

1 the Environmental Protection Agency, et al.,
2 supporting the Petitioners.

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4 the Petitioners.

5 RICHARD J. LAZARUS, ESQ., Cambridge, Mass.; on behalf of
6 the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first today in Case 07-588, Entergy Corporation
5 v. Riverkeeper Incorporated, and the consolidated cases.
6 Mr. Joseffer.

7 ORAL ARGUMENT OF DARYL JOSEFFER
8 ON BEHALF OF THE ENVIRONMENTAL
9 PROTECTION AGENCY, ET AL.,
10 SUPPORTING THE PETITIONERS

11 MR. JOSEFFER: Mr. Chief Justice, and may it
12 please the Court:

13 For more than 30 years, EPA has construed
14 the Clean Water Act to permit it to consider the
15 relationship between costs and benefits in setting
16 limits on water intake. The court of appeals'
17 unprecedented limitation of that discretion is wrong as
18 a matter of basic Chevron interpretive principles for at
19 least three reasons.

20 First, the controlling statutory standard,
21 which looks to the best technology available for
22 minimizing adverse environmental impacts, is ambiguous
23 and does not preclude EPA's interpretation, especially
24 in light of the statute's other "best technology"
25 provisions, two of which expressly require consideration

1 of the relationship between costs and benefits.

2 Second, there is no indication that Congress
3 determined for itself that the benefits of stricter
4 regulations would in fact outweigh their costs.

5 Instead, from the context -- I'm sorry, for -- I'm
6 sorry. There is no indication in either the context or
7 the history of the statute that Congress determined for
8 itself that the benefits of stricter regulations would
9 in fact justify their costs. Instead the indication is
10 that Congress left that to the agency.

11 Congress took a very careful look at the
12 separate issue of the discharge of pollutants and
13 legislated numerous very specific provisions concerning
14 the discharge of pollutants. But when it came to water
15 intake, the Congress gave scant attention to that at all
16 and included only this one very general provision in the
17 act on that subject.

18 CHIEF JUSTICE ROBERTS: Of course, in the
19 other provision it specifically required consideration
20 of costs and benefits and it didn't do so in this
21 provision.

22 MR. JOSEFFER: Right. In our view, that
23 strongly supports our view that, first, Congress
24 understood that consideration of cost and benefits was
25 not incompatible with the application of a best

1 technology standard. Otherwise it would not have
2 required that consideration as part of the best quality
3 standard, which seems to show at a minimum that a best
4 technology standard does not unambiguously foreclose
5 consideration of the relationship between costs and
6 benefits.

7 JUSTICE SOUTER: May I ask you to follow up
8 on that, because your statement about compatibility
9 raises what for me is a fundamental difficulty in
10 understanding this case. And I think my difficulty goes
11 both to Chevron step one and step two. And that is
12 this: I think we all start from the premise that,
13 whatever else subsection (d) had in mind, it was
14 imposing some kind of a technology-driven standard
15 criterion. It's there in the words.

16 The difficulty that I have is if you are
17 going to apply on at least a site-specific basis a cost
18 benefit analysis, I'm not sure how it would work. In
19 other words, it seems to me that when you're talking
20 about the possible harm from pulling in a few fish or a
21 few plankton or a few baby clam larvae and so on, as
22 against the cost conceivably of millions of dollars for
23 extending intake pipes or putting technical expensive
24 filtering mechanisms, you are dealing with such
25 incommensurables that I don't know how on a site-

1 specific basis you would sensibly apply a cost-benefit
2 analysis. Are a thousand plankton worth a million
3 dollars? I don't know.

4 And my difficulty then is, I don't know how
5 it would work. And because I don't know how it would
6 work, it seems to me that if you are going to apply a
7 cost-benefit analysis, the odds are what you are going
8 to do is basically eliminate the whole technology-driven
9 point of the statute. So that's my difficulty. Can you
10 help me out on that?

11 MR. JOSEFFER: Two points on that. The
12 first is that this is how it's always been done. I
13 mean, since 1977 at least, first permitting decisions
14 have always been done on a facility by facility, case by
15 case basis.

16 JUSTICE SOUTER: Do we know so far as intake
17 pipes are concerned? I mean, maybe I'm being foolish in
18 thinking it's a little easy to make sense of it when
19 we're talking about toxic discharges, but leaving that
20 aside, do we know that, with respect to these kind of
21 intake technology decisions, that the cost-benefit
22 analysis has been in any way sensible? In other words,
23 maybe what Congress had in mind was this just doesn't
24 work doing it on a site-specific cost-benefit analysis
25 and that's why we're going to pass subsection (b) in the

1 first place. So you say, well, we've had experience
2 with cost-benefit analysis. What's the experience?

3 MR. JOSEFFER: Sure. I guess now I have
4 three points.

5 JUSTICE SOUTER: Yes.

6 MR. JOSEFFER: The first is that -- the
7 first is that the history here is, that I was referring
8 to, is with respect to cooling water intake structures,
9 where for more than 30 years cooling water intake
10 structures have been determined on a case by case basis,
11 where EPA determined as early as 1977 and ever since
12 that it would be unreasonable to impose -- to require
13 the use of technology whose costs were wholly
14 disproportionate to its benefits.

15 JUSTICE SOUTER: And have these been
16 applications of something more than the outside
17 standard, which I guess everybody agrees would apply in
18 a case like this, that when it just becomes wholly or
19 outrageously disproportionate there wouldn't be -- that
20 there would in that sense be a cost-benefit cutoff?
21 These have been more subtle decisions than that?

22 MR. JOSEFFER: Yes. And I mean, just the
23 phrasing of the standard, whether costs are wholly
24 disproportionate to benefits, itself indicates that
25 there is a comparison here. We cite in our brief one

1 particular -- in our reply brief, one specific example
2 where benefits were clearly not de minimus.

3 JUSTICE GINSBURG: The Second Circuit
4 recognized that latter kind of taking account of costs
5 disproportionate, more than the industry would bear, and
6 they also recognized a cost comparison. If you have a
7 cheaper method that is almost as good, you can use that
8 and you don't have to use the one that will capture the
9 extra fish. So everybody agrees that there is some
10 consideration of cost. The question is how much, and
11 the concern is, as Justice Souter says, that you are
12 comparing things that aren't comparable.

13 MR. JOSEFFER: Well, first off -- I'm sorry.
14 I guess one basic point is just that -- first off,
15 excuse me, in terms of the court of appeals' recognition
16 that costs and benefits could be compared in extreme
17 circumstances, that just deprives it of the logic of its
18 position, because when we talk about the extent or
19 degree or manner to which a permissible consideration
20 can be considered that's a classic manner for the
21 agency's gap-filling discretion, not something for the
22 court of appeals or Respondents to get discretion on.

