencies, OIRA may not interfere with the agencies' compliance with statutory directives.

In the past several years, OIRA has become increasingly involved in agency rulemaking proceedings. In September 2001, the Administrator of OIRA sent a memorandum to the heads of all federal agencies, signaling his intent to use OIRA's oversight authority under Executive Order 12,866 in a variety of ways.¹³ Among other things, the Administrator of OIRA gave notice to the heads of other federal agencies that he would disapprove regulations that did not jibe with the cost-benefit framework of Executive Order 12,866.¹⁴ OIRA has made good on this promise. A report published by the Government Accountability Office (GAO) in 2003 concluded that OMB "can have a significant – if not determinative – effect on a broad array of federal regulations...."¹⁵ According to GAO, during the period June 2001 to July 2002, "the primary effect of OIRA's suggestions was to delay or

¹³ Memorandum For The President's Management Council From John D. Graham, Subject: Presidential Review of Agency Rulemaking by OIRA, September 20, 2001; *available at* http://www.whitehouse.gov/omb/inforeg/oira_review-process.html.

¹⁴ *Id.*

¹⁵ OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews, GAO-03-929 at 5 (Oct. 22, 2003), *available at* <http://www.gao.gov/new.items/d03929.pdf> ("GAO Report").

eliminate certain regulatory provisions that were included in the draft rules as submitted to OIRA.”¹⁶ Moreover, of the twenty-five rules studied by the GAO in its report which had been significantly affected by OIRA’s involvement, twenty-four were weakened during the OIRA review process; none was strengthened.¹⁷ The unidirectional nature of OIRA’s role in regulatory affairs has led one observer to call cost-benefit analysis in OIRA’s hands a “one-way ratchet, able to stand still to be sure, but only capable of moving in one direction when it does function as a tool having some substantive effect, that of making regulation less stringent.”¹⁸ Indeed, when agencies have offered proposals that involve *deregulation* rather than increased regulation, OIRA has not required a cost-benefit analysis supporting the deregulatory action.¹⁹

B. Technology-based regulation and cost-benefit analysis

The Clean Water Act is the leading U.S. law protecting the nation’s surface waters from pollution and other insults to their physical, biological, and chemical integrity. It was preceded by several other federal statutes that

¹⁶ *Id.*

¹⁷ David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 UNIV. COLO. L. REV. – (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=708402, at p. 35.

¹⁸ *Id.* at 55.

¹⁹ Lisa Heinzerling & Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENVTL. L. REP. 10485, 10488 (June 2004).

had been, in the memorable words of the Senate Committee on Public Works, “inadequate in every vital respect.”²⁰ The 1972 Act broke ranks with previous legislation in several important ways. For present purposes, the most important innovation of the 1972 Act was the move away from site-specific, water-quality based standards and toward national, technology-based standards for controlling water pollution.²¹

The Clean Water Act relies on technology-based regulation as the strategy of first resort for cleaning up the nation’s waters. Technology-based regulation is regulation which attempts to protect the environment through the use of some version of the “best available” technology for controlling pollution.²² Its great advantage, in comparison to water-quality-based regulation, is that one need not resolve all of the contentious scientific issues surrounding exactly what levels of pollution are bad for the waters before one proceeds to regulate.²³ To be sure, depending on the specific formulation of the “best available technology” requirement in place, the level of pollution reduction can be relevant to the technology-based inquiry.

²⁰ S. Rep. No. 92-414, p. 7 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, p. 1423 (1973) (hereafter Leg. Hist.).

²¹ *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004).

²² *Id.* at 184-185.

²³ *Id.* at 184.

But under the Clean Water Act, the inquiry into the effluent reduction level achieved by various technologies has historically been very limited. In the important early case of *Weyerhaeuser v. Costle*,²⁴ for example, the D.C. Circuit held that the consideration of “effluent reduction benefits” called for by the Clean Water Act did not require EPA to conduct a fine-grained cost-benefit analysis of technology requirements before imposing such requirements on the relevant industry.

Ever since the modern Clean Water Act was passed, industry has tried to convert the technology-based standards of the Act into cost-benefit standards. Early on there was the *Weyerhaeuser* litigation mentioned previously, which sought to require cost-benefit analysis in setting technology-based standards for the pulp and paper industry.²⁵ Other cases involved – and rejected – similar arguments.²⁶ In the mid-1990s, Congress flirted with statutory amendments that would have required cost-benefit analysis of any rule costing more than \$25 million; the amendments did not

²⁴ 590 F.2d 1011 (D.C. Cir. 1978).

²⁵ *Id.* at 1029.

