

Nos. 07-588, 07-589, 07-597 (Consolidated)

In the
Supreme Court of the United States

ENTERGY CORP., *Petitioner*,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

PSEG FOSSIL LLC AND PSEG NUCLEAR LLC,
Petitioners,

v.

RIVERKEEPER, INC., ET AL., *Respondents.*

UTILITY WATER ACT GROUP, *Petitioner,*

v.

RIVERKEEPER, INC., ET AL., *Respondents.*

On Writs Of Certiorari To The United States
Court Of Appeals For The Second Circuit

**BRIEF FOR PETITIONERS ENTERGY CORP.,
PSEG FOSSIL LLC, AND PSEG NUCLEAR LLC**

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QUESTION PRESENTED

Whether §316(b) of the Clean Water Act, 33 U.S.C. §1326(b), authorizes the Environmental Protection Agency (EPA) to compare costs with benefits in determining the “best technology available for minimizing adverse environmental impact” at cooling water intake structures.

PARTIES TO THE PROCEEDING

In the United States Court of Appeals for the Second Circuit, the petitioners were Riverkeeper, Inc., Natural Resources Defense Council, Waterkeeper Alliance, Soundkeeper, Inc., 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, Conservation Law Foundation, 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, Illinois Energy Association, Utility Water Act Group, Entergy Corporation, and PSEG Fossil LLC and PSEG Nuclear LLC (collectively “PSEG”). The respondents were United States Environmental Protection Agency and Stephen L. Johnson, in his official capacity as Administrator of the United States Environmental Protection Agency. Appalachian Power Company and the Illinois Energy Association are not parties to this appeal.

Pursuant to Supreme Court Rules 24.1 and 29.6, there is no change to the corporate disclosure statement previously filed by Entergy or PSEG.

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OPINION BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit (Pet.App.1a–94a¹) is reported at 475 F.3d 83 (“*Riverkeeper II*”).

JURISDICTION

The Second Circuit entered judgment on January 25, 2007, and denied petitions for rehearing and rehearing *en banc* on July 5, 2007. After this Court extended the time for filing petitions for certiorari, petitioners timely filed petitions on November 2, 2007. This Court granted certiorari on April 14, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves §316(b) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (“CWA” or “Act”), 33 U.S.C. §1326(b).² This provision and other relevant portions of the CWA are reproduced in the addendum to this brief and at Pet.App.97a–121a. The U.S. Environmental Protection Agency’s (“EPA”) rule at issue here (the “Phase II rule”) is codified at 40 C.F.R. pt. 125, subpt. J, and reproduced at Pet.App.122a–593a.³

¹ Citations to “Pet.App.” refer to the Appendix to the Petition for Certiorari filed by Entergy Corp. in No. 07-588. “J.A.” refers to the Joint Appendix filed herewith.

² We refer to CWA sections (“§316(b)”) and, where appropriate, provide citations to the U.S. Code (“33 U.S.C. §1326(b)”).

³ “National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake

STATEMENT OF THE CASE

Section 316(b) of the Clean Water Act states that “[a]ny standard established pursuant to section 1311 of this title or section 1316 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.” 33 U.S.C. §1326(b). The issue here is whether, as respondents contend, EPA is forbidden from considering costs in relation to benefits when selecting the “best technology available for minimizing adverse environmental impact” (“BTA”) for cooling water intake systems. In their view, with very few exceptions, EPA *must* require each of the Nation’s existing base-load electric-generating facilities to retrofit with any technology capable of saving additional fish or other aquatic organisms from being trapped against components of the intake structure (“impinged”) or drawn into the cooling water system itself (“entrained”)—a requirement that will cost hundreds of millions or billions of dollars per facility, regardless of the cost or actual environmental benefit. Pet.App.170a–71a, 255a–56a (69 Fed. Reg. at 41,586, 41,605).

For 30 years, EPA implemented §316(b) on a facility-by-facility basis, rejecting the application of particular intake structure technology at a given facility if the costs would be “wholly disproportionate” to the environmental benefits. In this rulemaking, EPA set national performance standards for cooling water intake structures at Phase II existing facilities

Structures at Phase II Existing Facilities,” 69 Fed. Reg. 41,576 (July 9, 2004).

by determining ranges of reductions in impingement mortality and entrainment that could be achieved in a cost-effective manner, and identifying a number of technologies capable of achieving such results. EPA also quite reasonably included a provision in the rule authorizing site-specific determinations of BTA where, in relevant part, the costs of retrofitting a particular facility would be “significantly greater than” the environmental benefits. *See* Brief of Petitioner Utility Water Act Group (“UWAG Br.”), at 6-11, 23-25, 42-57.

The Second Circuit invalidated EPA’s balanced rule, adopting a radical interpretation of §316(b) under which EPA must set national standards without regard to cost, except that EPA may decline to require technologies that could not be borne by the industry *as a whole*. That individual base-load electric plants would be forced to shut down did not trouble the court. Likewise, at the site-specific level, EPA must require technologies that impose costs for *no* guaranteed additional benefits over a substantially less costly alternative technology. The Second Circuit reached this radical conclusion in part by reading this Court’s precedents as effectively imposing a “clear statement” requirement for cost-benefit analysis, one forbidding agencies from weighing costs and benefits in implementing *any* statute unless Congress has expressly granted the agency permission to do so.

The Second Circuit’s decision is wrong. This Court’s precedents impose no clear statement rule for cost-benefit analysis. Such a rule is inconsistent with ordinary rules of deference to agencies and is wholly unwarranted. Even if such a rule did exist, §316(b), read both alone and within the broader structure of the Act, plainly permits EPA to weigh costs and benefits in

regulating cooling water intake structures. Other sections of the Act cross-referenced by §316(b) specifically authorize EPA to consider costs, as well as any other factors it deems appropriate. At a bare minimum, §316(b) is at least ambiguous on the question of cost-benefit analysis, and EPA's interpretation is reasonable and therefore entitled to deference. And EPA's authority to permit a site-specific determination of BTA is clearly consistent with both §316(b) and its general authority to provide variances from regulatory requirements. *See* UWAG Br. at 42-57.

Unless reversed, the Second Circuit's decision will undermine the ability of EPA and other agencies to use cost-benefit analysis to further rational decisionmaking. It will undermine agency efforts to set rigorous national standards secure in the knowledge that the agency can impose alternative requirements where the benefits clearly do not justify the costs. And, as the U.S. Department of Energy forewarned in this rulemaking, it will jeopardize the United States' core electric generating capacity through a regime of potentially perpetual retrofitting driven by changes in intake structure technology and the applicable five-year permit renewal cycle, with the massive expenditures and lengthy shutdowns such retrofits would entail. *See, e.g.*, J.A.311-13; J.A.320-24; J.A.345-51.

A. Background

1. Cooling Systems

To ensure safe, efficient operation, steam electric-generating facilities (such as those owned by petitioners Entergy and PSEG) require some means to absorb or dissipate the waste heat created by power

generation. Most such facilities draw in surface water to circulate through their systems as a coolant.

The amount of cooling water needed and the means by which that water is drawn into a facility are fundamental facets of plant design. Broadly speaking, there are three categories of cooling systems. Some facilities draw in water, pass it once through the plant, then release most of it back to surface waters (“once-through cooling”). Pet.App.554a (69 Fed. Reg. at 41,685). Other facilities draw water into cooling towers, ponds, or other structures, circulate it several times through the plant for cooling, and consume the vast majority by releasing it to the air as water vapor, with only a small discharge back to surface waters (wet “closed-cycle” cooling systems). Pet.App.551a (69 Fed. Reg. at 41,684); J.A.319. And yet others utilize so-called “dry cooling,” which principally relies on air instead of water for cooling. Pet.App.8a n.3.

All cooling systems have environmental and energy advantages and disadvantages, and EPA carefully considered these differences in developing the rule. Pet.App.253a–54a (69 Fed. Reg. at 41,604). Once-through cooling systems optimize energy output and minimize air emissions, but they sometimes add heat to the receiving water. They also withdraw larger volumes of water, and thus increase the potential for impingement and entrainment. Pet.App.239a–40a (69 Fed. Reg. at 41,601). In comparison, both closed-cycle and dry cooling systems withdraw less water and add little or no heat to the receiving water, but they are less effective at cooling and therefore reduce the efficiency and electric output of the facilities using them. *Id.*; Pet.App.257a–58a (69 Fed. Reg. at 41,605); J.A.318-22.

For example, when a once-through system is converted to a closed-cycle system (which may not always be feasible and requires the facilities to be taken offline), the retrofitted facility is capable of generating less energy using the same amount of fuel due to the differences in water temperature. J.A.320. Because this permanent “energy penalty” can be up to 5% or more of a facility’s output, requiring facilities to convert to closed-cycle cooling negatively affects energy supply and electric system reliability. J.A.320-25; J.A.333-34; Pet.App.257a–58a (69 Fed. Reg. at 41,605). It also requires greater consumption of fuels to make up for the energy penalty which, in turn, generally results in increased air emissions of carbon dioxide and other pollutants. Pet.App.258a (69 Fed. Reg. at 41,605); J.A.325-26.

In addition, closed-cycle and dry cooling systems may create other adverse environmental impacts, such as requiring more land use, causing fogging and icing, and increasing noise pollution. Pet.App.259a (69 Fed. Reg. at 41,606); J.A.316-17; J.A.325.

2. Section 316(b) of the Clean Water Act

Section 316(b) occupies a unique place within the CWA, for (unlike most other sections) it does not address the *discharge* of pollutants but rather the environmental impacts associated with the *withdrawal* of water by cooling water intake structures. Pet.App.151a (69 Fed. Reg. at 41,582). Such impacts include, but are not limited to, impingement and entrainment. Pet.App.169a (69 Fed. Reg. at 41,586) (impacts “depend[] on conditions at the individual site”).

The Second Circuit has twice acknowledged that §316(b) was “something of an afterthought.” *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 186 n.12 (2d Cir. 2004) (“*Riverkeeper I*”); *see also* Pet.App.4a–5a. This “afterthought” status is reflected in the legislative history. In the sole reference to §316(b), Representative Clausen, a Floor Manager for the Conference Report for the 1972 Act, explained:

Section 316(b) requires the location, design, construction, and capacity of cooling water intake structures ... to reflect best technology available for minimizing adverse environmental impact. The reference here to “best technology available” is intended to be interpreted to mean *the best technology available commercially at an economically practicable cost*.

118 Cong. Rec. 33,762 (1972) (emphasis added).

3. Technology Requirements Under §§301 and 306

Section 316(b) explicitly links the determination of BTA for cooling water intake structures to the process for setting standards for the *discharge* of various pollutants under CWA §§301 and 306, 33 U.S.C. §§1311, 1316. Accordingly, the Second Circuit and the parties before this Court agree that those provisions inform the interpretation of §316(b)—though they disagree on the lessons to be drawn.

For new facilities, §306 requires EPA to establish “standards of performance” that “reflect[] the greatest degree of effluent reduction which the Administrator

determines to be achievable through application of the best available demonstrated control technology” (“BADT”). 33 U.S.C. §1316(a)(1), (b)(1)(B). This standard reflects Congress’s understanding that it is more feasible and economical to install technologies when a facility is being constructed. *See Riverkeeper I*, 358 F.3d at 185; Pet.App.360a. Nonetheless, EPA is authorized to consider “the cost of achieving such effluent reduction,” as well as any non-water quality impacts and energy requirements, when setting BADT standards. 33 U.S.C. §1316(b)(1)(B).

Section 301 requires all point sources, whether existing or new, to comply with a series of technology-based pollutant discharge limitations. 33 U.S.C. §1311(b)–(e). First enacted in 1972, but subsequently amended as explained below, §301 originally contemplated two phases of standards for all dischargers. The initial phase required facilities to implement the “best practicable control technology currently available” (“BPT”). In establishing a BPT standard, EPA *must* compare “the *total cost of application of technology in relation to the effluent reduction benefits* to be achieved from such application.” 33 U.S.C. §1314(b)(1)(B) (emphasis added); *see Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978) (referring to costs and benefits as “comparison factors”). In other words, EPA is *required* to perform cost-benefit analysis in selecting BPT.