23 And, second, in terms of the concern that
24 the cost-benefit analysis can be difficult because we're
25 comparing benefits that are not easily monetized to

1 economic costs, that is just systematically the case
2 with all cost-benefit analyses, even ones which people
3 do in ordinary life. When I decide whether to buy a TV
4 for this amount or a more expensive TV for a different
5 amount, I don't know exactly how in my head I quantify
6 that, but I do. And with respect to cost-benefit --

7 JUSTICE SOUTER: Isn't it easier to quantity
8 that than the value of a plankton?

9 MR. JOSEFFER: Not -- well -- but with cost-
10 benefit analyses, again, this is routinely done by
11 agencies. The statisticians and the economists --

12 JUSTICE SOUTER: It is -- let me -- I will
13 grant you that agencies purport to do this kind of
14 thing. But my question and I think Justice Ginsburg's
15 question is, does it make any sense in these
16 circumstances to think that you really can do a cost-
17 benefit analysis? And if the answer is no, we have been
18 purporting to do it but it really doesn't make a lot of
19 sense, then it either means that there is just going to
20 be an irrational process going on, or it means that the
21 technology-driven standard basically is going to be read
22 right out of the statute, because you are always going
23 to find some disproportion which is going to limit your
24 use of technology.

25 MR. JOSEFFER: I think the most irrational

1 thing would be to just throw up one's hands and say that
2 we are going to impose standards whether or not they do
3 harm more harm than good, whether or not they make any
4 sense. And -- and here the agency very carefully
5 considered the relative costs and the relative benefits
6 and also did so in a way that puts its thumb on the side
7 of the environmental side of the scales.

8 CHIEF JUSTICE ROBERTS: But just to get back
9 to your television hypothetical, if you told somebody
10 that you were going to buy the best TV available nobody
11 would think you meant that you were going to buy a very
12 cheap TV because, considering the costs and benefits,
13 that was the best one. They would think you are going
14 to get the fanciest TV you could.

15 MR. JOSEFFER: Well, these words have
16 different meanings in different contexts, which just
17 underscores their ambiguity. But taking the phrase here
18 as a whole, if I said I was going to acquire the best
19 technology available for winterizing my lawnmower so
20 that it would work again in the spring, the best
21 technology available for winterizing a \$400 lawnmower
22 would not be \$500 fluid, because when one's talking
23 about protecting something it's intuitive to think about
24 the value of what's being protected.

25 And again, Congress by expressly requiring

1 cost-benefit analysis for some of the pollution
2 discharge limits was expressly contemplating exactly
3 what seems to concern you, Justice Ginsburg --

4 JUSTICE GINSBURG: Does it make any
5 difference --

6 MR. JOSEFFER: -- that costs would be traded
7 against benefits.

8 JUSTICE GINSBURG: You have the two labels:
9 The BP, "best practical," and then "best available."
10 And isn't it so that the best available technology,
11 thinking of the Clean Air Act, what they call "BAT," is
12 considered the most technology-forcing standard and then
13 there are lesser standards? But you seem to think that
14 these can be --

15 MR. JOSEFFER: All of these words can have
16 different meanings. I think of the four best technology
17 provisions that are expressly cross-referenced in this
18 provision, the one that's most informative here is the
19 best conventional pollutant control technology, because
20 Congress expressly required cost-benefit consideration
21 in determining the best conventional pollutant control
22 technology and "best" is the only word in that phrase
23 that is amenable to a cost-benefit reading.

24 JUSTICE KENNEDY: I think maybe what
25 Justice Ginsburg was beginning to get at is my question

1 here. I assume that BTA is the most rigorous of the
2 standards set forth in the statute. You can argue with
3 that assumption, but grant me the assumption for the
4 moment. If BTA is more rigorous than the other
5 standards, what is it in the regulations that reflects
6 the agency's concurrence with that? What is there in
7 the agency regulations that indicates that there is a
8 more rigorous examination under BTA than the other
9 standards?

10 MR. JOSEFFER: Well, to be clear, the agency
11 does not think and therefore did not in its regulation
12 presume that the best technology available for
13 minimizing adverse environmental impact was more strict
14 than the other standards. Just two commonsense points
15 on that. The pollutant discharge standards, which are
16 the other ones, establish their goal to be the
17 elimination of discharges, whereas here this provision
18 says that its goal is to minimize. So on its face this
19 is a more measured standard than the others.

20 And, second, as a practical matter, there is
21 no reason Congress would want greater protection for
22 fish through intake structures than for people through
23 the discharge of pollutants. I mean especially --
24 Congress enacted all of these provisions in 1972, and it
25 provided at that time that in determining pollution

1 discharge, even including toxic pollution discharge, EPA
2 was required to consider the relationship between cost
3 and benefits up until 1989.

4 And it makes no sense to think that Congress
5 would have wanted stricter standards for fish here than
6 for people under the toxic discharge provisions. And on
7 its face --

8 JUSTICE STEVENS: Are you disagreeing with
9 the premise of Justice Kennedy's question?

10 MR. JOSEFFER: Yes. Our argument is that --

11 JUSTICE STEVENS: You don't think --

12 JR. JOSEFFER: -- this provision here for
13 water intact --

14 JUSTICE STEVENS: -- Congress intended a
15 tougher standard?

16 MR. JOSEFFER: Pardon?

17 JUSTICE STEVENS: You do not think Congress
18 intended a tougher standard; is that true?

19 MR. JOSEFFER: We think Congress did not
20 intend this to be a tougher standard than the ones for
21 discharge of pollutants --

22 JUSTICE KENNEDY: Why didn't it use BPT or
23 -- or one -- one of the other standards?

24 MR. JOSEFFER: Well, because these are all
25 different standards. One thing that -- two thing are

1 for certain. One is that this standard is different
2 than all of the others --

3 JUSTICE KENNEDY: If they are different,
4 then one is either less rigorous or more rigorous.

5 MR. JOSEFFER: Right. But there is no
6 reason to presume this one is more rigorous, especially
7 considering -- first -- I mean, the words here -- it
8 uses important words here it did not use elsewhere.

9 Here we have "best technology available" --
10 "best technology available for minimizing adverse
11 environmental impact." And, first, "best," as some of
12 the examples earlier demonstrated, is not necessarily
13 the way that most singlemindedly pursues a goal at all
14 costs and without regard to all of the consequences,
15 which is why -- for example, if you were talking about
16 the best way to get home, it would not necessarily be
17 the most direct route if that required payment of a
18 toll.

19 Similarly, "minimize" is also an -- and,
20 again, Congress used "best" to mean that in "best
21 conventional pollutant control technology," because that
22 is the only word there that is amenable to our reading.

23 And, second, "minimize" is also an important
24 word, because "minimize" has two perfectly common and
25 ordinary meanings. One is to reduce to the greatest

1 extended possible. The other in ordinary usage is to
2 reduce to some lesser, reasonable level.

3 So if I said, for example, that I was trying
4 to minimize the risk of being hit by a car today, I
5 presumably would not mean that I was staying inside at
6 home all the time. Instead, it would mean that,
7 consistent with other needs, including economic ones,
8 like the need to travel to work, I was being prudent.