²⁶ See, e.g., *Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 936 n.9 (5th Cir. 1998); *B.P. Exploration & Oil v. EPA*, 66 F.3d 784, 800 (6th Cir. 1995) (citing *CPC Int’l Inc. v. Train*, 540 F.2d 1329, 1341-42 (8th Cir. 1976)).

pass.²⁷ At about the same time, Congress also considered the legislation implementing Newt Gingrich’s “Contract with America,” which would have required cost-benefit analysis for major health, safety, and environmental rules.²⁸ This legislation, too, failed to pass.

Thus, from the earliest days of the Clean Water Act, it has been understood that the Act’s technology-based requirements are not to be based on cost-benefit analysis. Efforts to import cost-benefit analysis into the Act’s basic structure have failed. Yet, some of the Act’s technology-based provisions do speak in terms of considering both the economic costs and the “effluent reduction benefits” of regulations.²⁹ What is the difference between these two regulatory approaches?

Cost-benefit analysis is different from technology-based regulation in three principal ways. First, cost-benefit analysis is indifferent to whether, at the end of the day, any regulation whatsoever is imposed on the actors subject to the relevant law. If the costs of regulation are too high in relation to benefits, then the cost-benefit analyst will call for regulation to be

²⁷ H.R. 961, 104th Congress (1995), §324(c)(1)(B). The bill died in committee.

²⁸ H.R. 9, 104th Congress (1995), §401 et seq.

²⁹ 33 U.S.C. §1285(j)(D); §1311(b)(2)(A); §1314(b)(1)(B); §1316(b)(1)(B).

rejected.³⁰ Technology-based regulation, on the other hand, takes it as a given that entities subject to the law will be subject to some form of pollution control requirements when all is said and done; the only question is how stringent those requirements will be. Cost-benefit analysis is agnostic on the question whether regulation should proceed; technology-based regulation is not.

A second major difference between cost-benefit analysis and technology-based regulation is that cost-benefit analysis requires quantification and monetization of the factors relevant to a decision, whereas technology-based regulation does not. Unlike cost-benefit analysis, technology-based regulation does not depend on obtaining numbers for extremely specific aspects of a given regulatory program (such as exactly which fish species are killed by a particular cooling water intake structure, and in what numbers, at what ages).³¹ Nor does it require the translation of such numbers into dollar figures. This step – “monetizing” regulatory

³⁰ The rule at issue here, for example, allows a conclusion that no new regulatory requirements are appropriate if a site-specific cost-benefit analysis shows that costs are significantly greater than benefits. 40 C.F.R. §125.94(a)(5)(ii).

³¹ *See, e.g.*, National Pollutant Discharge Elimination System – Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 67 Fed. Reg. 17122, 17139 (2002) (“Phase II Proposed Rule”).

benefits – is at once the most controversial, and most distinctive, feature of cost-benefit analysis.³²

A third feature of cost-benefit analysis that distinguishes it from technology-based regulation is more obscure, but also very important. Cost-benefit analysts today insist upon “discounting” both costs and benefits that occur in the future due to regulation.³³ This is normal procedure for financial costs occurring in the future; in that case, discounting allows the analyst to determine, based on estimates of prevailing rates of return on financial investments, what money in the future will be worth compared to money today. But cost-benefit analysts apply the same technique to non-monetary future goods (such as, in the present case, fish and wildlife protected in the future through control technologies). The basic idea here is that things that happen in the future are not as important as things that happen today.³⁴ Thus, in the present setting, the fish of the future are worth appreciably less than today’s fish. Technology-based regulation includes

³² For general discussion, see FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING*, ch. 4 (The New Press 2004).

³³ *See, e.g.*, OMB Circular A-4, Subject: Regulatory Analysis, September 17, 2003, pp. 33-34 (requiring agencies conducting cost-benefit analyses to discount future costs and benefits at 7 and 3 percent per year), available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

³⁴ *Id.* at 32.

nothing remotely resembling the technique of discounting.

In these ways – agnosticism about whether regulation occurs, and quantification, monetization, and discounting of costs and benefits – cost-benefit analysis is very different from the technology-based regulation of the Clean Water Act.

C. OIRA, Cost-Benefit Analysis, and the Phase II Rulemaking

The briefs of the petitioners, environmental petitioners and the states, thoroughly describe the Phase II rulemaking process. We highlight two general points here.

First, both of the parts of the final rule on which we will focus – the rejection of closed-cycle cooling at the largest and most harmful plants,³⁵ and the adoption of a compliance alternative based on site-specific cost-benefit analysis³⁶ – were incorporated into the rule during OIRA’s cost-

³⁵ Compare OMB Review Draft of Proposed Section 316(b) Rule for Large Cooling Water Intake Structures at Existing Power Generating Facilities (Dec. 28, 2001), DCN 4-4005, at 71-72, 74-75 (“2001 OMB Review Draft”) (proposing to require closed-cycle cooling at 59 plants), with Phase II Proposed Rule, 67 Fed. Reg. at 17158 (rejecting requirement of closed-cycle cooling at these facilities based on comparison of monetized, incremental costs and benefits).