By 1983, those initial BPT standards were to be followed by “best available technology economically achievable” (“BAT”) standards. Pub. L. No. 92-500, 86 Stat. 844–46 (1972). Congress directed EPA, when setting BAT standards, to “take into account” factors

enumerated in §304(b)(2)(B), including “the cost of achieving such effluent reduction ... *and such other factors as the Administrator deems appropriate.*” 33 U.S.C. §1314(b)(2)(B) (emphasis added). Congress did not, however, specify how EPA must consider those factors. *Weyerhaeuser*, 590 F.2d at 1045. As the D.C. Circuit has explained, under BAT “[a]ll factors, including costs and benefits,” are not mandatory “comparison factors,” as under BPT, but rather are discretionary “*consideration factors*” that give EPA flexibility in deciding how much weight to give each factor. *Id.* (emphasis added).

To provide additional flexibility to address unanticipated adverse economic and social consequences stemming from the BAT requirements, Congress included a safety valve in the 1972 Act. Section 301(c) authorizes a variance from BAT standards where the individual discharger can show that an alternate limit represents the maximum use of technology within its economic capability and will result in “reasonable further progress” toward the elimination of discharges. 33 U.S.C. §1311(c). This provision contemplates a kind of “economic capability/effluent reduction balancing.” *EPA v. Nat’l Crushed Stone Ass’n*, 449 U.S. 64, 77 n.16 (1980).

While §301 of the 1972 Act contemplated all discharges of pollutants being subject first to BPT and then to BAT standards under §301, Congress amended the Act in 1977 to create a three-tiered regulatory system, the goal of which was to regulate specific tiers of pollutants based on the actual threat they posed. At the top in terms of potential harm are toxic pollutants, which include “disease-causing agents ... [that] will ... cause death, disease, behavioral abnormalities, cancer

... or physical deformations,” among other harms. 33 U.S.C. §1362 (definition). Toxic pollutants remain subject to the BAT standard, which still allows EPA to consider what weight to give costs and benefits. *See* 33 U.S.C. §1311(b)(2)(C)–(D); *id.* §1317 (toxic effluent standards).

Congress also established a category of “conventional pollutants,” which need only comply with the “best conventional pollutant control technology” (“BCT”) standard. 33 U.S.C. §1311(b)(2)(E). BCT, like the 1972 Act’s BPT standard, *requires* EPA to evaluate “the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived.” 33 U.S.C. §1314(b)(4)(B). In other words, the 1977 amendments *mandated* cost-benefit analysis for conventional pollutants.

Finally, Congress created a tier of pollutants referred to as “non-conventional, non-toxic” pollutants, such as chlorine. In the 1977 amendments Congress retained the BAT standard for these pollutants, but it also provided, in §301(g) of the Act, a waiver provision allowing EPA to set less stringent limits so long as (among other requirements) the lesser standards would still ensure “protection and propagation of a balanced population of shellfish, fish, and wildlife.” 33 U.S.C. §1311(g)(2)(C).

In sum, the CWA provides EPA considerable authority to weigh costs and benefits to ensure rational regulatory outcomes, either mandating or permitting cost-benefit analysis for each of the categories of pollutants established by the amendments to §301. For non-conventional pollutants, cost and benefits may be

considered under both EPA's BAT discretionary authority and the §301(g) variance. For conventional pollutants, cost-benefit analysis is now required. And, even for toxic pollutants, EPA may consider "the cost of achieving such effluent reduction" and "such other factors as [EPA] deems appropriate" in setting BAT standards, and may modify standards based on the economic capability/effluent reduction balancing authorized by §301(c).

4. EPA's Phase II Rulemaking

In 1976 EPA promulgated its first final rule under §316(b), but the Fourth Circuit remanded it one year later on procedural grounds. *See Appalachian Power Co. v. EPA*, 566 F.2d 451, 457 (4th Cir. 1977); Pet.App.159a-60a (69 Fed. Reg. at 41,583-84). For the next 30 years, EPA and state permitting authorities implemented §316(b) on a case-by-case basis, weighing costs and benefits in approving intake structures. Pet.App.355a (69 Fed. Reg. at 41,627). At EPA's direction, permitting authorities declined to require "use of technology whose cost is wholly disproportionate to the environmental benefit to be gained." *In re Pub. Serv. Co. of N.H., (Seabrook Station, Units 1 and 2)*, 1977 WL 22370 (EPA), at *7, 1 E.A.D. 332 (June 10, 1977), J.A.76; *see also* UWAG Br. at 15-16, 37-41.

The current §316(b) rulemaking originated in a 1995 consent decree that required EPA to promulgate national §316(b) regulations. The rulemaking was conducted in three phases. In Phase I, EPA set forth standards for cooling water intake structures at new steam-electric generating facilities. The Phase II rule, at issue here, governs the Nation's approximately 550

large existing power-producing plants, each designed with the capacity to withdraw at least 50 million gallons of water per day and to use at least 25% of the water exclusively for cooling purposes. *See* Pet.App.124a, 203a (69 Fed. Reg. at 41,576, 41,593). These facilities comprise approximately 50% of the Nation's electric power supply. Office of Water, EPA, *Economic & Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule*, at A2-2 (2004) (50% of total projected for 2008), *available at* <http://www.epa.gov/waterscience/316b/phase2/econbenefits/final.htm>; *id.* at A3-13.⁴ And in Phase III, EPA promulgated regulations governing existing facilities not covered under Phase II (including smaller power plants) and new offshore oil and gas facilities.⁵

⁴ To implement the requirements of the Phase II rule for existing facilities, EPA chose to rely on the National Pollutant Discharge Elimination System ("NPDES") permit-renewal process set forth in §402, 33 U.S.C. §1342(a)(1). *See* Pet.App.150a-52a (69 Fed. Reg. at 41,582). The NPDES re-permitting process requires existing dischargers to apply for a renewed NPDES permit every five years. While §402 on its face is limited to discharge requirements, the Second Circuit deferred to EPA's determination that NPDES permits may be used to impose new intake structure requirements on existing facilities. Pet.App.15a.

⁵ As explained below, the Second Circuit resolved challenges to the Phase I rule in 2004, explicitly affirming EPA's use of cost-benefit analysis in choosing BTA for new facilities. The Phase III rule authorizes permit writers to select BTA for existing facilities on a case-by-case basis using the same type of cost-benefit analysis rejected by the Second Circuit here. 71 Fed. Reg. 35,006, 35,014-15, 35,016-17 (June 16, 2006). Challenges to the Phase III rule are currently pending in the Fifth Circuit. *See* UWAG Br. at 16-17 n.15.

In developing the Phase II rule, EPA targeted assumed impingement mortality and entrainment, under the assumption that doing so would assist aquatic populations taxed by, among other things, over-fishing. *See* Pet.App.169a, 188a (69 Fed. Reg. at 41,586, 41,590).⁶ Rejecting a nationwide mandate of closed-cycle cooling, the Agency concluded that the best technology available for minimizing adverse environmental impact varies among sites. Pet.App.255a (69 Fed. Reg. at 41,605). It therefore crafted the rule to require “technology that is technically available, economically practicable, and cost-effective while at the same time authorizing a range of technologies that achieve comparable reductions in adverse environmental impact.” Pet.App.157a–58a (69 Fed. Reg. at 41,583).⁷

⁶ As EPA explained, the technical information on which it relied to reach its assumptions about entrainment and impingement was anecdotal and, in many cases, outdated and/or highly imprecise. Pet.App.181a–82a (69 Fed. Reg. at 41,588) (many studies “based on limited data ... collected ... 25 years ago” and containing “serious study design limitations”). EPA also acknowledged that it was guided by a precautionary principle, one that it indicated would be subject to further analysis in the site-specific application of the rule. Pet.App.183a–84a (69 Fed. Reg. at 41,589).

⁷ The Second Circuit drew a distinction between “cost effectiveness” analysis, which it believed permits only a search for the cheapest way of achieving a given result, and “cost benefit” analysis, which permits a true weighing of marginal costs and benefits. *See infra*, at 18–20. EPA sometimes used the phrase “cost effectiveness” in the rule, but not in the narrow sense meant by the Second Circuit. *See* Pet.App.263a (69 Fed. Reg. at 41,606). EPA explained that it “consider[ed] the cost of technologies in relation to the reductions in impingement mortality and entrainment achieved,” which clearly is a form of *cost-benefit*

EPA determined that the goal of “minimizing adverse environmental impact” was best achieved by national performance standards that require all Phase II facilities to reduce impingement mortality by 80-95% from an uncontrolled level (“calculation baseline”) and, when appropriate, entrainment by 60-90%. *See* Pet.App.560a (40 C.F.R. §125.94(b)(1)–(2)) (requiring compliance with entrainment standards based on capacity utilization rate and, in relevant part, location on a particular waterbody type, such as an estuary or ocean). EPA explained that these performance standards “reflect best technology available [and] ... are not based on a single technology but, rather, are based on consideration of [the] range of technologies that EPA has determined to be commercially available for the industries affected as a whole.” Pet.App.228a (69 Fed. Reg. at 41,599). The standards therefore reflect the Agency’s judgment that, “given the wide range of various factors that affect the environmental impact posed by Phase II existing facilities, different technologies or different combinations of technologies can be used and optimized to achieve the performance standards.” Pet.App.226a (69 Fed. Reg. at 41,598); *see also* Pet.App.228a (69 Fed. Reg. at 41,599) (“range of available technologies ... used to derive the performance standards”).

In developing the national BTA requirements, EPA determined that existing facilities have far less flexibility than new facilities because their intake

analysis under the Second Circuit’s terminology. EPA Second Cir. Br. at 55; *see also id.* at 50 (“EPA’s cost-effectiveness analysis compares the *incremental* costs of technology to its *incremental* effectiveness in minimizing ... impingement mortality and entrainment.”).

structures have already been located, designed, and constructed. Pet.App.141a (69 Fed. Reg. at 41,580) (limitations include space, as well as location and development on a waterbody); Pet.App.255a (69 Fed. Reg. at 41,605) (retrofits “may be impossible or not economically practicable”). EPA therefore included two alternative compliance options—both allowing a facility to request a site-specific determination of best technology available for minimizing adverse environmental impact in certain circumstances. Pet.App.193a, 195a–96a (69 Fed. Reg. at 41,591). These provisions reflect EPA’s longtime reading of §316(b) as “indicat[ing] that site-specific conditions can be highly relevant to the determination of BTA to minimize adverse environmental impact.” Pet.App.351a–52a (69 Fed. Reg. at 41,626); *see* UWAG Br. at 15-16, 37-41 (history of case-by-case permitting).

At issue here is the site-specific determination based on a “cost-benefit test,” which allows facilities to request establishment of site-specific standards where they can demonstrate that the costs of meeting the national standards would be substantially greater than the benefits. Pet.App.249a–51a (69 Fed. Reg. at 41,603–04); Pet.App.559a (40 C.F.R. §125.94(a)(5)(ii)). The technology selected by the permitting authority for a facility qualifying under this provision “must achieve an efficacy level that comes as close as practicable to the applicable performance standards without resulting in significantly greater costs.” Pet.App.196a (69 Fed. Reg. at 41,591).

5. *Riverkeeper I*

Five months before EPA issued the Phase II rule, the Second Circuit resolved challenges to EPA’s Phase

I rule in *Riverkeeper I*. In relevant part, environmental petitioners (respondents here) challenged EPA's selection of closed-cycle cooling over dry cooling as BTA for new facilities. EPA had selected closed-cycle cooling on the basis that, *inter alia*, "dry cooling costs more than ten times as much per year as closed-cycle wet cooling," but provided only incremental improvements in reducing impingement mortality and entrainment. *Riverkeeper I*, 358 F.3d at 194–95. Environmental petitioners challenged this weighing of costs and benefits, arguing that "because section 316(b) does not mention cost or other factors, the EPA cannot give them any weight ... and even if the EPA was permitted to consider those factors, it abused its discretion in weighing them." *Id.* at 195.