9 JUSTICE GINSBURG: So if it "available to
10 reduce"? "For minimizing" is no stronger than if it had
11 said "available" -- if it meant what you suggest, why
12 didn't it read "available to reduce"?

13 MR. JOSEFFER: Well, elsewhere in the Clean
14 -- in the Clean Water Act, Congress clearly did use
15 "minimize" to mean a reduction. If Congress called for
16 a, quote, "drastic minimization of paperwork," Section
17 33 U.S. Code 1251(f), then a "drastic minimization" has
18 to mean a drastic reduction, which is a perfectly
19 ordinary meaning of the word.

20 "Available" is also relevant because,
21 Justice Ginsburg, as you mentioned earlier --

22 JUSTICE SCALIA: "Reduce" in any event is --
23 is not -- is not the same as what you are arguing. You
24 are arguing reduce to the maximum extent reasonably
25 possible. The word "reduce" alone doesn't convey that.

1 The word "reduce" would just mean, you know, if you --
2 if you knock it down any amount, you have reduced it.

3 But you are saying "minimize" requires more
4 than that. It means reducing it to the maximum extent
5 reasonably possible. Isn't that what you are saying?

6 MR. JOSEFFER: No. We -- we construe -- I
7 think the other side might take that view of -- of
8 "minimize." Our view is that "minimize" means you have
9 to reduce --

10 JUSTICE SCALIA: Just to reduce.

11 MR. JOSEFFER: -- a reasonable -- refers to
12 a reasonable reduction. And so some minimal reduction
13 in this context would probably not be reasonable.

14 JUSTICE SCALIA: I didn't understand that to
15 be your position. You -- you don't think that
16 "minimize" even means that you reduce it to the maximum
17 extent reasonably possible?

18 MR. JOSEFFER: Well, I guess it depends --

19 JUSTICE SCALIA: You think any reduction
20 constitutes minimizing?

21 MR. JOSEFFER: No, because it does have to
22 be a reasonable reduction, which would not be -- in this
23 context would not be a trivial one. Reasonableness --
24 we may -- we may agree, depending on what one means by
25 "reasonable." "Reasonableness" tends to connote a

1 consideration of -- of all relevant factors.

2 JUSTICE SCALIA: Yes.

3 MR. JOSEFFER: And so when we're talking
4 about a reasonable reduction, we are going to talk about
5 a reduction that is reasonable in light of, among other
6 things, the relationship between costs and benefits. So
7 we may agree if that's what we both mean by
8 "reasonableness."

9 JUSTICE SCALIA: Let me say it again and you
10 tell me whether you agree. I had thought that what you
11 meant the meaning of "minimize" was is that you reduce
12 the -- the harm to the maximum extent reasonably
13 possible, not merely that you reduce it to some extent.

14 MR. JOSEFFER: I think that's right with --
15 with "reasonably" entailing a consideration of -- of the
16 relationship between costs and benefits.

17 JUSTICE SCALIA: Of course, "reasonable"
18 includes everything.

19 MR. JOSEFFER: Yes.

20 If -- I could reserve the remainder of my
21 time for rebuttal.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Ms. Mahoney.

24 ORAL ARGUMENT OF MAUREEN E. MAHONEY

25 ON BEHALF OF THE PETITIONERS

1 MS. MAHONEY: Mr. Chief Justice, and may it
2 please the Court:

3 I would like to start with just setting the
4 stage here. For almost 30 years now, the Executive
5 Branch has had an executive order through all
6 administrations that requires a cost-benefit analysis to
7 be done whenever regulations are adopted. And that's
8 because the Executive Branch considers that to be just
9 an essential component of reasoned decisionmaking.

10 So this Court should not be quick to
11 conclude that Congress intended to deprive the agency of
12 the tools that it needs to come up with reasoned answers
13 to these vexing problems in the absence -- -

14 JUSTICE KENNEDY: Do you agree that this is
15 a Chevron case?

16 MS. MAHONEY: Well, it is a Chevron case,
17 Your Honor. And we think -- certainly think it could be
18 resolved under step one, meaning the following: Can you
19 read the statute reasonably to say that Congress
20 unambiguously foreclosed cost-benefit analysis under
21 316(b)? I think the answer to that is no.

22 JUSTICE BREYER: Well, the -- the -- one
23 question I have on this is if I look at the two
24 standards -- and the first one is "best practical" -- it
25 talks about cost-benefit. It says you shall consider

1 the total cost of application of technology in relation
2 to the effluent-reduction benefits.

3 Then you look at "best available," and
4 they've changed the phrase. It doesn't get rid of cost,
5 but it simply says you shall take into account the cost
6 of achieving such effluent reduction.

7 MS. MAHONEY: Your Honor, but that's --

8 JUSTICE BREYER: So they both use the word
9 "cost."

10 MS. MAHONEY: They do.

11 JUSTICE BREYER: Then you look at what
12 Senator Muskie said at the time.

13 MS. MAHONEY: Yes.

14 JUSTICE BREYER: And what Senator Muskie
15 said at that time is the object here is when we move to
16 better -- to better technology, we -- you know, when you
17 get past the practical and you get into the other, it
18 says -- stop considering costs? Not quite. He says:
19 "While costs should be a factor in the administrator's
20 judgment." So he is not against using costs. He says
21 that you have to do it under a reasonableness standard
22 where you are taking into account all the goals and so
23 forth.

24 Now, that's ambiguous. But, as I read it,
25 it says: Of course you can't avoid taking into account

1 costs, but don't do it too much.

2 And, therefore, you would say: Don't apply
3 one of these big formal things when you reach your final
4 goal. There are other ways of getting there. Of
5 course, see that it isn't absurd. And for 30 years the
6 agency has had a way. It has talked about "grossly
7 disproportionate."

8 Now, that's the whole background to the
9 question. My question is, of course: Why not let
10 sleeping dogs lie? Let the agency take it into account
11 the way it's done it to prevent absurd results, but not
12 try to do it so that it's so refined you can't even take
13 account of what a fish is worth unless they happen to be
14 one of the 1.2 percent that goes to market.

15 MS. MAHONEY: Well, Your Honor, we are not
16 arguing that you have to do monetized cost-benefit
17 analysis, nor did the agency say that it was basing its
18 rule on --

19 JUSTICE BREYER: Okay, fine. Then what are
20 you arguing? Are you arguing that you should take costs
21 into account? Because I don't think -- or I don't think
22 you should reach much disagreement on that point, that
23 sometimes you take them into account the way that
24 Senator Muskie suggested.

25 MS. MAHONEY: But, Your Honor, the -- the

1 Second Circuit held, and Respondents argue, that the
2 benefits have to be essentially the same before you can
3 look at the cost of the technology.

4 JUSTICE BREYER: Well now, what they are
5 going to argue, I guess, is going to be up to them, and
6 I would be very interested in hearing it.