³⁶ Compare 2001 OMB Review Draft, at 93-95 (declining to propose (while inviting comment on) compliance alternative based on site-specific cost-benefit analysis, due to administrative costs and regulatory uncertainties created by such an alternative), with Section 316(b) OMB Review Draft of Proposed Section 316(b) Rule for Large Cooling Water Intake Structures at

benefit review process.

Second, the cost-benefit analysis insisted upon by OIRA featured all of the characteristics of cost-benefit analysis described above – agnosticism about whether any regulatory requirements will ultimately be imposed, and quantification, monetization, and discounting of the costs and benefits of regulation. On agnosticism: the site-specific cost-benefit compliance alternative allows a facility to avoid regulation altogether if the costs of control technology are “significantly greater” than the benefits.³⁷

As for monetization, EPA struggled to attach a dollar figure to the benefits of this regulation. In the end, EPA could monetize only the benefits of saving the fish that, with the protections of this rule in place, will survive the hazards of cooling water intake structures, only later to be caught by commercial or recreational fishers.³⁸ EPA was unable to attach any separate dollar figure whatsoever to the benefits of 98.2 percent of the aquatic

Existing Power Generating Facilities (Dec. 28, 2001), DCN 4-4005 Phase II Proposed Rule Summary of Major Changes During Interagency Review (DCN 4-4019) at 2 (noting that this cost-benefit variance was added at OIRA’s behest).

³⁷ See 40 C.F.R. §125.94(a)(5)(ii).

³⁸ National Pollutant Discharge Elimination System – Final Regulations To Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities; Final Rule, 69 Fed. Reg. 41576, 41657 (July 9, 2004) (“Phase II Final Rule”)

organisms saved by this rule.³⁹ EPA could not identify the dollar value of the “nonuse” benefits provided by these organisms (such as ecological values).⁴⁰ An impressive list of benefits that EPA was unable to monetize appears in the preamble to the final rule.⁴¹

As for discounting, EPA used this technique in two ways. First, EPA assumed (without elaboration) that compliance costs would likely be incurred about one year before the relevant control technology would be operational and thus begin saving fish.⁴² EPA discounted the monetary value of the fish saved over this one year between imposition of costs and realization of benefits. Second, EPA also observed that the fish saved by the relevant control technologies would not have been caught by commercial or recreational fishers until they had reached some appropriate level of maturity. The benefits of the Phase II rule would not accrue, EPA thought, until the date on which the fish saved by the rule would otherwise have been caught. For this reason, EPA discounted the fish-saving benefits of the rule for one or more years, depending on “the time of the ultimate harvest” of the

³⁹ *Id.* at 41661.

⁴⁰ *Id.* at 41657.

⁴¹ *Id.* at 41662.

⁴² *Id.* at 41658.

relevant fish.⁴³ Discounting in this manner reduced the estimated benefits of saving fish through this rule by as much as 34 percent.⁴⁴

SUMMARY OF ARGUMENT

In its Phase II rulemaking, EPA erred by converting a technology-based regulatory regime into a cost-benefit regime. Two important aspects of the final rule rest on EPA's unlawful interpretation of the statute: the rejection of a requirement of closed-cycle cooling structures at the largest and most environmentally damaging facilities, and the embrace of a "compliance alternative" based on site-specific cost-benefit analysis. EPA's substitution of a cost-benefit regime for a technology-based regime conflicts with the plain meaning of the Clean Water Act and thus is due no deference. Even if this court were to hold that the Act is ambiguous on the relevant issues, EPA's interpretation of the statute does not deserve deference from this court. In caving in to the view of the statute foisted on it by a sister agency, the Office of Information and Regulatory Affairs, EPA earned itself the lesser measure of deference recognized in recent Supreme Court cases narrowing the instances in which the broad deference of *Chevron U.S.A. v.*

⁴³ *Id.* at 41658.

⁴⁴ Memo to Phase II Docket, "Discounting Recreational and Commercial Fishing Benefits," at p. 3, Table 2, Docket No. OW-2002-0049-0351, DCN 5-2390 (Mar. 12, 2003).