The Second Circuit squarely rejected this argument and upheld EPA's choice of BTA. First, the court determined that the cross-reference to §306 in §316(b) "is an invitation [for EPA] to look to section 306 for guidance" in selecting BTA for new facilities. *Id.* at 186. The court observed that even when setting new source performance standards under §306, EPA is authorized to "take into consideration," among other factors, "the cost of achieving such effluent reduction." *Id.* at 195 (quoting §306). The court thus concluded that "EPA was permitted to consider cost and energy efficiency in determining the 'best technology available.'" *Id.*

The Second Circuit also noted that "[a]ppellate courts give EPA considerable discretion to weigh and balance the various factors" applicable to §306, including cost. *See id.* at 195 (quoting *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002)). Addressing the Phase I rule, the court explained that

“it is undeniably relevant that the difference” in impingement and entrainment reduction offered by dry cooling *“represents a relatively small improvement over closed-cycle cooling at a very significant cost.”* *Riverkeeper I*, 358 F.3d at 194 & n.22 (emphasis added). Accordingly, the Second Circuit rejected the environmental petitioners’ challenge and deferred to EPA’s selection of closed-cycle cooling, concluding that the court (unlike EPA) was “not well equipped ... to meaningfully weigh” the incremental benefits of dry cooling against its incremental environmental and monetary costs. *Id.* at 196 (EPA better placed to compare entrainment reductions against “300 pounds of mercury, and \$443 million”).

B. The Decision Below

The Phase II rule was challenged by environmental and state respondents, as well as industry petitioners, with the challenges consolidated before the Second Circuit in *Riverkeeper II*. Of relevance here, environmental and state petitioners challenged EPA’s designation of a suite of technologies—as opposed to closed-cycle cooling—as BTA, as well as the provision allowing site-specific BTA determinations based on a “cost-benefit test.” Pet.App.20a. As in *Riverkeeper I*, they argued that §316(b) does not permit weighing of costs and benefits, and also argued that EPA exceeded its authority in rejecting closed-cycle cooling as BTA for all existing facilities. *Id.*; Pet.App.29a n.14.

The Second Circuit accepted those arguments in a confusing opinion that misunderstands the language of §316(b) and other cross-referenced provisions of the Act, fails to defer to EPA’s interpretation, and ignores its own holding—reached just three years earlier in

Riverkeeper I—that EPA has “considerable discretion to weigh and balance” costs and benefits in regulating under §316(b). *Riverkeeper I*, 358 F.3d at 195 (citation omitted).

The Second Circuit presented three bases for its conclusion that cost-benefit analysis is prohibited under §316(b). First, the Second Circuit reasoned that “[t]he BTA standard of section 316(b) ... is linguistically similar to the BAT standard of section 301 and the standard that applies to new sources under section 306.” Pet.App.23a. Accordingly, the court explained, “to the extent that cost-benefit analysis is precluded under those sections”—a reading rejected by other courts, as explained below—“it is similarly not permitted under section 316(b).” *Id.*

To reach this idiosyncratic reading of §§301 and 306, the Second Circuit focused on the differences between §301’s BPT and BAT standards, which the court read as having “clearly signaled Congress’s intent to move cost considerations ... from a cost-benefit analysis *to a cost-effectiveness one.*” Pet.App.22a (emphasis added). “Cost-effectiveness,” according to the Second Circuit, means that, within “a narrowly bounded range,” EPA “may permissibly choose between two (or more) technologies that produce essentially the same benefits but have markedly different costs.” Pet.App.28a, 22a. As applied to §316(b), the Second Circuit explained that “cost-effectiveness” means that, if EPA is “given a choice between a technology that costs \$100 to save 99-101 fish and one that costs \$150 to save 100-103 fish,” it “could appropriately choose the cheaper technology.” Pet.App.27a. If, however, industry could bear the cost of technology saving “at least 102 fish,” then EPA could not choose the cheaper technology saving at most

only 101 fish, whatever the difference in cost. Pet.App.27a–28a.

Second, the court of appeals reasoned that the phrase “best technology available for minimizing adverse environmental impact” is inherently inconsistent with cost-benefit analysis, and “represents Congress’s conclusion that the costs imposed on industry in adopting the best cooling water intake structure technology available (*i.e.*, the best-performing technology that can be reasonably borne by the industry) are worth the benefits in reducing adverse environmental impacts.” Pet.App.57a–58a; *see also* Pet.App.23a–28a. The Second Circuit did not attempt to square that “plain meaning” interpretation with the fact that other “best technology” standards under the Act expressly permit *or even require* cost-benefit analysis.

Third, the Second Circuit relied on the fact that §316(b) does not on its face explicitly mention cost-benefit analysis, and essentially extracted from this Court’s cases an unprecedented presumption that cost-benefit analysis is forbidden if not expressly authorized:

[Our] conclusion is further supported by the fact that Congress in establishing BTA *did not expressly permit* the Agency to consider the relationship of a technology’s cost to the level of reduction of adverse environmental impact it produces. “When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such on the face of the statute.”

Pet.App.25a (emphasis added) (footnote omitted) (quoting *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 (1981) (hereafter “*American Textile*”)).

Applying those principles, the Second Circuit expressed concern that EPA had weighed costs and benefits in rejecting closed-cycle cooling as BTA for all Phase II facilities. Pet.App.28a–33a. The court remanded this aspect of the rule because, in the court’s estimation, it was unclear on the record whether EPA had incorrectly “construed the statute to permit cost-benefit analysis,” had “misunderstood or misapplied cost-effectiveness analysis,” or had “simply failed either to perform the required analysis or to explain adequately a decision that was within its authority to make.” Pet.App.36a–37a. The court also remanded the Phase II performance standards derived from EPA’s selection of BTA, acknowledging that “EPA may ... set performance standards as ranges,” but expressing concern that the chosen ranges do not require Phase II facilities “to achieve as much reduction of adverse environmental impacts as technologically possible.” Pet.App.38a, 43a.

In addition, the Second Circuit invalidated the rule’s provision authorizing site-specific determinations of BTA based on a cost-benefit test. Pet.App.56a–60a. The court held that “[j]ust as the Agency cannot determine BTA on the basis of cost-benefit analysis, it cannot authorize site-specific determinations of BTA based on cost-benefit analysis.” Pet.App.58a. It further reasoned that site-specific cost-benefit analysis would “impermissibly authorize[] the EPA to consider the degraded quality of waterways in selecting a site-specific BTA,” which the court believed to be inconsistent with the general policy of the Act. *Id.*

Citing the extent of the rule's provisions affected by the Second Circuit's decision, EPA subsequently suspended the Phase II rule. 72 Fed. Reg. 37,107 (July 9, 2008) (formal notice following memorandum suspending rule).

SUMMARY OF ARGUMENT

The Second Circuit held that §316(b) of the Clean Water Act requires EPA to mandate the height of current technology for reducing impingement and entrainment of aquatic organisms by cooling water intake structures, without regard to costs, so long as that technology will save at least a few more fish and the costs will not cripple the entire industry. The Second Circuit's radical interpretation must be rejected, for several reasons.

First, the Second Circuit relied on a presumption, drawn from a misunderstanding of this Court's opinion in *American Textile*, that cost-benefit analysis may be considered only if expressly authorized by Congress. There is no such clear statement rule, and it makes no sense to start from a presumption that Congress would prefer agencies not to weigh costs and benefits when implementing statutes. If anything, the usual presumption should be the opposite. Congress does not ordinarily intend that its statutes be implemented in ways that do more harm than good. And EPA's consideration of costs and benefits under §316(b) reflects 30 years of agency practice.

Second, §316(b)'s language authorizes EPA to consider costs in relation to benefits, particularly when §316(b) is placed in its broader statutory context. The phrase "best technology available for minimizing adverse environmental impact" delegates enormous

discretion to EPA. The “best” technology “for minimizing” an effect is not necessarily the one that reduces that effect as much as possible (*i.e.*, the best *at* minimizing). As even the Second Circuit acknowledged, the word “available” necessarily requires some judgment about what is economically reasonable. And “minimize” does not necessarily mean “eliminate to the maximum extent feasible;” it frequently just means “reduce.”

Section 316(b) also cross-references the standard-setting process under §§301 and 306 for the Act’s various other “best technology” standards. The Second Circuit thought that the §316(b) standard should be interpreted consistently with the strictest BAT standard under §301, which governs the most toxic pollutants and which the court of appeals wrongly believed forbids cost-benefit analysis. In fact, the provisions implementing BAT expressly authorize EPA to “take into account ... the cost of achieving such effluent reduction” as well as “such other factors as the Administrator deems appropriate.” 33 U.S.C. §1314(b)(2)(B). EPA is at least authorized, and in some cases required, to weigh costs against benefits when setting *every* technology standard under the Act. Moreover, it is far from clear that BAT is the appropriate analogy for a standard governing water intakes. *See* UWAG Br. at 11-15, 45-47.

The Second Circuit’s interpretation also leads to results that Congress could not possibly have intended, and that come perilously close, at least, to absurdity. If facility-specific cost-benefit considerations must be ignored in determining the ideal “location, design, construction, and capacity” for an intake structure, EPA must shut its eyes to the fact that, for example, a

particular facility impinges mostly dead fish or nuisance fish that federal and state regulators *want* to eliminate. Likewise, EPA would have to ignore that losses caused by the facility are so small in relation to the size and health of the relevant fish population that the most cautious regulator would consider them trivial. These facts clearly are relevant to any decision about whether “adverse environmental impacts” exist and have been minimized, yet the Second Circuit’s decision would require they be ignored.

Finally, the statute is at a minimum ambiguous on these issues. EPA’s interpretation of the Act “is entitled to considerable deference; and to sustain it, [the Court] need not find that it is the only permissible construction ... but only that EPA’s understanding of this very ‘complex statute’ is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.” *Chem. Mfrs. Ass’n v. NRDC*, 470 U.S. 116, 125 (1985). EPA (and the states that implement the vast majority of permitting programs) have reasonably interpreted this statute for more than 30 years to permit cost-benefit analysis. That interpretation has been upheld by the courts and implemented in countless permitting decisions, and has never been questioned by Congress despite multiple amendments to the Act. *See* UWAG Br. at 15-16, 37-41.

ARGUMENT

I. THE SECOND CIRCUIT’S NEW CLEAR STATEMENT RULE FOR COST-BENEFIT ANALYSIS IS CONTRARY TO PRECEDENT AND MUST BE REJECTED

In proscribing EPA from weighing costs and

benefits to determine BTA at the national and site-specific level, the court of appeals relied on a presumption, drawn from its interpretation of this Court's pre-*Chevron* decision in *American Textile*, that cost-benefit analysis must be unambiguously authorized by Congress. The Second Circuit's clear statement rule is based on a misreading of *American Textile*, clearly outdated in light of *Chevron* and its progeny, and unsound as a matter of policy and reasonable inferences about congressional intent.

A. The Second Circuit's Clear Statement Rule For Cost-Benefit Analysis Is Inconsistent With This Court's Precedent

In *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843–44 (1984), this Court made clear that when a statute “is silent or ambiguous with respect to the specific issue,” a court “may not substitute its own construction of [the] statutory provision for a reasonable interpretation made by the administrator of an agency” responsible for its implementation. Instead, “[whenever] there is statutory ambiguity and the agency’s interpretation is reasonable, its interpretation must receive deference.” *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 46 (2002). In this case, however, the Second Circuit concluded that cost-benefit analysis is prohibited unless explicitly authorized, based solely on this Court’s statement in *American Textile* that “[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.” Pet.App.25a (quoting *Am. Textile*, 452 U.S. at 510).