7 MS. MAHONEY: But that is what they --

8 JUSTICE BREYER: And then you would be
9 satisfied with the following ruling: The Second Circuit
10 went too far in saying that you can never take costs
11 into account.

12 MS. MAHONEY: Well, Your Honor --

13 JUSTICE BREYER: Of course, you can
14 sometimes take account of them, and the standard that we
15 think is there -- I'm just imagining this -- is the one
16 they have used for 30 years. Is it grossly
17 disproportionate? Are you -- is it feasible? Is it
18 practical? Are you using costs along with other things?
19 How do you feel about some slightly vague thing like
20 that?

21 MS. MAHONEY: Well, something like that, as
22 long as it is clear that costs can be --

23 JUSTICE BREYER: You are happy with that?

24 MS. MAHONEY: Well, as long as costs can be
25 compared to benefits, and the Second Circuit said they

1 could not be; that the benefits have to be essentially
2 the same. That's what "cost-effectiveness analysis"
3 means. Of course the statute doesn't say "cost
4 effectiveness."

5 JUSTICE BREYER: All right. So it's simply
6 saying the Second Circuit was wrong, the use of the word
7 "cost" is meaningless without some idea --

8 MS. MAHONEY: Of comparison.

9 JUSTICE BREYER: -- of what the costs are
10 relevant to, but a -- but a vague, grossly
11 disproportionate test is okay with you?

12 MS. MAHONEY: Well, if --

13 JUSTICE BREYER: Is it or not?

14 MS. MAHONEY: A -- a vague, grossly
15 disproportionate --

16 JUSTICE BREYER: The one they used for 30
17 years at EPA, is that all right or not all right?

18 MS. MAHONEY: Your Honor, I think the point
19 is: Yes, if for 30 years they have not been mandating
20 closed-cycle cooling under that standing -- standard, so
21 from the industry's perspective, that probably is an
22 acceptable standard.

23 But the real point here is that when we
24 start talking about to what degree can you compare the
25 costs, is it significantly greater than, is it wholly

1 disproportionate, that's exactly where Chevron comes in.
2 If everyone concludes that you can compare costs to
3 benefits, then certainly the agency should have some
4 flexibility.

5 With respect to the question of whether it
6 should be the same standard as the -- what I think
7 you're referring to as the B-A-T standard, which governs
8 discharges of even toxic pollutants, I think the answer
9 to that is that not necessarily by any means, because
10 the acronyms are similar but the text isn't. That
11 standard actually talks about the goal of eliminating
12 discharges. Congress did not say eliminate all
13 impingement and entrainment to the country. They could
14 have, they didn't.

15 They said minimize adverse environmental
16 impact, which is necessarily a broad delegation of
17 discretion to the agency. In addition, that standard --

18 JUSTICE SCALIA: Ms. Mahoney, I -- before
19 you go any further. I am not clear. I -- I did not
20 understand that for 30 years the only test has been a
21 grossly disproportionate test. You seem to accept that
22 as true.

23 MS. MAHONEY: Wholly disproportionate, Your
24 Honor, has been the test. That's what has been used.

25 JUSTICE SCALIA: Wholly disproportionate?

1 MS. MAHONEY: Wholly disproportionate, not
2 grossly disproportionate.

3 JUSTICE SCALIA: And you're -- you're happy
4 with that?

5 MS. MAHONEY: Well, the point is that I -- I
6 think what I am happy with is saying that the agency
7 should have discretion to formulate what test it's going
8 to use. But under the wholly disproportionate --

9 JUSTICE SCALIA: Okay. You think they can
10 use a wholly disproportionate?

11 MS. MAHONEY: Yes, I do, Your Honor.

12 JUSTICE SCALIA: And you'd be happy if they
13 continued to do that, but you wouldn't be particularly
14 happy if we prescribed that as the only available test?
15 Is that the --

16 MS. MAHONEY: Well, I just think that it's
17 hard to get that out of the language. When -- when it
18 doesn't come straight out of the language "wholly
19 disproportionate," then you ought to leave it to the
20 agency. But --

21 JUSTICE KENNEDY: Could the -- could the
22 agency mandate a closed-cycle system, recirculating
23 system --

24 MS. MAHONEY: Well, they haven't.

25 JUSTICE KENNEDY: -- for a whole plant?

1 Could they -- under your view, could the agency, given
2 its Chevron latitude, mandate closed circulation?

3 MS. MAHONEY: Under a wholly
4 disproportionate standard, Your Honor?

5 JUSTICE KENNEDY: Just under the statute.

6 MS. MAHONEY: Under the statute, I doubt it.
7 It would probably be arbitrary and capricious. But --
8 and -- and let me explain why.

9 The statute talks about minimizing adverse
10 environmental impact, and it's important to understand
11 what the EPA did here. At page 169a of the appendix,
12 they say: "We are using impingement and entrainment as
13 a quick and convenient metric." In other words, we are
14 going to make you reduce impingement and entrainment to
15 the -- to a very large extent, get it down, you know,
16 close to zero if we can, whatever. But that's not
17 because it is itself adverse environmental impact. They
18 say they didn't define it at 287a.

19 JUSTICE KENNEDY: But it -- it seems to
20 me -- of course, there are limits on what the agency can
21 do, but if it couldn't mandate the closed circulation
22 system -- I think I've got the term right -- if it could
23 not do that, then this is not -- you're backing away
24 from Chevron.

25 MS. MAHONEY: Well, here's -- here's how we

1 would say it, Your Honor. There may be some locations
2 where that -- where it would not be wholly
3 disproportionate. If -- if for some reason you couldn't
4 design an alternative system that would protect, for
5 instance, a balanced population of fish in that water
6 body, then it might be that -- that -- that
7 closed-cycled cooling would be required.

8 But on a national basis, at 355a the agency
9 said that they understood that reducing impingement and
10 entrainment at the ranges they were talking about would
11 not be justified in many locations across the country.
12 And that's because power plants may be impinging numbers
13 of fish that aren't actually harming that water body.
14 Fish have the potential to procreate in very substantial
15 numbers. Some fish spawn 500,000 eggs in a year. And,
16 so, if the -- and throughout the act, even under 316a,
17 for instance, Congress has said that, even with respect
18 to thermal discharges, you can get variances if you can
19 show that you are not harming a balanced population of
20 fish in the water body.

21 So given that, given the variances
22 throughout the act and even these kinds of limits on the
23 discharge standards, which are designed to protect human
24 health, why would you read the mandate for the maximum
25 technology on intake structures which has nothing to do

1 with human health, nothing. It is just to protect fish
2 in the water body.

3 So, it doesn't make sense that in a single
4 sentence added in conference in a voluminous act about
5 discharges of pollutants, that Congress would mandate
6 the maximum technology for --

7 JUSTICE SOUTER: Then why didn't they use
8 the word "cost"?

9 MS. MAHONEY: Because, Your Honor, I
10 don't --

11 JUSTICE SOUTER: I mean, your -- your
12 argument is they used cost here, they used cost there,
13 they didn't use cost here but they must have meant cost.