*Natural Resources Defense Council*⁴⁵ is available.⁴⁶ Even under *Chevron* itself, moreover, EPA’s interpretation cannot stand. Thus the portions of the Phase II rule which rest on EPA’s conversion of the Clean Water Act from a technology-based regime into a cost-benefit regime must be invalidated.⁴⁷

DISCUSSION

This case turns on the proper interpretation of section 316(b) of the Clean Water Act. This interpretation will determine the appropriateness of, among other things, EPA’s performance standards for cooling water intake structures and its endorsement of a compliance alternative based on site-specific cost-benefit analysis. EPA’s Phase II rule also, of course, involves important issues of contested fact. The interpretive issues must, however, come first, as one cannot know how to approach EPA’s assessment of the facts without first knowing what the relevant legal standards are.⁴⁸

EPA explicitly based both its rejection of closed-cycle cooling at the largest and most harmful facilities, and its “compliance alternative” using

⁴⁵ 467 U.S. 837, 844 (1984).

⁴⁶ See, e.g., *United States v. Mead Corporation*, 533 U.S. 218 (2001).

⁴⁷ Petitioners make fundamentally the same argument in their briefs; they also argue that EPA’s rejection of closed-cycle cooling at the largest and most harmful facilities, and its creation of a compliance alternative based on site-specific cost-benefit analysis, contravened Congress’s intent in the Clean Water Act. See Brief of the Environmental Petitioners, at 28-36, 73-95; Opening Brief for Petitioners Rhode Island *et al.*, at 32-44, 51-62.

⁴⁸ See *Riverkeeper*, 358 F.3d at 184.

site-specific cost-benefit analysis, on its view that section 316(b) authorizes cost-benefit balancing. EPA explained that it interpreted the phrase “best technology available” under section 316(b) to require “best technology available commercially at an economically practicable cost,”⁴⁹ and that it viewed economic practicability as including “a consideration of the relationship of costs to environmental benefits” and requiring “some reasonable relationship between the cost of cooling water intake structure technology and the environmental benefits associated with its use.”⁵⁰ EPA then went on to reject closed-cycle cooling because it was “not determined to be the most cost-effective approach on a national basis.”⁵¹ The way EPA uses cost-effectiveness here, it is nothing more or less than cost-benefit analysis.⁵² Similarly, EPA also based its cost-benefit “compliance

⁴⁹ Phase II Final Rule, 69 Fed. Reg. at 41604.

⁵⁰ *Ibid.*

⁵¹ *Id.* at 41607.

⁵² EPA does not explain why it concluded that closed-cycle cooling was not cost-effective. (This lack of explanation is in itself a problem.) In its final draft for OMB review, in discussing cost-effectiveness, EPA stated that “[t]he incremental social costs of [closed-cycle cooling at the largest and most harmful facilities] relative to the proposed option (\$686 million) significantly outweigh the incremental benefits (\$299 million).” *See* OMB Review Draft of Proposed Section 316(b) Rule for Large Cooling Water Intake Structures at Existing Power Generating Facilities (Dec. 22, 2003); *see also* Phase II Proposed Rule, 67 Fed. Reg. at 17158 (offering same kind of analysis, but with numbers of \$413 million for incremental costs and \$146 million for incremental benefits). EPA’s analysis here is cost-benefit

alternative” on its view that the section 316(b) authorizes cost-benefit balancing.⁵³ Thus the validity of both of these features of the rule depends on the validity of EPA’s interpretation of the Act.

I. The Clean Water Act Unambiguously Rejects Cost-Benefit Analysis as the Basis for Standards and Variances Under Section 316(b).

The language of a statute is the starting point for statutory interpretation.⁵⁴ In the midst of the Clean Water Act’s jumble of acronyms, section 316(b) offers refreshingly plainspoken terms. Here is the provision in its entirety:

Any standard established pursuant to section 1311 [301] of this title or section 1316 [306] of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.⁵⁵

The key phrase here is the one describing the technology EPA must require: “the best technology available for minimizing adverse environmental impact.” *Webster’s New World Dictionary* defines “minimize” as “to reduce

analysis; the agency is simply comparing the results of two different cost-benefit analyses, for two different regulatory options.

⁵³ Phase II Final Rule, 65 Fed. Reg. at 41603.

⁵⁴ See *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577, 585 (2004).

⁵⁵ 33 U.S.C. 1326(b).

to a minimum; decrease to the least possible amount, degree, etc.”⁵⁶ The use of the term “minimize” in environmental statutes has been strictly interpreted by the courts. For example, the D.C. Circuit construed the term “minimized” in the Resource Conservation and Recovery Act⁵⁷ to require that EPA reduce the targeted harm to the “greatest possible extent...”⁵⁸ Thus, section 316(b) charges EPA with reducing adverse environmental impacts from cooling water intake structures to the lowest possible amount.