Neither the quoted language from *American*

Textile, nor the decision as a whole, can bear the weight placed on them by the Second Circuit. *American Textile* addressed an industry claim that the Occupational Safety and Health Act (“OSHA”) was *required* to conduct a cost-benefit analysis when implementing worker safety standards that required the Secretary of Labor, “in promulgating standards dealing with toxic materials or harmful physical agents ... [to] set the standard which most adequately assures, to the extent feasible ... that *no employee will suffer material impairment* of health or functional capacity.” 29 U.S.C. §655(b)(5) (emphasis added). Of course that statute—which protects human health and would not allow a single worker to be exposed to a preventable material impairment—specifies a regulatory goal far more stringent and specific than §316(b)’s direction that EPA “minimiz[e] adverse environmental impact.” Regardless, in the passage the Second Circuit focused on, this Court simply observed that a court should look to the face of a statute to determine whether Congress “*intended*” to require the agency to engage in cost-benefit analysis—in other words, whether cost-benefit analysis is *required*, not whether it is *permitted*. 452 U.S. at 510 (emphasis added). That is a straightforward, uncontroversial statement of interpretive principle fully consistent with *Chevron*.

The rest of this Court’s opinion in *American Textile* confirms that this Court only addressed the question whether cost-benefit analysis was *required* by that statute. For instance, this Court stated that “[t]he principal question presented in these cases is whether [OSHA] *requires* the Secretary ... to determine that the costs of the standard bear a reasonable relationship to its benefits,” and echoed that it was “faced with the

issue whether the Act *requires* OSHA to balance costs and benefits.” *Am. Textile*, 452 U.S. at 506, 509 n.29 (emphasis added). Likewise, in explaining its holding, this Court twice stated that it was “reject[ing] the argument that Congress *required* cost-benefit analysis.” *Id.* at 512 (emphasis added); *see also id.* at 509 (“cost-benefit analysis by OSHA is not *required* by the statute”) (emphasis added). Indeed, in an unrebutted characterization of the majority opinion, Justice Rehnquist in dissent read the opinion as having plainly “suggest[ed] ... that the Act *permits* the Secretary to undertake [cost-benefit] analysis if he so chooses.” *Id.* at 544 (Rehnquist, J., dissenting).⁸

Unsurprisingly, therefore, this Court has never ascribed to *American Textile* the meaning given it by the Second Circuit. Nor has any other court of appeals. To the contrary, most circuit courts have concluded that “*American Textile* would seem to be limited to the finding that ... the agency is not *required* to employ cost-benefit analysis,”⁹ and that, under *Chevron*,

⁸ Even assuming this language in *American Textile* had the meaning ascribed to it by the Second Circuit, it is inconsistent with this Court’s subsequent decision in *Chevron* and cannot survive it. Under *Chevron*, statutory silence is read not as a prohibition, but as delegating the decision to the agency. This principle holds equally true for cost-benefit analysis as any other issue. *See* Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 Mich. L. Rev. 1651, 1684–85 (2001) (“If Congress has not ... referred to costs, it will often be because Congress ... has not resolved the question whether costs should be considered. And if this is so, the agency is entitled to consider costs if it chooses.”).

⁹ *NRDC v. EPA*, 824 F.2d 1146, 1159 n.6 (D.C. Cir. 1987) (en banc) (emphasis added). The First Circuit has similarly observed that *American Textile* “held only that the statute ... did

agencies are free to weigh costs and benefits in the face of statutory silence or ambiguity.¹⁰ The few circuit courts that have read *American Textile* to prohibit cost-benefit analysis in the OSHA context have emphasized the specific and inflexible worker safety goal set by the statute.¹¹

Similar statutory language explains this Court’s decision in *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001), which considered EPA’s authority to consider costs under §109(b)(1) of the Clean Air Act, 42 U.S.C. §7409(b)(1). That provision requires EPA to set air quality standards that are “requisite to protect the public health” with “an adequate margin of safety.” 531 U.S. at 465 (citation omitted). This Court held that the language in §109(b)(1) plainly requires EPA to set the minimum standards “requisite” to achieve that goal, and that costs were irrelevant. *Id.* This Court observed that some further “textual commitment of

not require ... cost/benefit analysis.” *Massachusetts v. Hayes*, 691 F.2d 57, 61 n.4 (1st Cir. 1982).

¹⁰ See, e.g., *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (“preclusion of cost consideration requires ... express congressional direction”), *cert. denied*, 532 U.S. 904 (2001); *Sierra Club v. EPA*, 375 F.3d 537, 541 (7th Cir. 2004) (“when the statute is ambiguous the EPA is free to take costs into account”); *Sierra Club v. EPA*, 314 F.3d 735, 744 (5th Cir. 2002) (“[agency] determinations based on a cost/benefit analysis are within the EPA’s discretion unless the statutory scheme precludes such a determination”); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 623–24 (D.C. Cir. 1998); *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796 (6th Cir. 1995); *Consol. Rail Corp. v. United States*, 855 F.2d 78, 85–86 (3d Cir. 1988).

¹¹ See, e.g., *Nat’l Grain & Feed Ass’n v. OSHA*, 866 F.2d 717, 730 (5th Cir. 1989); *Bldg. & Constr. Trades Dep’t, AFL-CIO v. Brock*, 838 F.2d 1258, 1264 (D.C. Cir. 1988).

authority” would be necessary to authorize cost-benefit analysis, particularly since the standards set under this provision “are the engine that drives nearly all of Title I of the [Clean Air Act]” and Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” *Id.* at 468. This Court’s discussion of a “textual commitment of authority” to consider cost was not intended to apply—and has never been applied by this Court—more broadly than with respect to that provision. To the contrary, this Court distinguished several court of appeals decisions finding “authority for the EPA to consider costs” under other provisions of the Clean Air Act, even though those provisions did not expressly provide for cost-benefit analysis. *See id.* at 469 n.1.

B. The Second Circuit’s Clear Statement Rule Is Unsound And Should Be Rejected

The Second Circuit’s clear statement rule not only lacks precedential support, it makes no sense. Cost-benefit analysis by agencies is *avored* by the law, not disfavored.¹² In the absence of strong contrary

¹² It is worth contrasting the Second Circuit’s clear statement rule with the presumption this Court employs in the context of the federal courts’ remedial powers. Under traditional principles of equity, a court considering whether to grant injunctive relief must consider, *inter alia*, whether the “balance of hardships” favors the plaintiff. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This largely entails an informal weighing of costs and benefits. *See, e.g., Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275 (7th Cir. 1992) (Posner, J.) (“The choice between remedies requires a balancing of the costs and benefits of the alternatives.”). This Court has repeatedly held that statutes should be interpreted to permit (or even require) a court to weigh the traditional equitable factors when tailoring

evidence, the most reasonable presumption is that Congress intended to authorize it. Indeed, there are strong reasons for this Court to adopt a presumption or clear statement rule that is the *opposite* of the one employed by the Second Circuit. The Second Circuit's clear statement rule would undermine agency efforts to engage in the reasoned decisionmaking required by general principles of administrative law.

At a basic level, what respondents and the Second Circuit denigrate as “cost-benefit analysis” is nothing more than common sense—the imperative of basic rationality to ensure that actions do more good than harm. And the form employed by EPA here is exceedingly modest. EPA left a substantial thumb on the scale for environmental protection in the national standards, *see* UWAG Br. at 21 (cost-to-benefit ratio), and determined that cost considerations would moderate its BTA determinations on a site-specific basis only if the incremental costs of a particular technology or design are “*significantly* greater than” the incremental benefits. *See supra* at 3, 15. In the absence of clear direction, there is no reason to presume that Congress would want its statutes interpreted in a manner that does significantly more harm than good, and no policy reason for the law to prefer such an outcome.

In fact, “[f]or twenty-five years, American presidents have compelled administrative agencies to complete a cost-benefit analysis before enacting major rules and regulations.” Stephen Clowney, Note,

enforcement measures, unless a contrary purpose plainly appears. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–14 (1982) (no contrary purpose in CWA); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *eBay*, 547 U.S. at 391–92.

Environmental Ethics & Cost-Benefit Analysis, 18 Fordham Envtl. L. Rev. 105, 106 (2006); *see also, e.g.*, Matthew D. Adler, *Risk, Death & Harm: The Normative Foundations of Risk Regulation*, 87 Minn. L. Rev. 1293, 1389–90 (2003). That is unsurprising, for, other than in those rare cases where Congress has expressly prohibited a weighing of costs and benefits, it may be arbitrary and capricious under the Administrative Procedure Act (“APA”), 5 U.S.C. §706(2), for an agency to promulgate a rule without doing so. “[A]ny reasonable judgment will ordinarily be based on some kind of weighing of costs and benefits, not on an inquiry into benefits alone.” *Cost-Benefit Default Principles* at 1694, *supra* at 26 n.8; *see also id.* at 1668 (“Unless Congress has clearly said otherwise, agencies will be expected to balance costs against benefits in issuing regulations.”).

EPA, like other agencies and in coordination with other agencies, must implement discrete statutory provisions in light of multiple regulatory goals that place competing demands on administrative and industry resources and, in some instances, may conflict. In *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002), this Court recognized “the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to administrative leeway.” And in the landmark *Chevron* decision, this Court observed that agencies frequently must make “policy choices” to reconcile “the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.” 467 U.S. at 865–66; *see*

also *ICC v. Or. Pac. Indus., Inc.*, 420 U.S. 184, 193 n.2 (1975) (Powell, J., concurring) (agencies “mak[e] ... decision[s] reasonably accommodating diverse and often competing public interests”). A weighing of costs and benefits preserves resources for competing priorities and provides a framework for managing conflicting policies.

Finally, site-specific determinations grounded in cost-benefit balancing, such as the one included in the Phase II rule, help guard against the disruptive effect of a one-size-fits-all regulation. This approach, as noted above, is particularly important for existing facilities, which are more technically, physically, and geographically constrained than new facilities. *See supra* at 14–15; Pet.App.248a (69 Fed. Reg. at 41,603).¹³

II. THE ONLY REASONABLE INTERPRETATION OF §316(b) PERMITS EPA TO WEIGH COSTS AND BENEFITS AT THE NATIONAL AND LOCAL LEVEL

Once the Second Circuit’s unsound clear statement rule is set aside, its radical interpretation of §316(b) must be rejected even at the first step of the *Chevron* analysis. The statutory language is clearly expansive enough to permit a reasonable weighing of costs and benefits. And when the broader structure and

¹³ *See Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 350 (5th Cir. 1981). This flexible approach is critical for regulations involving essential national services, such as power generation. As here, agencies can develop more stringent national standards, secure in the ability to moderate their effects in particular local cases where the costs of compliance would substantially outweigh the benefits. *See supra* at 14–15, 29.

purposes of the statute, traditional canons of construction, and legislative history are considered, it becomes clear that an interpretation authorizing EPA to engage in cost-benefit analysis is the only reasonable reading. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (at *Chevron* step one, a court “should not confine itself to examining a particular statutory provision in isolation.’ ... Rather, ‘[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context ...’”) (citations omitted) (alteration in original).

A. The Ordinary Meaning Of The Phrase Congress Used In §316(b) Permits Cost-Benefit Analysis

The Second Circuit’s conclusion that §316(b) “precludes cost-benefit analysis” (Pet.App.24a), both nationally and on a site-specific basis, is based on what the court believed to be the only literal and therefore reasonable interpretation of §316(b). But even if §316(b) is considered in isolation (and of course it cannot be), the dictionary and common usage point to only one plausible reading of the clause: the “best technology available for minimizing adverse environmental impact” does not have to be the one that impinges or entrains the fewest fish without imposing financial burdens the industry cannot bear.