14 MS. MAHONEY: Here's why, Your Honor:
15 Because the most significant comparison between this
16 statutory section and the others is they didn't list any
17 of the factors. All of the other sections have -- have
18 a detailed list of considerations that the agency must
19 take into account. This one says nothing. This is not
20 an example of where --

21 JUSTICE SOUTER: And maybe the inference to
22 be drawn is the agency is not supposed to be taking any
23 of these considerations into account.

24 MS. MAHONEY: I -- I don't think that's the
25 most reasonable inference because it would lead to very

1 irrational results, 200-foot cooling towers in -- in --
2 in town -- in historic old towns --

3 JUSTICE SOUTER: You've got the -- I mean
4 everybody agrees that there is kind of an ultimate
5 irrationality standard here. So that's -- that's not --
6 that -- that kind of a horrible is not really the point.

7 MS. MAHONEY: I don't think so, Your Honor.
8 I don't know where in the language you can get allowance
9 to take into account things like energy impacts. Why?
10 If Congress gave a complete and full standard, why can
11 we take into account aesthetic harm, navigational harm,
12 energy impact? It doesn't allow for that, and I think
13 it doesn't allow for that because Congress intended the
14 agency to define the terms in a reasonable way.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MS. MAHONEY: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Lazarus.

18 ORAL ARGUMENT OF RICHARD J. LAZARUS

19 ON BEHALF OF THE RESPONDENTS

20 MR. LAZARUS: Mr. Chief Justice and may it
21 please the Court:

22 In section 316(b), Congress did not
23 authorize EPA to decide that the benefits of minimizing
24 adverse environmental impact did not justify the cost of
25 available technology.

1 JUSTICE SCALIA: Except -- except, you say,
2 when it's grossly disproportionate?

3 MR. LAZARUS: No, Your Honor.

4 JUSTICE SCALIA: Where -- where -- where do
5 you find that? Or the Second Circuit said, anyway.

6 MR. LAZARUS: Let me explain our position,
7 Your Honor. EPA has no authority in any circumstance to
8 decide that fish aren't worth a certain amount of cost.
9 So EPA never has the authority, in any context, to weigh
10 costs against benefits. The reason why we think that
11 would not lead to the kind of absurd circumstances
12 they're suggesting is not because Congress has that --
13 sorry -- EPA has that authority. It's because we don't
14 think that those kinds of absurd circumstances result
15 from the cost-benefit balance mandated by Congress.

16 Let me explain why, because there are three
17 safeguards in the statutory language, its plain meaning,
18 which would guard against any possibility that a
19 regulated facility would have to spend millions or
20 hundreds of millions or billions of dollars to protect
21 just a few fish.

22 They would -- that would never happen. I
23 mean, it would never happen, but not because EPA can
24 decide it's not worth it. This is why it would never
25 happen. Three reasons, and these are contributing

1 reasons.

2 The first reason is if you actually had some
3 exorbitant huge increase in costs, if that would happen,
4 most of those cases would be triggered by the
5 availability requirement. And that is, that EPA could
6 deem that cost not be reasonably borne by the industry.
7 That's the ground they --

8 JUSTICE ALITO: I don't want to interrupt
9 you in your enumeration of three reasons, but I just
10 don't see how you get cost into the concept of
11 availability. It doesn't fit in there any better than
12 it does under "best."

13 MR. LAZARUS: No, I think it -- I think it
14 fits quite well in the word "available." And EPA has
15 said that since 1976. It was not disputed by anyone
16 that available --

17 JUSTICE ALITO: It's not the plain meaning
18 of the word. If I look in the real estate page of
19 the -- of the "Washington Post" on Sunday and I look for
20 the best house that is available, the best house that is
21 available might cost \$50 million. Now, that would be
22 available to me. I couldn't afford it, but it would be
23 available.

24 I don't see how cost can be fit into that
25 concept of availability.

1 MR. LAZARUS: I think because it's clear
2 that in the context of the Clean Water Act what Congress
3 meant in available -- and this is throughout the
4 statute -- all the technology-based performance
5 standards, the availability was both technologically
6 available and economically available. And that is not
7 --

8 JUSTICE SCALIA: You are using the word in a
9 strange -- economically available? Economically
10 feasible maybe. But you wouldn't say economically
11 available. You wouldn't say I can't buy the house
12 because for me it's not economically available. I might
13 say it's not economically feasible, it's not
14 economically possible, but it's not economically
15 available? That's weird.

16 MR. LAZARUS: It may -- it may be weird,
17 Your Honor, but it is not anything that has ever been
18 disputed in the interpretation of the Water Act. It's
19 how EPA has interpreted it for 30 years, and no court,
20 no one, has ever disputed the fact that availability
21 includes economic availability.

22 JUSTICE SCALIA: I disagree with that.

23 JUSTICE SOUTER: Availability -- if
24 availability includes economic availability, why doesn't
25 "best" include economically best?

1 MR. LAZARUS: Because what the statute says
2 is not that EPA should -- should promulgate the best
3 technology. It says the best technology available for
4 minimizing.

5 And what -- what Congress did was told EPA
6 what the technology must be best for. And that is not
7 reducing it to the amount that EPA believes is sensible.
8 It means minimizing it, which means --

9 JUSTICE SCALIA: But that -- but that -- but
10 that doesn't answer, it seems to me, the question. Yes,
11 the best available for that purpose, but what is best
12 for that purpose could include other factors such as how
13 expensive is it and -- and how much it harms the
14 industry and all sorts of things.

15 MR. LAZARUS: No, it certainly -- it
16 certainly includes costs. It certainly includes sort of
17 whether it can be reasonably borne by the industry.
18 There's --

19 JUSTICE SCALIA: Why? Why does it? I don't
20 know how you draw the lines you are drawing. You say
21 yes, "best" includes whether it would bankrupt the
22 industry. Well, if it includes whether it would
23 bankrupt the industry, why shouldn't it include whether
24 it would bankrupt the individual power company?

25 MR. LAZARUS: Well, there is no -- there is

1 no question, Your Honor, that the word "available," and
2 perhaps the word "best" -- we think the word "available"
3 includes an inquiry into whether or not it could be
4 borne by the industry. We also wouldn't doubt, Your
5 Honor -- we wouldn't doubt --

6 JUSTICE SCALIA: I -- I agree with you on
7 that, whether it's borne by the industry. But you draw
8 the line there.

9 MR. LAZARUS: No, that's not what --

10 JUSTICE SCALIA: Why isn't it where that
11 line is drawn up to the agency?

12 MR. LAZARUS: We're not, Your Honor -- let
13 me explain because I think we are confusing different
14 inquiries here.

15 JUSTICE SCALIA: Okay.

16 MR. LAZARUS: We also would agree that EPA
17 can take into account site-specific factors in deciding
18 whether technology is available. Some technology is
19 available for some facilities given their location, but
20 not available for other facilities given their location;
21 but when -- where EPA decides, right, where EPA decides
22 whether technology is available or not, we don't doubt
23 they have authority to do that and some discretion to
24 decide when technology is no longer available because of
25 the cost. But where they don't have --

1 CHIEF JUSTICE ROBERTS: Isn't that -- isn't
2 that exactly what they did here in listing what they
3 call a suite of technologies or approaches that is
4 available? I thought that was exactly what they did.
5 They said for different locations, different
6 technologies may be the best available.