EPA’s conversion of section 316(b) to a cost-benefit regime cannot be squared with this unambiguous statutory language, and thus EPA’s interpretation is not entitled to deference. A cost-benefit regime does not minimize adverse environmental impacts; a cost-benefit regime balances costs against benefits in deciding what level of environmental impact is acceptable. A regime, like section 316(b), which aims at minimization of environmental impacts, explicitly favors environmental protection. Cost-benefit analysis does not do this. Indeed, given the difficulty cost-benefit analysis has in developing meaningful numbers for the benefits of

⁵⁶ WEBSTER’S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 3d (College Ed. 1988).

⁵⁷ 42 U.S.C. §6924(m)(1).

⁵⁸ *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 361 (D.C. Cir. 1989) (“To “minimize” something is, to quote the Oxford English Dictionary, to ‘reduce [it] to the smallest possible amount, extent, or degree.’”)

environmental protection, it can fairly be said that this analytical framework puts a thumb on the scales *against* environmental protection. This is not the regime created by the language of minimization in section 316(b).

This conclusion is only fortified by considering section 316(b)'s cross-reference to sections 301 and 306 of the Clean Water Act. This court has said that this cross-reference

is an invitation to look to section 306 for guidance in discerning what factors Congress intended the EPA to consider in determining the 'best technology available.' . . . Because section 316(b) refers to sections 301 and 306 but provides a different standard . . . , we think it is permissible for the EPA to look to those sections for guidance but to decide that not every statutory directive contained therein is applicable to the Rule.⁵⁹

As the court makes clear in this passage, section 316(b) describes a different standard – the minimization of adverse environmental effects – than the standards contemplated by sections 301 and 306. In looking at sections 301 and 306 as guideposts to the meaning of “best technology available” under 316(b), the special standard enunciated in section 316(b) for cooling water intake structures must be preserved.

Sections 301 and 306 establish an array of technology-based standards. Among these are the “best available technology economically

⁵⁹ *Riverkeeper*, 358 F.3d at 186-87.

achievable,”⁶⁰ the “best practicable control technology currently available,”⁶¹ the “best conventional pollutant control technology,”⁶² and the “best available demonstrated control technology.”⁶³ Linguistically, the technology-based standards cited in sections 301 and 306 that are closest to the “best technology available” of section 316(b) are the standards for new sources under section 306 (“best available demonstrated control technology”)⁶⁴ and for existing sources under section 301(b)(2)(A) (“best available technology economically achievable”).⁶⁵ If Congress had wanted EPA to set standards for cooling water intake structures based on the “best practicable” control technology, or the “best conventional” control technology, it could easily have done so; it did so in other provisions of the very same statute,⁶⁶ provisions cited in the very section under consideration

⁶⁰ 33 U.S.C. §1311(b)(2)(A), CWA §301(b)(2)(A); 33 U.S.C. §1317(a)(2); CWA §307(a)(2).

⁶¹ 33 U.S.C. §1311(b)(1)(A), CWA §301(b)(1)(A).

⁶² 33 U.S.C. §1311(b)(2)(E), CWA §301(b)(2)(E).

⁶³ 33 U.S.C. §1316(a)(1); CWA §306(a)(1).

⁶⁴ 33 U.S.C. §1316(a)(1), CWA §306(a)(1).

⁶⁵ This standard applies to existing sources which involve pollutants other than “conventional” pollutants. 33 U.S.C. §301(2)(A) (provision applies to pollutants identified in subsections (C), (D), and (F), which are toxic pollutants and pollutants that are not conventional pollutants). Cooling water intake structures involve neither toxic nor conventional pollutants.

⁶⁶ 33 U.S.C. §1311(b)(1)(A), CWA §301(b)(1)(A) (“best practicable”); 33 U.S.C. §1311(b)(2)(E), CWA §301(b)(2)(E) (“best conventional”).

here. Instead, in section 316(b), Congress used language remarkably similar to that used in described the technology-based requirements under section 306 and 301(b)(2)(A).

The importance of this point goes well beyond semantics, for the specific categorization of control technologies under the Clean Water Act ushers in a cascade of regulatory consequences. Most important for present purposes, the criteria relevant to choosing the required technology change considerably from one technology-based standard to another. In particular, the consideration of costs *in relation to benefits* is explicitly allowed in determining the “best practicable control technology”⁶⁷ and the “best conventional pollutant control technology.”⁶⁸ The relationship between costs and benefits is *not* one of the factors listed as relevant in choosing the

⁶⁷ 33 U.S.C. §1314(b)(1)(B), CWA §304(b)(1)(B) (directing EPA to consider factors including “the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application”).