First, the word “best” means “[m]ost satisfactory, suitable or useful; most desirable.” *American Heritage Dictionary* 178 (3d ed. 1992). It often means the superlative of “good,” but it also means the most *productive* of good—in the sense of what is optimal for achieving an end result. *Black’s Law Dictionary* 160

(6th ed. 1990), for example, defines “best” to mean “[o]f the highest quality; of the greatest usefulness for the purpose intended. Most desirable, suitable, useful, or satisfactory,” and goes on to explain:

For example, the “best bid” of interest by a prospective depository of school funds would not necessarily be the highest bid, but, looking to the solvency of the bidder, the bond tendered, and *all the circumstances surrounding the transaction*, the safety and preservation of the school fund, the “best bid” might be the lowest bid.

Id. (emphasis added).

The word “best” is therefore perfectly consistent with the need to balance multiple, complex goals. Even in the specific CWA context, courts have recognized that the “best” pollution control technology is not necessarily the technology that reduces pollution the maximum amount. “[T]he CWA’s requirement that EPA choose the “best” technology does not mean that the chosen technology must be the best pollutant removal.” *Citizens Coal Council v. EPA*, 447 F.3d 879, 903 (6th Cir. 2006) (en banc) (quoting *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796 (6th Cir. 1995)). Instead, the word “best” is used to characterize standards that “must be acceptable on the basis of numerous factors, only one of which is pollution control.” *Id.* (quoting 66 F.3d at 796); *see also E. I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 121 (1977) (for “‘best practicable’ or ‘best available’ technology ... [the CWA] refers to §304 for a definition of these terms”).

Second, even the Second Circuit recognized that the word “available” gives EPA authority—indeed a mandate—to consider economic costs when selecting BTA. Determining just how absurdly expensive a technology must be before it is no longer realistically “available” calls for a substantial exercise of discretion. The Second Circuit held that EPA could reject technology requirements as “unavailable” only if the costs exceeded the maximum financial burden the industry as a whole could bear. Pet.App.24a. But nothing about the plain meaning of that word limits EPA’s consideration of “availability” to the industry’s ability to absorb exorbitant costs regardless of the benefit. Congress has repeatedly given “available” a broader meaning in the CWA to allow the balancing of diverse economic, environmental, and technological considerations—including three times using combinations of the words “best,” “technology,” and “available” to create CWA standards that either permit or mandate more robust cost-benefit analysis. See *supra* at 7–11.

Third, the word “minimize” does not always mean “eliminate” or even “eliminate to the maximum extent feasible.” “Minimize” frequently just means “reduce.” *American Heritage Dictionary* 1150 (3d ed. 1992). If I resolve to “minimize” my gasoline consumption this summer, I am not committing never to drive my car, or to drive my car only in emergencies. I am committing to reduce my gasoline usage by some unspecified amount, implicitly balanced against other goals and values. Similarly, the *American Heritage Dictionary* observes that “[w]hen a manager announces that [‘]The company wants to *minimize* the risk of accidents to line workers,[’] we naturally interpret the manager as

meaning that the risk is to be reduced to the smallest level consistent with considerations of efficiency and cost”—“*not ... to the lowest level logically possible.*” *Id.* (emphasis added and omitted).

Congress has also used “minimize” in contexts where it cannot have intended the Second Circuit’s maximalist interpretation. For example, it ordered the executive branch to “minimize the paperwork burden for individuals” and “minimize the Federal information collection burden,” but it obviously did not mean to require the elimination of tax forms or background checks for federal employees. 44 U.S.C. §§3501(1), 3504(c)(3). Similarly, in the CWA Congress set a goal of the “drastic minimization of paperwork,” but it did not intend to eliminate paperwork to the maximum extent technologically feasible (or, for that matter, for the word “drastic” to be grammatically nonsensical). 33 U.S.C. §1251(f). And in the sparse legislative history of §316(b) itself, Representative Clausen quoted the “minimize” language and then immediately stated that it required only technology that could be implemented at an “economically practicable cost.” 118 Cong. Rec. 33,762 (1972); *see supra* at 7. Moreover, interpreting “minimize” as “reduce” is consistent with this Court’s usage of the word. *See, e.g., Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 621 (1966) (reasoning that the APA’s deferential standards of review “minimize the opportunity for reviewing courts to substitute their discretion for that of the agency,” although of course that “opportunity” could be further reduced by even more deferential standards).

Finally, the phrase “adverse environmental impact” is not synonymous with impingement and entrainment but reflects an inherently broad delegation of authority

to EPA to consider what kinds of effects, and at what level, genuinely have an “adverse impact” on the “environment” in a particular context. Nothing in the Clean Water Act establishes a goal of ensuring the survival of every possible fish. To the contrary, the Act in numerous sections (including §316(a), 33 U.S.C. §1326(a)) limits compliance burdens on industry so long as the “protection and propagation of a *balanced population* of shellfish, fish, and wildlife” is assured. 33 U.S.C. §1311(g)(2)(C) (emphasis added); *see also id.* §1311(h)(2), (m)(2); *id.* §1314(a)(5)(A), (a)(5)(B), (l)(1)(A); *cf. id.* §1251(a)(2). Even the Act’s provisions governing *toxic pollutants* direct EPA to consider “the importance of the affected organisms” in the local ecosystem. 33 U.S.C. §1317(a)(1), (2). The Second Circuit’s reading of §316(b) would mandate enormous burdens, without any weighing of costs and benefits, to save as many fish as possible when that objective was never adopted by Congress or EPA.

Thus, the “*best* technology available for minimizing adverse environmental impact” may be the most suitable or desirable technology available for reducing such impact, to whatever extent the decisionmaker believes appropriate in light of competing values. And, based on a balancing of competing values, BTA for “minimizing adverse environmental impact” may not be the one that impinges or entrains the fewest fish. Similarly, Congress did not take the absolutist approach of requiring EPA to “eliminate” any particular impacts associated with intake structures, as it did for pollutant discharges under §§301 and 306. *See* 33 U.S.C. §1311(b)(2)(A) (“national goal of *eliminating* the discharge of *all pollutants*”) (emphasis added); *accord id.* §1311(b)(3) (requiring EPA to “identify

control measures ... available to eliminate the discharge of pollutants”); *id.* §1251(a)(1). Congress chose the far more flexible term “minimizing,” which allows EPA to determine the degree of reduction appropriate. *Cf. Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998) (permitting agency to consider economic impacts where “Congress ... required ‘substantial restoration of the natural quiet,’ not total restoration”), *cert. denied*, 526 U.S. 1158 (1999).

B. The Structure Of The Act Confirms EPA’s Interpretation

If the bare language “best technology available for minimizing adverse environmental impact” leaves any doubt about the permissibility of cost-benefit analysis, it is dispelled by the relationship of §316(b) to other sections of the Act. “A court must ... interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into an harmonious whole.’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted). Here, reading §316(b) in the context of the entire CWA—a statute described by this Court as one “in which Congress envisioned, rather than curtailed, the exercise of discretion”—confirms that §316(b) authorizes EPA to compare the costs of technologies to their environmental benefits in selecting BTA. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316 (1982).

**1. Sections 301 And 306 Either
Mandate Or Permit Cost-Benefit
Analysis**

All parties to this case,¹⁴ the Second Circuit, and the other courts of appeals to have considered the issue agree that “best technology available” standard in §316(b) should be interpreted and applied in a manner informed by the “best technology” standards in CWA §§301 and 306. The brevity of §316(b), the linguistic similarity of BTA to the other “best technology” standards, the cross-reference to those other provisions, and the fact that Congress did not separately provide for civil or criminal enforcement of violations of §316(b), *see* 33 U.S.C. §1319, all reinforce the conclusion that Congress intended to incorporate the comprehensive decisional framework established by §§301, 304, and 306. Respondents contend, however, that EPA lacks authority to compare costs and benefits under §301’s BAT standard, and that the BTA requirement in §316(b) should be interpreted consistently with this constrained view of BAT.¹⁵

As an initial matter, respondents’ premise is simply incorrect. *All* of the “best technology” standards under

¹⁴ *See, e.g.*, Riverkeeper Second Cir. Supp. Br. at 50 (“EPA’s authority for *considering* compliance costs ... comes from the cross-reference in section 316(b) to sections 301 and 306.”) (emphasis added); States Opp. to Cert. at 7–8 (arguing that the Second Circuit properly “rejected the cost-benefit analysis because it was precluded ... by the plain language of the cross-referenced sections”).

¹⁵ Environmental respondents have taken conflicting positions on this issue. They previously conceded that in setting national standards EPA “can, and did, consider costs in relation to benefits.” Riverkeeper Second Cir. Opening Br. at 93.

§§301 and 306, *including* BAT, authorize EPA to consider costs of compliance as well as environmental benefits. For some of the “best technology” standards, Congress specified that costs were a mandatory “comparison factor.” Congress mandated in §304 that EPA’s assessment of BPT “include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application.” 33 U.S.C. §1314(b)(1)(B). It is undisputed that EPA was *required* to conduct a comparison of costs and benefits when setting BPT. *See, e.g.*, Pet.App.21a; States Opp. to Cert. at 7–8; Riverkeeper Second Cir. Reply Br. at 115. The BCT standard for conventional pollutants—which respondents and the Second Circuit have ignored—similarly requires EPA to evaluate “the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived.” 33 U.S.C. §1314(b)(4)(B); *see supra* at 10.

When §§301, 304 and 306 do not *require* cost-benefit analysis as a mandatory “comparison factor,” those provisions still expressly grant EPA authority to consider costs and benefits as discretionary “consideration factors.” Even under the BAT standard EPA “shall take into account ... the cost of achieving such effluent reduction” as well as “such other factors as the Administrator deems appropriate.” 33 U.S.C. §1314(b)(2)(B). The primary difference between the statute’s treatment of BPT and BAT is that, under BAT, “[a]ll factors, including costs and benefits, are [discretionary] consideration factors, and no factors are

separated out for [mandatory] comparison.” *Weyerhaeuser*, 590 F.2d at 1045.¹⁶

As the D.C. Circuit has observed, for BAT “Congress did not mandate any particular structure or weight for the many consideration factors,” but instead “left EPA with discretion to decide how to account for the consideration factors, and how much weight to give each factor.” *Id.* Thus, §304 “on its face lets EPA relate the various factors as it deems necessary.” *Id.* at 1046. One obvious—and clearly permissible—way to give costs and benefits weight and “relate” them to each other is to perform a cost-benefit analysis. The “such other factors as the Administrator deems appropriate” language in §304 underscores the broad discretion granted to EPA in determining what technology is “best” in particular contexts. The D.C. Circuit has correctly observed that, because of this language, the CWA provisions “cannot logically be interpreted to impose on EPA a specific structure of consideration or set of weights because it gave EPA authority to ‘upset’ any such structure by exercising its discretion to add new factors to the mix.”¹⁷ *Id.*

¹⁶ Congress provided a “virtually identical” structure for BADT standards under §306. *Am. Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1059 (3d Cir. 1975). In setting BADT under §306, Congress required that EPA “shall take into consideration *the cost of achieving such effluent reduction*, and any non-water quality environmental impact and energy requirements.” 33 U.S.C. §1316(b)(1)(B) (emphasis added).

¹⁷ *Cf. Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 489, 494–95 (1987) (holding that the CWA preempted state nuisance law where the NPDES permit program—the same program through which EPA establishes §316(b) BTA requirements—is designed

Recognizing this significant flexibility, the Sixth Circuit has expressly held that EPA is permitted to use cost-benefit analysis in setting BAT. *BP Exploration*, 66 F.3d at 796. That court endorsed the D.C. Circuit’s reasoning that the BAT “consideration factors” give EPA “discretion to decide how to account for the consideration factors, and how much weight to give each factor”—and thus to compare costs in relation to benefits. *Id.* (quoting *Weyerhaeuser*, 590 F.2d at 1045). Other circuits have held that cost-benefit analysis is not *required* under the BAT provisions, but until now no court has ever held that such analysis is forbidden.¹⁸ The Second Circuit itself previously understood this statutory structure. In *Riverkeeper I*, it relied on *Weyerhaeuser* and *BP Exploration* to hold that cost-benefit analysis was permissible *under §316(b) itself*. See 358 F.3d at 195 (quoting *BP Exploration* and *Weyerhaeuser*).