7 MR. LAZARUS: Right. And that is perfectly
8 appropriate. But here's what they did which is not
9 permitted. They could decide based on site-specific
10 factors whether technology is available. What they
11 can't do is, once they decide a technology is available,
12 they can't then say: But we don't think it's worth
13 minimizing adverse environmental impact with that
14 technology, because we don't think those benefits are
15 worth that cost. That comparison inquiry they can't
16 make.

17 So if I can do my safeguards: The first one
18 is we think availability and cost would eliminate a lot
19 of those problems. But let's assume -- let's just
20 assume that technology is much more expensive, way more
21 expensive, but it's still available in our view. It
22 still can be borne by the industry even on a
23 site-specific basis, which we don't disagree that could
24 be done.

25 Then let's say that the national -- EPA says

1 well, but that will only save -- you know, your cheaper
2 technology will only save a million fish. We actually
3 think you have to save a million and one fish.

4 JUSTICE BREYER: I don't see how you can do
5 that. I just don't see it. It's -- I mean, suppose
6 that the cost of this machine is \$100,000. Now, if you
7 say I'm talking about using that machine for an entire
8 industry, you would say, my God, that is certainly
9 available. But here I have just one part of the
10 industry here; I have a little plant; and you know, to
11 hook that machine up is only going to save one
12 paramecium. Neither of us wants that.

13 And so the logical thing to say is to say
14 well, it isn't available for that. And I would be with
15 you there.

16 MR. LAZARUS: No --

17 JUSTICE BREYER: But to be honest about it,
18 I would have to say the reason it isn't available is
19 quite -- it isn't available for minimizing the -- the
20 harm -- that particular adverse impact which is killing
21 a -- a water animal. The reason it isn't is because it
22 doesn't kill any water animals. Well, let me be honest;
23 it kills one, or it kills two --

24 MR. LAZARUS: But --

25 JUSTICE BREYER: Or it kills three, and

1 don't tell me de minimis, because as soon as you say de
2 minimis, I'm going to add one, okay?

3 (Laughter.)

4 JUSTICE BREYER: But what I'm trying to show
5 here is that -- that there -- it isn't meaningful to
6 talk about cost being available for an end, without some
7 -- about something not being available for an end in
8 light of its costs, unless you take into account what
9 that end is. I mean, we'd spend trillions to make
10 America secure so not 50 thousand people die, but we
11 won't spend trillions for a road accident. And -- and
12 of course you take those things into account.

13 So that's -- that's exactly the point I
14 wonder about. Are you really saying pay no attention or
15 are you saying, which I could understand better, but you
16 have to say what you want, I mean, that what we mean is,
17 yes, they can take costs into account. That's what they
18 do under the comparable standard, best available
19 technology, but just use your head, don't do it too
20 much, don't use it -- like take other things into
21 account, too, don't do a formal cost-benefit analysis;
22 don't try to evaluate the parametrium. Do the difference
23 between the -- you know, the two standards: Best
24 practical, best available. Do "grossly" or "wholly" or
25 something.

1 MR. LAZARUS: But for best available there
2 is no cost-benefit analysis. It's only for best
3 practical --

4 JUSTICE BREYER: No, no, no, but best
5 available says take costs into account.

6 MR. LAZARUS: Right. Right.

7 JUSTICE BREYER: Now, there is a way of
8 doing that which is what I'd call a commonsense way that
9 they have some discretion over, that doesn't involve
10 some enormously elaborate thing; and that's what I am
11 searching for. I don't -- I am not sitting here with an
12 answer. I'm trying to find a way of making sense of
13 this.

14 MR. LAZARUS: But -- well, let me try to
15 give you an answer. They can consider costs only in a
16 cost feasibility perspective. They cannot compare costs
17 to benefits. Congress made --

18 JUSTICE BREYER: Those two things seem
19 contrary to me. I don't see how you could -- do you see
20 why?

21 MR. LAZARUS: No, I don't, because it is two
22 fundamentally different policy decisions. What Congress
23 decided in 1972 was that EPA should be allowed to
24 consider costs in determining whether technology was
25 available, but not -- and they did this for a reason,

1 Your Honor -- but not to weigh those costs against those
2 benefits in deciding whether or not those costs were
3 worth it.

4 JUSTICE BREYER: But how is it -- how is it
5 feasible if it has no benefits at all?

6 MR. LAZARUS: It -- it -- it's still
7 feasible for, in terms of the industry, whether they can
8 afford it.

9 JUSTICE BREYER: Then we are going to reach
10 our insane results.

11 MR. LAZARUS: Yes -- you are never going to
12 -- you are never going reach the insane result. It's
13 never going to happen, Your Honor. It's never going to
14 happen. Put aside the availability limitation, which
15 will cut off like it did dry cooling. EPA rejected it
16 saying it was too expensive. Not because of the
17 cost-benefit: it's too expensive. If you have some --
18 something where it will only just be saving a few fish
19 -- what you have to remember is that 316(b) doesn't
20 impose technology design reform. What it imposes is
21 that technology-based performance standards. And if EPA
22 were to say, you have to save just a few more fish, if
23 they really want to promulgate a standard on that kind
24 of increment, the regulated facility would always be
25 able to save just a small increment, without adopting

1 some expensive technology, because of the way cooling
2 water intake structures work.

3 CHIEF JUSTICE ROBERTS: Counsel, your
4 argument is focused on proving that your interpretation
5 won't lead to insane results, as you put it. But you
6 have to do a lot more than that. I mean, you have to
7 establish that this is not ambiguous language.

8 MR. LAZARUS: Well, I think it's not
9 ambiguous language because you look at the statutory
10 language, it says -- right? That's in section 316(b) --
11 EPA is required -- right? Instructed, required, that
12 location, design, construction, capacity of cooling
13 water intake structures reflect the best technology
14 available for minimizing adverse environmental impact.
15 And what we argue, and I think this is quite compelling,
16 Your Honor, is that with that language Congress itself
17 struck the cost-benefit analysis. Congress said for
18 costs, EPA has to ensure the technology is available.
19 Either on industry wide, and could take site into
20 account site-specific factors. For benefits, Congress
21 said EPA has to ensure that the environmental benefits
22 -- the adverse environmental impact -- be minimized to
23 the extent it can be done with available technology.

24 JUSTICE ALITO: You have a good -- you have
25 a good argument based on the language of the statute, I

1 think, that that costs cannot be taken into account at
2 all.