⁶⁸ 33 U.S.C. §1314(b)(4)(B), CWA §304(b)(4)(B) (directing EPA to consider factors including “the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived”). Even here, and with respect to best practicable control technology, however, EPA has not relied upon the kind of formal, quantified and monetized cost-benefit analysis that formed the basis of its decisions in this rulemaking proceeding. *See, e.g., Weyerhaeuser v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

best available technology under section 306⁶⁹ or section 301(b)(2)(A).⁷⁰ Thus, neither of the provisions that bears the closest linguistic resemblance to section 316(b) authorizes EPA to consider the relationship between costs and benefits in choosing the requisite technology. The explicit mention of a comparison between costs and benefits in some provisions of the statute, and the omission of mention of that comparison in others, strongly indicates that Congress did not mean to allow that comparison under the rubric of the provisions that do not mention it.⁷¹

Thus EPA may not, consistent with the unambiguous meaning of section 316(b), convert this provision into a cost-benefit regime. Congress could easily have charged EPA with considering the relationship between costs and benefits in setting standards under section 316(b) – either indirectly, by specifying that the standards should require use of the “best practicable” or “best conventional” control technology (which would have brought with it consideration of the cost-benefit relationship), or directly, by using the very same kind of language Congress proved itself capable of using in describing the factors to be considered in setting certain technology-

⁶⁹ 33 U.S.C. §1316(b)(1)(B), CWA §306(b)(1)(B).

⁷⁰ 33 U.S.C. §1304(b)(2)(B), CWA §304(b)(2)(B).

⁷¹ *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 467-69 (2001).

based standards.⁷²

In creating a site-specific “compliance alternative” based on cost-benefit analysis, EPA also ignored explicit statutory language ruling out such an alternative. Congress was painstaking in its elaboration of different rules for variances in different circumstances.⁷³ In only one kind of case – involving “biochemical oxygen demand and pH from discharges ... into deep waters of the territorial seas” – was modification of technology-based requirements allowed based on a cost-benefit balancing.⁷⁴ The other provisions for variances involve consideration of some combination of the kinds of factors this court upheld in reviewing the variance allowed for new sources under section 316(b) – a comparison of actual costs to the costs predicted during the rulemaking proceeding, significant adverse effects on local air quality, local water resources other than impingement and

⁷² Again, the language describing the factors relevant to identifying “best practicable” and “best conventional” control technology explicitly refers to the relationship between costs and benefits. See 33 U.S.C. §1314(b)(1)(B), CWA 304(b)(1)(B); 33 U.S.C. §1314(b)(2)(B), CWA §304(b)(2)(B).

⁷³ EPA’s decision to style the cost-benefit option a “compliance alternative” rather than a “variance” does not make the provisions of the Clean Water Act dealing with exceptions to technology-based standards – there styled “variances” – any less relevant.

⁷⁴ 33 U.S.C. §1311(m)(1)(B), CWA §301(m)(1)(B).

entrainment, and local energy markets.⁷⁵ In allowing a variance based on site-specific cost-benefit analysis for the existing sources covered by this rule, EPA went well beyond the narrow variance it allowed for new sources in the Phase I proceeding.⁷⁶

EPA's efforts to get around the clear meaning of section 316(b) are tinged with desperation. EPA notes the linguistic similarity between the "best technology available" of section 316(b) and the "best available technology" of section 301.⁷⁷ EPA states that it therefore looked for guidance in that section (and the closely related section 304) in determining the best technology available under section 316(b).⁷⁸ Nevertheless, EPA asserts,

[T]here are significant differences between section 316(b) and sections 301 and 304.... In contrast to the effluent limitations provisions, the object of the 'best technology available' is explicitly

⁷⁵ *Riverkeeper*, 358 F.3d at 192.

⁷⁶ The cost-benefit "compliance alternative" in this rule also goes beyond the Phase I variance in other ways: the Phase I variance more clearly placed the entire burden of justifying a variance on the applicant; it required that the costs of a technology at a specific site be "wholly disproportionate to" – rather than "significantly greater than" – the costs EPA had assumed in writing the rule; and it did not provide that it was acceptable not to do anything in response to the rule if the costs were high enough in relation to the benefits. Compare 40 C.F.R. §125.85(a)(2)-(3) (Phase I variance provision) with 40 C.F.R. §125.94(a)(5)(ii) (Phase II site-specific "compliance alternative" based on cost-benefit analysis).

⁷⁷ Phase II Final Rule, 69 Fed. Reg. at 41583.