The court’s contrary reading of §§301 and 316(b) in this case rests in part on a misreading of a single sentence in this Court’s pre-*Chevron* opinion in *EPA v. National Crushed Stone Ass’n*, 449 U.S. 64 (1980). Pet.App.21a–23a. This Court held in *Crushed Stone* that EPA was not *required* to provide a variance for individual facilities that could not afford to meet BPT effluent standards. This Court reasoned in part that

for EPA’s “weighing of costs and benefits” in establishing effluent limitations, and state law would circumvent those considerations).

¹⁸ See, e.g., *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 559, 563 (D.C. Cir. 2002); *Rybachek v. EPA*, 904 F.2d 1276, 1290–91 (9th Cir. 1990); *Am. Petroleum Inst. v. EPA*, 787 F.2d 965, 972 (5th Cir. 1986); *Reynolds Metal Co. v. EPA*, 760 F.2d 549, 565 (4th Cir. 1985); *CPC Int’l, Inc. v. Train*, 540 F.2d 1329, 1341–42 (8th Cir. 1976); *Am. Iron & Steel Inst.*, 526 F.2d at 1059.

the BPT standards were supposed to reflect the “prescribed minimum technology,” and that the statute already required EPA to weigh costs against benefits when setting those standards. 449 U.S. at 76–77. When distinguishing the BAT provisions, which include a variance for individual plant economic affordability, this Court observed that “in assessing BAT total cost is no longer to be considered in comparison to effluent reduction benefits.” *Id.* at 71. But this Court clarified that the BAT provision “lists ‘cost’ as a factor to consider in assessing BAT, although it does not state that costs shall be considered in relation to effluent reduction.” *Id.* at 71 n.10. In other words, Congress made cost-benefit analysis *mandatory* for BPT but only optional for BAT—which helped justify deference to EPA’s distinction between the two. This Court certainly did not hold that EPA was *forbidden* from considering costs in setting BAT standards, as subsequent courts have recognized. *See Tex. Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 936 (5th Cir. 1998) (“EPA is *not obligated* to evaluate ... the relationship between costs and benefits” under BAT) (emphasis added) (citing *Crushed Stone*, 449 U.S. at 71).

2. The Second Circuit’s Rigid Analogy To BAT Standards Is Inappropriate

Even if this Court were to conclude that §§301 and 304 of the CWA place significant constraints on EPA’s discretion to consider costs when setting BAT standards, there is no sound basis for importing those constraints into §316(b). This Court has recognized that even though the CWA imposes “absolute” requirements in certain contexts, overall it “is a statute in which Congress envisioned, rather than curtailed,

the exercise of discretion.” *Weinberger*, 456 U.S. at 316 & n.11 (distinguishing constraints recognized in *Crushed Stone* and holding that CWA violations do not necessarily require injunctive relief).

As EPA recognized in the Phase II rule when distinguishing §316(b) from the effluent limitation provisions, “the object of the ‘best technology available’ [in §316(b)] is explicitly articulated by reference to the receiving water: To minimize adverse environmental impact in the waters from which cooling water is withdrawn.” Pet.App.157a (69 Fed. Reg. at 41,583). The BAT standard has the very different statutory goal of “eliminating the discharge of all pollutants.” 33 U.S.C. §1311(b)(2)(A). The content of each CWA technology standard is necessarily tied to the statutory goal it is intended to advance. *See Crushed Stone*, 449 U.S. at 77 (recognizing the close relationship between the technology standard and the statutory goal, where the variance sought would have “allow[ed] a level of pollution inconsistent with the judgment of the Administrator”); *id.* at 75 n.14.

The Second Circuit focused on BAT because of its superficial “linguistic similarity” with BTA, but failed to recognize the important differences in the phrasing, purpose, and regulatory context of those two standards. Even if the Second Circuit were correct that Congress intended for BAT standards to be “technology-forcing” in some sense, §316(b) embodies no comparable policy.

Congress’s amendments to §301 also illustrate the flaw in the Second Circuit’s conflation of BTA with the BAT standard. The Second Circuit assumed that the original Act’s scheduled shift from BPT to BAT

signaled an intent by Congress to elevate technological performance above all else. Pet.App.21a, 24a. But that ignores the subsequent history of the Act, under which Congress substantially modified §301 to make the BAT standard applicable to a much narrower range of effluents. *See supra* at 9–11. Under the 1977 amendments, so-called “conventional” pollutants need only comply with the BCT standard, which affirmatively *requires* EPA to weigh “the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived.” 33 U.S.C. §1314(b)(4)(B). Congress also added §301(g), which permits EPA to exempt some non-conventional, non-toxic pollutants from the BAT standard and regulate them under the even less stringent BPT standard. *See* 33 U.S.C. §1311(g)(2)(A).

After the 1977 and 1987 amendments, the BAT standard is principally confined to the regulation of potentially lethal toxic pollutants discharged into the Nation’s waters. 33 U.S.C. §1362(13) (toxic pollutants are those “which after discharge and upon exposure ... will ... cause death,” among other serious harms). Other pollutants are eligible for consideration under standards *requiring* a weighing of costs and benefits. *See supra* at 7–11. Under the Second Circuit’s reading, EPA therefore must analyze impingement and entrainment under a standard that Congress thought too stringent for the release of *pollutants* that pose risks to *human health*, let alone to fish. The Second Circuit’s assumption that Congress would have wanted that standard to be applied to cooling water intake structures in a rigid and “technology-forcing” way, even though the statute now permits variances from

BAT even for toxic pollutants in certain circumstances, is simply unreasonable.

That risks to fish from impingement and entrainment are poorly analogized to toxic and other dangerous pollutants is further confirmed by Congress's decision to place cooling water intake structure requirements in §316, which generally deals with the more modest risks posed by *thermal* pollution. Thermal discharges are generally regulated as a non-conventional, non-toxic pollutant subject to the discretionary variance provision of §301(g) and a special variance provision in §316(a), 33 U.S.C. §1326(a). The §316(a) variance requires EPA to relax its regulations for a particular facility if the facility shows that the regulations are “more stringent than necessary to assure the projection [protection] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made.” 33 U.S.C. §1326(a).

Indeed, to the extent that §316(b) might be viewed as principally concerned with the protection of fish (even though, of course, “minimizing adverse environmental impact” is much broader), Congress has never extended to risks to individual fish the same level of concern it has displayed for pollutants dangerous to humans. Given the care with which Congress structured the entire Act to ensure that disproportionate expenditures are not required to protect aquatic life, see *supra* at 7–11, 36, it strains credulity to imagine that it would have opened the door, through a provision that the Second Circuit twice characterized as an “afterthought,” to regulations requiring massive expenditures on behalf of fish for no

appreciable benefit.¹⁹ Such a reading of §316(b) would inappropriately “alter the fundamental details of a regulatory scheme in ... [an] ancillary provision[.]” *Am. Trucking*, 531 U.S. at 468; *supra* at 27–28. And, as this Court has repeatedly cautioned, Congress does not “hide elephants in mouseholes.” *Am. Trucking*, 531 U.S. at 468.

3. The Water Quality Policies Of The Act Do Not Support The Second Circuit’s Rejection Of Cost-Benefit Analysis

The Second Circuit also reasoned that any effort to weigh costs and benefits on a site-specific basis would inevitably draw permitting authorities into “consideration of the quality of the receiving water,” which the court believed would be inconsistent with the broader policies of the Clean Water Act. Pet.App.56a–60a. The Second Circuit’s reservations about site-specific cost-benefit analysis are misplaced.

The plain language of §316(b) strongly suggests that BTA should be determined at the facility level, particularly for existing facilities. It is hard to imagine

¹⁹ For example, the Second Circuit’s reading would require a radically and arbitrarily different approach to the effects of a cooling system’s intake and its outflow. Under §316(a), harm to individual fish from the thermal discharges of a “once-through” cooling system may be disregarded so long as the discharge does not threaten the protection and propagation of a balanced population of fish. Under the Second Circuit’s reading of §316(b), however, such a facility might nonetheless be required to rip out that same cooling system and replace it with, *e.g.*, a wet closed-cycle system, based solely on a showing that it would save some extra fish, without any showing that the impingement or entrainment of those fish threatens a balanced population.

how the optimal “location” or even “design, and construction” of cooling water intake structures could be specified at a national level, without regard to the geographic and waterbody characteristics at particular facilities. *See* Pet.App.157a (69 Fed. Reg. at 41,583) (EPA discussing consideration of “effects on and benefits to” the local waterbody); Pet.App.229a (69 Fed. Reg. at 41,599 (explaining that “[b]ecause different waterbody types have the potential for different ... impacts, the requirements ... vary by waterbody type.”).²⁰ And, as explained in greater detail in the brief filed by UWAG, both the costs and the environmental benefits of particular intake structure technologies can vary dramatically from facility to facility. *See* UWAG Br. at 6-11. In at least some cases, the only sensible way to identify the “best” available technology will be to weigh costs and benefits in a site-specific manner.

The Second Circuit appears to be concerned that it would be inappropriate for a permitting authority to conclude that the costs of a better intake technology significantly outweigh the benefits only because the waterbody is already artificially degraded from its natural state in a manner that a better intake system might have helped to remedy. Pet.App.58a–59a. Even

²⁰ Perhaps for this reason, §316(b), unlike the effluent discharge requirements in §§301 and 306, does not require that facilities “implement” a particular technology, but only that the “the location, design, construction, and capacity of cooling water intake structures *reflect*” that technology. That structures “reflect” a technology is a far more ambiguous mandate than one requiring that facilities “implement” that technology, and one with ample room for variations and alternative requirements where justified by local circumstances.

if such concerns were valid they do not remotely justify precluding site-specific cost-benefit analysis altogether, including appropriate consideration of site-specific waterbody characteristics. The Second Circuit's reasoning would require EPA to close its eyes to the fact that some waterbodies *naturally* support ecosystems that are robust, or abnormally meager, enough to affect the "best" choice of intake technology.

The Second Circuit also reasoned that site-specific cost-benefit analysis is inappropriate because §316(a) explicitly authorizes variances from thermal discharge limitations if those limits "will require effluent limitations more stringent than necessary to assure the projection [protection] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made"—whereas §316(b) contains no similar language. *See* 33 U.S.C. §1326(a), (b); Pet.App.59a n.27. That reasoning is flawed. While §316(b) does not explicitly contain a variance procedure, it directs regulators to consider the "impact" of the "location, design, construction, and capacity" of cooling water intake structures. 33 U.S.C. §1326(b). As explained above and in UWAG's brief, this analysis inherently calls for some consideration of site-specific issues. *See supra* at 14–15; *see* UWAG Br. at 6-11, 42-57.

In any event, EPA's authority to weigh costs and benefits at the site-specific level need not be grounded in a single provision, but may reflect the Agency's inherent authority to select "a mechanism for ensuring that its necessarily rough-hewn categories do not unfairly burden atypical plants." *Chem. Mfrs.*, 470 U.S. at 120 (affirming EPA's authority to "temper[] with flexibility" otherwise categorical pretreatment

standards); *Du Pont*, 430 U.S. at 128 (1977) (concluding that BPT and BAT limitations may “be set by [national] regulation” “so long as some allowance is made for variations in individual plants, as EPA has done”).

C. The Second Circuit’s Interpretation Has Consequences Congress Could Not Have Intended

For all of the reasons given above, it is simply not plausible that Congress intended to mandate the maximum possible reduction in impingement and entrainment without allowing EPA to balance costs against benefits. Indeed, such an interpretation of the Act flirts with absurdity.