3 MR. LAZARUS: But --

4 JUSTICE ALITO: At all. But once you
5 concede that it can be taken into account at all, then I
6 don't see why you were not in Chevron step 2.

7 MR. LAZARUS: Well, Your Honor, this is a --

8 JUSTICE ALITO: Once the foot is in the door
9 I don't see how you can --

10 MR. LAZARUS: It's a complete line. Whether
11 the word "available" can extend to cost feasibility
12 analysis is one question. Whether the word "available"
13 can be -- allow EPA to compare costs and benefits, to
14 weigh one against the other, that's a completely
15 different question. So the fact that we say the first
16 half, it doesn't mean the second. Congress really had a
17 -- what they were doing in 1972, was Congress --

18 JUSTICE SOUTER: But our problem is that
19 we -- you've got a clear distinction in mind, and I -- I
20 don't think we are getting the distinction. Is the
21 distinction in crude terms this: they can consider
22 costs in the sense that on an industry-wide basis they
23 can ask, is there money in the bank or will there be
24 money in the bank to pay for this? They don't ask
25 cost-benefit in the sense of asking: is the money in

1 the bank worth what they are going to get for it?

2 So is -- is the line you are drawing a money
3 in the bank line? Is that the point you are making?

4 MR. LAZARUS: No. It's -- it's they can't
5 make a judgment that it's not worth it. It's --

6 JUSTICE ALITO: Right. But --

7 MR. LAZARUS: And for reasons that --

8 JUSTICE SOUTER: But if the only question,
9 when you say they can consider costs, are you saying
10 they are simply asking whether it is economically
11 possible for the industry to afford this, regardless of
12 whether it's any good or not?

13 MR. LAZARUS: Absolutely.

14 JUSTICE SOUTER: Is that what --

15 MR. LAZARUS: Absolutely. What -- 1972, if
16 this is what Congress is faced with.

17 JUSTICE ALITO: When you say whether the
18 industry can afford it, does it take into account at all
19 the effect on the that price consumers have to pay? If
20 the effect of achieving a small gain in protecting -- uh
21 -- fish is to increase electricity costs ten times, is
22 that something that cannot be taken into account?

23 MR. LAZARUS: If it can be reasonably borne
24 by the industry or some site-specific, they can't make
25 any other judgment. And if I can, Your Honor --

1 JUSTICE BREYER: Can't make any other
2 judgment. So imagine the consequence of that
3 environmentally. They can't make any other judgment.
4 Suppose the EPA is right: it's going to add 20 electric
5 plants, huge plants, purely to save the fish; and the
6 result is the cost of electricity goes up, and the
7 result is there are no electric cars, because people
8 make the comparison with oil, and now they have to have
9 petrol. I mean, it's very hard for me to believe that
10 Senator Muskie would have written a statute that would
11 have foreseen such an effect.

12 MR. LAZARUS: Right. I think because such
13 an effect wouldn't happen. What Senator Muskie and
14 Congress was worried about in 1972, Your Honor, was they
15 were worried about the possible underregulation. They
16 worried about overregulation. And their concern was, if
17 you gave EPA the authority to weigh costs against
18 benefits, you would have systemic underregulation and
19 the regulatory process bogged down by --

20 JUSTICE BREYER: That's exactly where I
21 agree with you. So I go back to page 170 of the
22 legislative history, which I have read now six times,
23 and I agree with you that it is not totally clear.
24 Maybe you think it is. But it seems to me what he is
25 saying there is just what you've said: Don't go into

1 this with some elaborate thing, but remember costs are
2 still relevant. And what I've been searching for
3 throughout is a set of words that would help me
4 translate that thought into a legal reality.

5 MR. LAZARUS: And going back to Justice
6 Souter's statement a moment ago, which I agree with,
7 what Senator Muskie's distinction he wanted to draw was
8 to allow EPA to engage in cost analysis as to
9 feasibility, money in the bank, but not to make that
10 value judgment of what's worth what. And --

11 CHIEF JUSTICE ROBERTS: Well, if you get to
12 that money in the bank, does this mean that best
13 technology available changes over time? I mean, maybe
14 the industry could have borne these costs two years ago,
15 but they probably can't today. Nobody has money in the
16 bank today.

17 (Laughter.)

18 MR. LAZARUS: It certainly does depend, and
19 this is how EPA does it, not just in this area but
20 throughout all the technology-based performance
21 standards, looking at availability. EPA looks at
22 industry revenues, barriers to entry, and decides
23 whether or not this technology is available.

24 CHIEF JUSTICE ROBERTS: So you think they
25 could have said, two years ago, this is what you have to

1 do, but today they would say you don't have to do that
2 anymore --

3 MR. LAZARUS: It's quite possible --

4 CHIEF JUSTICE ROBERTS: -- even though the
5 technology is still available.

6 MR. LAZARUS: Notice -- notice -- not
7 economically. Notice in this case, what the Second
8 Circuit said in remanding was EPA may be able to justify
9 the same decision on availability basis, but they didn't
10 make that determination here. What has happened for the
11 past 30 years, which is how I -- counsel over here
12 posited the case -- what has happened over the last 30
13 years is the EPA has ignored the statutory language and
14 it engaged in this wholly disproportionate analysis as a
15 result, which has led to the very kind of
16 underregulation that Senator Muskie was worried about,
17 and that is that they had never looked to see whether
18 closed-cycle cooling is in fact available, economically
19 available. Instead, they tried to compare these things.
20 They've just kept from going Phase I through cycle
21 cooling. They've never given a serious look at
22 closed-cycle cooling. And the kind of increment we're
23 talking about, if they actually looked at closed-cycle
24 cooling, if they'd make available information, we are
25 not talking about increments; it's a 98 percent

1 reduction in the water flow that happens. If you go
2 from one --

3 JUSTICE STEVENS: Mr. Lazarus, can I ask you
4 --

5 MR. LAZARUS: -- phase to closed cycle.

6 JUSTICE STEVENS: May I ask you this
7 question? It's not economically available if it would
8 bankrupt the whole industry?