⁷⁸ *Ibid.*

articulated by reference to the receiving water: To minimize adverse environmental impact in the waters from which cooling water is withdrawn....For this Phase II rulemaking, EPA therefore interprets CWA section 316(b) as authorizing EPA to consider not only technologies but also their effects on and benefits to the water from which the cooling water is withdrawn.⁷⁹

This interpretation must underlie EPA's deployment of the "cost-effectiveness" test in rejecting closed-cycle cooling at the largest and most harmful facilities (since that test is but a refinement of the cost-benefit balancing EPA is describing in this passage), and this interpretation forms the express basis of EPA's embrace of a "compliance alternative" based on site-specific cost-benefit analysis.⁸⁰

But the interpretation is absurd. First, if EPA had indeed looked for "guidance" in sections 301 and 304 when it was interpreting section 316(b), and done so responsibly, EPA would have found that cost-benefit balancing is foreclosed under section 316(b). Second, to use the specific language of section 316(b) to *enlarge* the authority of EPA to conduct cost-benefit balancing is bizarre. As discussed above, several provisions of the Clean Water Act explicitly authorize the weighing of costs against benefits. As *Weyerhaeuser* makes clear, even these provisions have not been interpreted to require the kind of formal cost-benefit analysis EPA required here. Thus

⁷⁹ *Ibid.*

⁸⁰ *Id.* at 41603-41604.

EPA must somehow argue that a provision requiring it to “minimize adverse environmental impacts” is *less* environmentally protective – because it allows more relaxed regulatory standards under the rubric of formal cost-benefit analysis – than a provision that, like those in section 304, authorizes an informal comparison of economic costs and pollution reduction benefits. To be sure, section 316(b) does, as EPA says, have an eye on “the effects on ... the water from which the cooling water is withdrawn”⁸¹ – but EPA is directed to *minimize* those effects, not to balance those effects against economic costs. EPA has read section 316(b) exactly backwards.

For all of the foregoing reasons, EPA’s transformation of section 316(b) into a cost-benefit provision is inconsistent with the unambiguous meaning of that provision. Thus, the portions of EPA’s rule dependent on the incorporation of cost-benefit analysis – that is, the rejection of closed-cycle cooling at the largest and most harmful plants and the embrace of a compliance alternative based on site-specific cost-benefit analysis – must be invalidated, and returned to the agency for revision under the proper legal standard.

II. EPA’s Interpretation of Section 316(b) Does Not Deserve This Court’s Deference.

⁸¹ *Id.* at 41583.

If, however, this court disagrees with the foregoing assessment, then the only proper conclusion it can reach is that the law is ambiguous on the critical interpretive questions raised by EPA's rule. The route that is not open to this court is to rule that the statute is unambiguous in the other direction; that is, that it unambiguously allows cost-benefit analysis to serve as the criterion for choosing technologies under section 316(b), or that it unambiguously permits a compliance alternative based on site-specific cost-benefit analysis. That route is foreclosed for all of the reasons already given. Moreover, EPA appears to concede this point; in the preamble to the final rule, the agency states that "neither the statute nor the legislative history *requires* a formal or informal cost-benefit assessment."⁸²

If the court finds the statute ambiguous on this critical issue, then it faces the further question of what its posture should be with respect to EPA's interpretation of the statute. In recent years, the Supreme Court has refined its holding in *Chevron* by deciding that the degree of deference courts ought to give to agency interpretations of statutes depends on a fairly wide array of factors.⁸³ The quite substantial deference afforded, under

⁸² Phase II Final Rule, 69 Fed. Reg. at 41604 (emphasis added).

⁸³ *United States v. Mead Corporation*, 533 U.S. 218, 228 (2001).

Chevron,⁸⁴ to the agency charged with implementing a statute is, in other words, not automatically applicable to every situation in which an agency offers an interpretation of a statute.⁸⁵ Rather, the Court held in *United States v. Mead Corporation*,⁸⁶

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.⁸⁷

The Court went on to quote Justice Jackson's opinion in *Skidmore v. Swift & Co.*:⁸⁸

The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The situation here calls for the application of *Mead*, not *Chevron*. First and foremost, *Chevron* deference is due only to the agency responsible for implementing the statute in question, or, in *Chevron*'s words, to the

⁸⁴ *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

⁸⁵ *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 200-201 (2d Cir. 2004).

⁸⁶ 533 U.S. 218 (2001).

⁸⁷ *Id.* at 228 (citations and footnotes omitted).

⁸⁸ 323 U.S. 134, 140 (1944).

agency “entrusted to administer” the relevant statute.⁸⁹ Moreover, as the Supreme Court held in *Martin v. OSHRC*,⁹⁰ where there exists a clash between two different executive branch agencies, then the agency that has the greatest degree of implementing authority under the statute is the one that deserves deference to its interpretation.⁹¹ EPA is that agency in this case.⁹²

The paper trail in this case makes clear that the Office of Information and Regulatory Affairs foisted on EPA an interpretation of the Clean Water Act that EPA itself had not developed.⁹³ OIRA is not the agency charged with implementing the Clean Water Act. Indeed, the Act does not mention OIRA; it does not give OIRA even the tiniest role in the implementation of

⁸⁹ *Chevron*, 467 U.S. at 844 & n. 14, citing numerous cases.