First, a campaign to eliminate impingement and entrainment of fish, to the maximum extent possible without regard to cost, is self-evidently unsound policy. Although EPA chose reductions in impingement mortality and entrainment as a “convenient” metric for determining performance at Phase II facilities (Pet.App.290a, 169a (69 Fed. Reg. at 41,612, 41,586)), neither the statutory language nor sound environmental policy justify the Second Circuit’s fixation on saving every possible fish. Fish and other aquatic creatures often produce many thousand times more offspring than the available ecosystem resources can support, expecting high natural mortality in the early life stages.²¹ Moreover, when a waterbody is

²¹ See, e.g., *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 309 (1st Cir. 1979) (noting that “[t]hrough the intake would act as an additional large predator, there are other more dangerous threats in the natural environment, which fish are able to survive because they are highly fecund. For instances,

either highly robust or naturally lacking aquatic life that is susceptible to impingement or entrainment (like the Dead Sea or the Great Salt Lake), moderate levels of impingement and entrainment may have no consequences for the marine ecosystem that are remotely worth massive technology costs. The Second Circuit's interpretation would compel EPA to order refits that are enormously expensive symbolic gestures devoid of any meaningful environmental consequence.

Second, the Second Circuit's interpretation also presumably requires EPA to require intake designs and construction methods that eliminate, to the maximum extent possible, *all* "adverse environmental impact," so long as the industry can reasonably bear the costs. Pet.App.26a. As explained above, "adverse environmental impact" encompasses far more than impingement mortality and entrainment, and may also include the fogging, icing, consumptive water usage, and noise associated with closed-cycle cooling, as well as increased air emissions from greater fuel consumption. *See supra* at 5–6. Indeed, it could extend to "impacts" such as atmospheric carbon dioxide produced in the manufacturing and transporting of building materials used in the "construction" of intake structures. Congress could not have intended to require EPA to consider, and reduce to the maximum extent possible, every far-flung environmental impact associated with the design and construction of a cooling water intake structure *while intentionally blinding*

individual female winter flounder produce about 500,000 eggs annually and rainbow smelt produce between 25,000 and 50,000.") (citation omitted).

itself to whether the costs significantly exceed the benefits.

Third, the cost burdens imposed by the Second Circuit's interpretation are potentially limitless in light of EPA's decision to implement §316(b) through the NPDES permitting process, which operates on a five-year cycle.²² As new technologies are developed, it is possible—indeed likely—that the maximally-effective technology may change over the course of a permitting cycle. This is problematic because cooling water intake structures often require tons of concrete and steel in the ground or underwater.²³

Moreover, both the type of cooling system and the amount of cooling water used affect a facility's layout and operation, not to mention energy output. Yet, under the Second Circuit's interpretation of §316(b) and the Phase II rule, EPA and state permitting authorities presumably would have to reevaluate such structures every five years, then mandate any new improvements that will significantly reduce impingement mortality and entrainment—without regard to the aggregate costs of such a fickle regulatory policy (as long as the industry can bear them), or any facility-specific difficulties in implementation (such as if the ideal location for a state-

²² Congress did not specify any permitting process for §316(b), and there are good reasons to believe it intended for §316(b) requirements to be implemented only once, at a facility's initial construction. *See supra* at 12 n.4. This Court elected not to review that issue.

²³ The structure considered by the First Circuit 30 years ago in *Seacoast*, for example, involved piping structures drawing seawater from over a mile out in the ocean. 597 F.2d at 309.

of-the-art intake is occupied by other vital facility infrastructure). *Cf.* 33 U.S.C. §1316(d) (new facilities, but not existing facilities, are protected from more stringent effluent standards for 10 years). Besides the exorbitant costs, retrofits are extremely time-consuming, potentially resulting in facilities being taken offline for significant periods of time, with obvious consequences for the stability of electric supplies. J.A.312; J.A.343–44; Pet.App.258a-59a (69 Fed. Reg. at 41,605). There is no evidence in the language or history of §316(b) indicating that it was meant to require such a Sisyphean task.

Congress cannot possibly have intended these results. Since the language is easily broad enough to encompass consideration of costs as well as benefits, and the overall language, structure, and legislative history of the Clean Water Act reflect a strong commitment to cost-benefit analysis rather than hostility to it, the Second Circuit’s extreme reading of this one isolated provision is clearly inappropriate. Indeed, the reading is so absurd as to require its rejection even if the plain language did—though it does not—appear to require it. *See, e.g., Logan v. United States*, 128 S. Ct. 475, 484 (2007) (“Statutory terms ... may be interpreted against their literal meaning where the words ‘could not conceivably have been intended to apply’ to the case at hand.” (citation omitted)); *Pub. Citizen v. U.S. DOJ*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) (such a rule “demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way”).

D. The Legislative History Confirms That §316(b) Permits Cost-Benefit Analysis

The absence of any congressional intent in §316(b) to force technology irrespective of costs and benefits is confirmed by the Act's legislative history. Representative Clausen, a Floor Manager, explained that “‘best technology available’ is intended to be interpreted to mean the best technology available commercially at an economically practicable cost.” *See supra* at 7.

The legislative history of the thermal discharge provisions of §316 reflects a similar congressional understanding that EPA (and state regulators) would weigh the costs of any implementing regulations against the benefits of such technology forcing to fish and other wildlife. In discussing Congress's goal in enacting §316, Representative Clark—a member of the House Committee on Public Works and sponsor of the amendment to H.R. 11896 relating to thermal discharges—stated:

[T]he [EPA] Administrator has shown an unfortunate tendency sometimes in the past to require ridiculous expenditures of hundreds of millions of dollars with no benefit to any persons, or even to the fish. The purpose of the language in sections 304, 306, *and* 316 is to require the Administrator to utilize better judgment in the future.

118 Cong. Rec. 33,765–66 (1972) (emphasis added).

Conference managers from both the House and Senate also recognized that the bill would not fulfill its

objectives if it imposed unreasonable costs. Senate Debate on S. 2770 (Nov. 2, 1971), *reprinted in 2 Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1272 (Comm. Print 1973) (“Legis. Hist.”) (statement of Sen. Randolph, Chairman of the Conference Committee and Chairman of the Committee on Public Works) (“under the proposed legislation, controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred”). As explained by Senator Bentsen:

If these programs cause too severe economic dislocations, if the economic and social benefits of pollution control programs bear no reasonable relationship to the costs involved in implementing them, then all of our best efforts to clean up the waterways could be defeated in a backlash against those of us who are working to clean up the environment....
There must be a reasonable relationship between costs and benefits if there is to be an effective and workable program.

Id. at 1281 (emphasis added); *see also id.* at 1278 (statement of Sen. Montoya, member of the Committee on Public Works) (“I would point out ... that the bill will allow reason to be applied when the benefits of attaining clean water are clearly and significantly out of line with the costs involved”).

III. AT A MINIMUM, §316(b) IS AMBIGUOUS AND EPA'S INTERPRETATION IS REASONABLE AND ENTITLED TO DEFERENCE

As explained above, the only reasonable reading of §316(b) is that the statute expressly delegates to EPA discretion to consider the relationship between costs and benefits when selecting the “best technology available for minimizing adverse environmental impact.” At worst, however, the statute is ambiguous or silent on this critical point, particularly considering the broader statutory context.²⁴ Indeed, the Second Circuit essentially conceded that the statute was at least ambiguous; rather than stopping at step one of *Chevron*, it held that EPA’s interpretation “was not ‘based on a permissible construction of the statute’” Pet.App.36a (quoting *Chevron*, 467 U.S. at 843). EPA’s construction of the statute is plainly reasonable, and entitled to deference.

First, respondents and the Second Circuit have conceded that §316(b) permits consideration of costs in some manner. They have simply attempted to impose exceptionally detailed and cramped restrictions on exactly *how* EPA may analyze costs under §316(b). For example, if EPA had determined that industry could “reasonably bear the price of technology” that saves 100-105 fish, the Second Circuit would allow EPA

²⁴ See *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S. Ct. 1534, 1546 (2007) (“[A]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.”) (citation omitted) (final two alterations in original); *Brown & Williamson*, 529 U.S. at 132 (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”).

to choose as BTA a technology that saves 99-101 fish for \$100 instead of one that saves 100-103 fish but costs 50% more (\$150) for this incremental benefit. Pet.App.27a–28a. But EPA could *not* choose the cheaper technology saving up to 101 fish if it had first determined that the industry could bear the price of technology that could save “at least 102 fish.” Pet.App.28a. In essence, respondents and the Second Circuit believe that §316(b) affirmatively authorizes the consideration of costs, but drastically constrains how EPA may *weigh* this criterion—unlike all other “consideration factors” under the CWA. As the United States has explained, the Second Circuit’s holding would “micro-manage the agency’s decisionmaking by establishing rules that cannot be found anywhere in the Act.” U.S. Opp. to Cert. at 12.

Second, in the absence of statutory language clearly signaling congressional disapproval, cost-benefit analysis is *always* reasonable. Cost-benefit analysis (and particularly the modest form employed by EPA here) is essentially just another way of describing common sense or basic rationality. *See supra* at 26–31 & n.10. Assuming from §316(b)’s *ambiguous* language that Congress did not intend for its efforts to do more harm than good is, at a minimum, a permissible interpretation. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 105, 107 (1992) (reversing where CWA did not limit EPA’s authority on a permitting question and EPA’s interpretation was a “reasonable exercise of [its] substantial statutory discretion”).

Third, where an agency’s interpretation “closely fits ‘the design of the statute as a whole,’” courts “should be especially reluctant” to reject it. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417–18 (1993) (citation

omitted). The Act clearly grants EPA significant authority to consider costs and to provide reasonable variances even in the context of toxic pollutants. *See supra* at 7–11. When it mentions fish at all, it consistently expresses a policy of protecting balanced populations of fish—not, as the Second Circuit assumed, *individual* fish. EPA’s interpretation of §316(b) as permitting a weighing of costs and benefits in setting national BTA standards, as well as with site-specific determinations based on further cost-benefit analysis at the local level, is reasonable and consistent with the Act’s approach towards the protection of fish. The Second Circuit’s approach, conversely, places fish and other aquatic organisms on a pedestal never erected by Congress.

Finally, this Court “‘normally accord[s] particular deference to an agency interpretation of ‘longstanding’ duration,’ recognizing that ‘well-reasoned views’ of an expert administrator rest on ‘a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) (citations omitted). The long-standing nature of EPA’s reliance on cost-benefit analysis in applying §316(b) is beyond dispute,²⁵ and Congress has

²⁵ Since at least 1977, EPA has compared costs and benefits in making BTA determinations. *See, e.g., In re Pub. Serv. Co. of N.H., supra* at 11, *aff’d after remand, Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306 (1st Cir. 1979). EPA discussed this long history in the Phase II rulemaking, referring to the “‘wholly disproportionate’ cost-benefit test that has been in use since the 1970s.” 67 Fed. Reg. 17,222, 17,224 (Apr. 9, 2002); *see also* Pet.App.157a (69 Fed. Reg. at 41,583). Furthermore, in *Seacoast* the First Circuit affirmed EPA’s decision without expressing any reservations as to EPA’s “wholly disproportionate” standard. 597

never amended §316(b) to prohibit EPA from comparing costs to benefits, nor has it otherwise expressed disapproval of EPA’s cost-benefit approach to permitting. This absence of any change to §316(b) to overrule the Agency’s long-standing interpretation, despite Congress’s amendments to other CWA provisions, “provide[s] further evidence—if more is needed—that Congress intended [EPA’s] interpretation, or at least understood [it] as statutorily permissible.” *Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

IV. THE SECOND CIRCUIT’S JUDGMENT SHOULD BE REVERSED IN PART

The Second Circuit remanded a number of provisions in the Phase II rule. Pet.App.93a–94a. Some of those provisions, such as the site-specific “cost-cost” and restoration provisions, were remanded for reasons unrelated to the question presented here. The portions of the Second Circuit’s judgment remanding the national performance standards and the site-specific cost-benefit provisions, however, should be reversed. They were based on the Second Circuit’s erroneous determination that §316(b) bars cost-benefit analysis at the national and local level.