⁹⁰ 499 U.S. 144 (1991).

⁹¹ *Id.* at 152-53.

⁹² See 33 U.S.C. § 1251(d) (stating “the Administrator of the Environmental Protection Agency . . . shall administer this chapter.”); and 33 U.S.C. § 1316(b)(1)(B) (providing “the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources . . .”).

⁹³ See *supra* notes 35-36; Brief of the Environmental Petitioners at 19-20, 31-36, 73. See also Form for Compliance with E.O. 12866 Docket Requirements, Docket No. OW-2002-0049-2766, p. 9 (noting that OMB had been behind adding the “clarification that comparison of costs with benefits is an important component of economic practicability”).

the Act.⁹⁴ In this way, therefore, this case is even more straightforward than *Martin*; there, the agency offering the interpretation that conflicted with the interpretation of the agency given primary responsibility for implementing the statute at least had some responsibilities under the statute.⁹⁵ Here, OIRA has none. EPA should not be given *Chevron* deference for an interpretation that simply caves in to the will of a sister agency.⁹⁶

Another feature of this rulemaking also supports application of the *Mead* rather than *Chevron* standard of review for EPA's interpretative choices. The interpretive choices we have referenced here – such as the adoption of a “net benefits” standard and the embrace of a site-specific cost-benefit test – were made abruptly, in response to pressure applied by OIRA, rather than with careful deliberation and application of EPA's unique expertise.⁹⁷ The care with which an agency makes an interpretive choice is

⁹⁴ Cf. 42 U.S.C. §7607(d)(4)(B)(ii) (Clean Air Act expressly refers to OMB regulatory review process in requiring that drafts of proposed rules submitted for this process be placed in the relevant rule's public docket).

⁹⁵ 499 U.S. at 152-53.

⁹⁶ Cf. *Hazardous Waste Treatment Council v. EPA*, 886 F.3d 355, 365-66 (D.C. Cir. 1989) (EPA did not adequately explain interpretation of statute where it referred to Congressmen's post-enactment letter setting forth their own interpretation of the statute, as if their interpretation controlled EPA's view of the statute).

⁹⁷ See *supra*, notes 35-36.

another factor in deciding how much deference to afford that choice.⁹⁸

In sum, therefore, not only OIRA's aggressive involvement in EPA's interpretive choices, but also the lack of care taken in making these choices, counsel in favor of withholding *Chevron* deference in this case.

Basic principles of administrative law support the same result. A bedrock principle of administrative law holds that an agency may not offer post hoc rationalizations for its regulatory choices.⁹⁹ This principle is, in fact, reflected in the decision of *Mead* itself: the Court there strongly signaled that an agency may not support an interpretive choice through lawyers' argument made after the interpretation has been settled upon.¹⁰⁰ In this case, we submit that EPA's lawyers were essentially put in the position of appellate lawyers asked to defend an agency's pre-existing interpretive choice. EPA was given its marching orders by OIRA, and then EPA had to supply the legal rationale for the changes instigated by EPA. This is not the way agencies are supposed to go about interpreting the statutes they

⁹⁸ *Mead*, 533 U.S. at 228.

⁹⁹ *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

¹⁰⁰ *Mead*, 533 U.S. at 228 (noting that the Court had shown “near indifference” to an agency interpretation that appeared in an appellate brief); *id.* at 238 n. 19.

administer.¹⁰¹

When the appropriate standard of *Mead* is applied to the circumstances of this case, it is clear that EPA's interpretive choices cannot be upheld. We have already discussed at some length EPA's explanation of these interpretive choices. The explanation is completely unpersuasive. Thus it lacks the "power to persuade" that is the hallmark of deference under *Mead*. So unpersuasive is EPA's reasoning that, even if this court chose to use *Chevron* rather than *Mead* as the measuring rod for evaluating the agency's interpretation, the interpretation should fail.

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¹⁰¹ See, e.g., *Investment Co. Inst. v. Camp*, 401 U.S. 617, 627-28 (1971) (Court declines to defer to Comptroller General's statutory interpretation where he "adopted no expressly articulated position at the administrative level as to the meaning and impact" of the relevant provisions in the setting at hand, noting that although appellate counsel had offered such a position, "It is the administrative officer and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.").

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(a)(7)(C), I certify that this Amicus Brief is proportionally spaced, has a typeface of 14 points or more and contains 7,299 words, including footnotes, but excluding the cover, tables, corporate disclosure statement, statement of interest of amicus, and certificates of compliance and service, as counted by Microsoft Word's word-count function.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2005, a true and complete copy of the foregoing **BRIEF OF AMICUS CURIAE** was served by electronic mail on the following:

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