First, the defect the Second Circuit saw in the national performance standards was that “it is impossible to tell whether the EPA based its decision on permissible cost-effectiveness analysis or exceeded its authority by relying impermissibly on a cost-benefit

F.2d at 311. The First Circuit’s treatment was sufficiently definitive that no one challenged EPA’s interpretation in federal court again for nearly a quarter century.

analysis.” Pet.App.36a. The court of appeals also remanded the national performance standards because they “set performance standards as ranges without requiring facilities to achieve the greatest reduction of adverse impacts they can.” Pet.App.94a. In other words, “the Rule does not require facilities to choose technologies that produce the greatest reduction possible.” Pet.App.28a. All of those rationales rest on the Second Circuit’s erroneous belief that cost-benefit analysis is prohibited, and that the “best technology available” must be the one that reduces impingement and entrainment the most.

Second, the Second Circuit also remanded the section of the rule authorizing site-specific determinations of BTA based on a cost-benefit test, 40 C.F.R. §125.94(a)(5)(ii). As explained above, that holding also rested on the Second Circuit’s determination that EPA had impermissibly authorized permitting authorities to weigh the costs and benefits at the local level. Pet.App.57a–60a.

CONCLUSION

The portions of the Second Circuit’s judgment remanding EPA’s determination of best technology available and related performance standards, as well as the site-specific cost-benefit provisions, should be reversed.

Respectfully submitted,

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ADDENDUM

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§ 1251. Congressional declaration of goals and policy

- (a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

- (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

- (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

- (b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

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(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

* * *

33 U.S.C. § 1311

§ 1311. Effluent limitations

- (a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

- (b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the

Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of

subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than

publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years

after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic

pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the

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determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph—

- (i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;
- (ii) may be filed before promulgation of such guideline; and
- (iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water

quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no

pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase “the discharge of any pollutant into marine waters” refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), “primary or equivalent treatment” means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which

applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such

a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later than [FN1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency

in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g)—

(A) Effect of filing—An application for a modification under subsection (g) of this section and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) Effect of disapproval—Disapproval of an application for a modification under subsection (g) of this section shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) Deadline for subsection (g) decision—An application for a modification with respect to a pollutant filed under subsection (g) of this section must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in

which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline—

(A) In general—In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of this section of the requirements of subsection (b)(1)(B) of this section with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application—An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will—

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions—The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average)

and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) Preliminary decision deadline—The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two

years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A)

and (b)(2)(E) of this section and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractual [FN2] obligation to use funds in the amount required (but not less than \$250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(1) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient

water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: Provided, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) of this section or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national

effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this

subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this

subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(o) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or

affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection—

(A) Coal remining operation

The term “coal remining operation” means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term “remined area” means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term “pre-existing discharge” means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. § 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

33a

[FN1] So in original. Probably should be “than”.

[FN2] So in original. Probably should be “contractual”.

33 U.S.C. § 1314**§ 1314. Information and guidelines**

(a) Criteria development and publication

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and

wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

(4) The Administrator shall, within 90 days after December 27, 1977, and from time to time thereafter, publish and revise as appropriate information identifying conventional pollutants, including but not limited to, pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH. The thermal component of any discharge shall not be identified as a conventional pollutant under this paragraph.

(5)(A) The Administrator, to the extent practicable before consideration of any request under section 1311(g) of this title and within six months after December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and to allow recreational activities, in and on the water.

(B) The Administrator, to the extent practicable before consideration of any application under section 1311(h) of this title and within six months after

December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife, and to allow recreational activities, in and on the water.

(6) The Administrator shall, within three months after December 27, 1977, and annually thereafter, for purposes of section 1311(h) of this title publish and revise as appropriate information identifying each water quality standard in effect under this chapter or State law, the specific pollutants associated with such water quality standard, and the particular waters to which such water quality standard applies.

(7) Guidance to states—The Administrator, after consultation with appropriate State agencies and on the basis of criteria and information published under paragraphs (1) and (2) of this subsection, shall develop and publish, within 9 months after February 4, 1987, guidance to the States on performing the identification required by subsection (1)(1) of this section.

(8) Information on water quality criteria—The Administrator, after consultation with appropriate State agencies and within 2 years after February 4, 1987, shall develop and publish information on methods for establishing and measuring water quality criteria for toxic pollutants on other bases than pollutant-by-pollutant criteria, including biological monitoring and assessment methods.

(9) Revised criteria for coastal recreation waters—

(A) In general—Not later than 5 years after October 10, 2000, after consultation and in cooperation with appropriate Federal, State, tribal, and local officials (including local health officials), the Administrator shall publish new or revised water quality criteria for pathogens and pathogen indicators (including a revised list of testing methods, as appropriate), based on the results of the studies conducted under section 1254(v) of this title, for the purpose of protecting human health in coastal recreation waters.

(B) Reviews—Not later than the date that is 5 years after the date of publication of water quality criteria under this paragraph, and at least once every 5 years thereafter, the Administrator shall review and, as necessary, revise the water quality criteria.

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently

available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section

1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 1311(b)(2)(E) of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including

measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

(c) Pollution discharge elimination procedures

The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

(d) Secondary treatment information; alternative waste treatment management techniques; innovative and alternative wastewater treatment processes; facilities deemed equivalent of secondary treatment

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after October 18, 1972 (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within nine months after October 18, 1972 (and from time to time thereafter) information on alternative waste treatment management techniques and systems available to implement section 1281 of this title.

(3) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall promulgate within one hundred and eighty days after December 27, 1977, guidelines for identifying and evaluating innovative and alternative wastewater treatment processes and techniques referred to in section 1281(g)(5) of this title.

(4) For the purposes of this subsection, such biological treatment facilities as oxidation ponds, lagoons, and ditches and trickling filters shall be deemed the equivalent of secondary treatment. The

Administrator shall provide guidance under paragraph (1) of this subsection on design criteria for such facilities, taking into account pollutant removal efficiencies and, consistent with the objectives of this chapter, assuring that water quality will not be adversely affected by deeming such facilities as the equivalent of secondary treatment.

(e) Best management practices for industry

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, may publish regulations, supplemental to any effluent limitations specified under subsections (b) and (c) of this section for a class or category of point sources, for any specific pollutant which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant under section 1317(a)(1) or 1321 of this title, to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage which the Administrator determines are associated with or ancillary to the industrial manufacturing or treatment process within such class or category of point sources and may contribute significant amounts of such pollutants to navigable waters. Any applicable controls established under this subsection shall be included as a requirement for the purposes of section 1311, 1312, 1316, 1317, or 1343 of this title, as the case may be, in any permit issued to a point source pursuant to section 1342 of this title.

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

(g) Guidelines for pretreatment of pollutants

(1) For the purpose of assisting States in carrying out programs under section 1342 of this title, the Administrator shall publish, within one hundred and twenty days after October 18, 1972, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

(h) Test procedures guidelines

The Administrator shall, within one hundred and eighty days from October 18, 1972, promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 1341 of this title or permit application pursuant to section 1342 of this title.

- (i) Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower

The Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title, and (2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include:

- (A) monitoring requirements;

- (B) reporting requirements (including procedures to make information available to the public);

- (C) enforcement provisions; and

- (D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

- (j) Lake restoration guidance manual

The Administrator shall, within 1 year after February 4, 1987, and biennially thereafter, publish and disseminate a lake restoration guidance manual

describing methods, procedures, and processes to guide State and local efforts to improve, restore, and enhance water quality in the Nation's publicly owned lakes.

(k) Agreements with Secretaries of Agriculture, Army, and the Interior to provide maximum utilization of programs to achieve and maintain water quality; transfer of funds; authorization of appropriations

(1) The Administrator shall enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior, and the heads of such other departments, agencies, and instrumentalities of the United States as the Administrator determines, to provide for the maximum utilization of other Federal laws and programs for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 1288 of this title and nonpoint source pollution management programs approved under section 1329 of this title.

(2) The Administrator is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior and the heads of such other departments, agencies, and instrumentalities of the United States as the Administrator determines, any funds appropriated under paragraph (3) of this subsection to supplement funds otherwise appropriated to programs authorized pursuant to any agreement under paragraph (1).

(3) There is authorized to be appropriated to carry out the provisions of this subsection, \$100,000,000 per fiscal year for the fiscal years 1979 through 1983 and

such sums as may be necessary for fiscal years 1984 through 1990.

(l) Individual control strategies for toxic pollutants

(1) State list of navigable waters and development of strategies

Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection—

(A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

(B) a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title;

(C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source; and

(D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy.

(2) Approval or disapproval

Not later than 120 days after the last day of the 2-year period referred to in paragraph (1), the Administrator shall approve or disapprove the control strategies submitted under paragraph (1) by any State.

(3) Administrator's action

If a State fails to submit control strategies in accordance with paragraph (1) or the Administrator does not approve the control strategies submitted by such State in accordance with paragraph (1),

then, not later than 1 year after the last day of the period referred to in paragraph (2), the Administrator, in cooperation with such State and after notice and opportunity for public comment, shall implement the requirements of paragraph (1) in such State. In the implementation of such requirements, the Administrator shall, at a minimum, consider for listing under this subsection any navigable waters for which any person submits a petition to the Administrator for listing not later than 120 days after such last day.

(m) Schedule for review of Guidelines

(1) Publication

Within 12 months after February 4, 1987, and biennially thereafter, the Administrator shall publish in the Federal Register a plan which shall—

(A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section;

(B) identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published; and

(C) establish a schedule for promulgation of effluent guidelines for categories identified in subparagraph (B), under which promulgation of such guidelines shall be no later than 4 years after February 4, 1987, for categories identified in the first published plan or 3 years after the

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publication of the plan for categories identified in later published plans.

(2) Public review

The Administrator shall provide for public review and comment on the plan prior to final publication.

33 U.S.C. § 1316

§ 1316. National standards of performance

(a) Definitions

For purposes of this section:

(1) The term “standard of performance” means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term “new source” means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term “source” means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term “owner or operator” means any person who owns, leases, operates, controls, or supervises a source.

(5) The term “construction” means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such

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equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;

paperboard, builders paper and board mills;

meat product and rendering processing;

dairy product processing;

grain mills;

canned and preserved fruits and vegetables processing;

canned and preserved seafood processing;

sugar processing;

textile mills;

cement manufacturing;

feedlots;

electroplating;

organic chemicals manufacturing;

inorganic chemicals manufacturing;

plastic and synthetic materials manufacturing;

soap and detergent manufacturing;

fertilizer manufacturing;

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petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent

reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or

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amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

- (e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

33 U.S.C. § 1326**§ 1326. Thermal discharges**

- (a) Effluent limitations that will assure protection and propagation of balanced, indigenous population of shellfish, fish, and wildlife

With respect to any point source otherwise subject to the provisions of section 1311 of this title or section 1316 of this title, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.

(b) Cooling water intake structures

Any standard established pursuant to section 1311 of this title or section 1316 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.

(c) Period of protection from more stringent effluent limitations following discharge point source modification commenced after October 18, 1972

Notwithstanding any other provision of this chapter, any point source of a discharge having a thermal component, the modification of which point source is commenced after October 18, 1972, and which, as modified, meets effluent limitations established under section 1311 of this title or, if more stringent, effluent limitations established under section 1313 of this title and which effluent limitations will assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in or on the water into which the discharge is made, shall not be subject to any more stringent effluent limitation with respect to the thermal component of its discharge during a ten year period beginning on the date of completion of such modification or during the period of depreciation or amortization of such facility for the purpose of section 167 or 169 (or both) of title 26, whichever period ends first.

33 U.S.C. § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall

be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

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