9 MR. LAZARUS: That's right.

10 JUSTICE STEVENS: What about if it bankrupts
11 three firms?

12 MR. LAZARUS: If it bankrupts three firms --
13 if one looks how EPA has interpreted that historically,
14 Your Honor, throughout all the pollution control
15 statutes, the Air Act, the Water Act, Resource
16 Conservation Act, EPA has said that itself is not enough
17 to say it's available for the industry, but it is
18 possible -- we don't doubt this -- it is possible --

19 JUSTICE STEVENS: But it's not economically
20 available to those three firms.

21 MR. LAZARUS: No, but here's what happens:
22 What the EPA said -- and you can see this in this
23 Court's decision in the Crushed Stone case, where the
24 Court drew this distinction. A particular facility can
25 seek a variance based on cost impact to them, if they

1 can show that the cost to them is much greater because
2 of some particular circumstances to them than it is for
3 the industry as a whole. And this Court said they could
4 do that. EPA has long said it. We don't question it,
5 that they can do a cost-benefit --

6 JUSTICE STEVENS: No, but this -- they just
7 have -- they are just not quite as strong a company.

8 MR. LAZARUS: No. And that's the very
9 distinction this Court drew in the Crushed Stone case.

10 JUSTICE SOUTER: But is the variance a
11 matter of statutory right or -- or is it available under
12 a regulation?

13 MR. LAZARUS: It's -- the way this Court
14 interpreted sort of the use of categorical standards in
15 the Dupont case, early on in the 1970s, the Court said
16 in that case that EPA can promulgate these kind of
17 technology-based performance standards on a categorical
18 basis --

19 JUSTICE STEVENS: Yes.

20 MR. LAZARUS: -- but if they do so, they
21 have to take -- they have to give a variance possibility
22 because if a particular --

23 JUSTICE SOUTER: Why -- why isn't that
24 simply another name for cost-benefit analysis?

25 MR. LAZARUS: Because you can't do it on a

1 cost-benefit -- it's not a cost-benefit variance.

2 JUSTICE SOUTER: Well, you are doing it on
3 cost-benefit. You are saying --

4 MR. LAZARUS: No --

5 JUSTICE SOUTER: -- if we require this and
6 the company goes bankrupt, the value of demanding it is
7 not satisfied by the result.

8 MR. LAZARUS: No, that's not the
9 justification for the cost variance. The justification
10 for cost variance is not because of a sort of benefits
11 being lost. It's because if you can show -- if the only
12 basis you can get a cost variance -- and this is an
13 important distinction but not an easy one -- the only
14 way you can get a variance is if you can show the
15 assumptions EPA made about how much this would cost
16 don't apply to you because there is something different
17 about your facility, so it actually costs you much more.
18 You can get a variance for that. You can't get a
19 variance if you say, "We are a weak company and our
20 revenues aren't strong." You can't get a variance for
21 that.

22 JUSTICE SCALIA: I assume you can't get a
23 variance and you also would say the EPA cannot take it
24 into account if this particular plant -- although the
25 company as a whole is quite prosperous, this is a small

1 plant, and it's not generating that much electricity.
2 It's really just not worth it to put in this big tower.
3 We are going to close down.

4 MR. LAZARUS: No, that --

5 JUSTICE SCALIA: That would not be something
6 that EPA could take into account.

7 MR. LAZARUS: The EPA can take into account,
8 as they do for all technology-based performance
9 standards, they can take into account the size of the
10 facility to the extent it bears on the availability
11 question. They can't do it because they think it's not
12 worth it in terms of the benefits over here. They can
13 -- they can take into account on availability, but not
14 over here.

15 JUSTICE BREYER: Well, what about the
16 particular case? What they said here is that, if you
17 require the closed circuit for everybody, we are going
18 to have to build, we are going to have to pay an energy
19 penalty of 2.4 to 5.3 percent. You will have to build
20 20 additional 400-megawatt plants, which is huge, many,
21 many, many billions of dollars, and the -- just to
22 replace the capacity you have lost. And the result,
23 which seems quite logical, would be to increase by a
24 lot, not just a little, the consumption of fossil fuel.

25 Well, now how are they not -- you seem to

1 be arguing that they can't take that into account,
2 which, for an environmental agency, I would have
3 thought, "But they must take it into account."

4 MR. LAZARUS: We are not saying they can't
5 take that into account. EPA has said they can. The
6 Second Circuit said they could, and we agree. But
7 here's how they could take it into account. They can
8 take it into account in deciding what will be necessary
9 to reduce environmental impact. So they can take into
10 account those things that --

11 JUSTICE BREYER: So if they did exactly the
12 same thing they've done, which I've just read you, and
13 they put a label on it, instead of saying "thinking of
14 benefits," we were calling it now "taking into account
15 environmental impacts," then they could do it?

16 MR. LAZARUS: Well -- but they -- here's
17 what they could do, Your Honor, and I don't think there
18 is anything anomalous about this: The EPA can say,
19 "Here are the factors we're going to take into account
20 in deciding whether or not we are minimizing adverse
21 environmental impact, and we have some authority to
22 decide what is and is not a relevant environmental
23 impact. We -- here the industry can take into account
24 in deciding whether or not this technology, this cost,
25 makes it available or not." They have authority here,

1 but once they decide whether technology is available,
2 once they decide what "environmental impact" means and
3 what it means to minimize, once they decided that, they
4 can't then say, "Well, we don't think these impacts are
5 worth those costs."

6 JUSTICE BREYER: I see that thought, and
7 this is what's concerning me, but there may be a very
8 good answer. A lot remains to be done with EPA. They
9 have an enormous job to do. And I wouldn't want to get
10 them tied up in unnecessary red tape, where everybody is
11 suddenly taking them to court on rather technical
12 things. So if this "grossly" or "wholly," or whatever
13 you call it, read out of the Muskie page 170 -- read it
14 out of the "available technology" definition, you can
15 take costs into account; just don't do it in this other
16 way. I can see how they could work with that.

17 MR. LAZARUS: Right.

18 JUSTICE BREYER: Now, I'm worried about what
19 you are saying that may make it so difficult for them
20 that they won't be able to do the job.

21 MR. LAZARUS: Well, we are doing the exact
22 opposite now, Your Honor. What we are trying to do is
23 say that the information that EPA has to focus on, the
24 way Congress constrained them, is limited and it doesn't
25 allow them to weigh one against the other.

1 What happens if -- and this is why Congress
2 didn't want to give EPA cost-benefit analysis authority
3 here or almost anywhere in the statute. Congress was
4 concerned that it would bog down the regulatory process,
5 and that is that if you actually had EPA -- had to come
6 up to this weighing of one to the other and try to weigh
7 these imponderables, you would be subject to such
8 extraordinary attack -- it happened in this case with
9 this rulemaking -- it would slow down the decisionmaking
10 process. It wouldn't speed it up. Congress understood
11 that information is not costless. And sometimes one can
12 achieve a better cost-benefit balance by having
13 regulation be based on less information rather than more
14 information.

15 JUSTICE BREYER: I agree.

16 MR. LAZARUS: And that's why they said, "We
17 want to take out this particular" -- remember, before
18 1972, there was cost-benefit analysis based upon
19 assessment of water quality impacts. And Congress saw
20 what happened with that. It completely paralyzed the
21 regulatory decisionmaking process. They ended up with
22 very little regulation. So they said: All right, we're
23 not -- we think EPA can do cost-feasibility analysis
24 well. We don't think they do cost-benefit analysis
25 well. We think that kind of information is several

1 orders of magnitude greater and more imponderable, and
2 it's --

3 JUSTICE SOUTER: Well, is the reason they
4 don't do cost-benefit analysis well because they are
5 forced to do it in a political atmosphere in which it is
6 difficult to make rational decisions? Is that basically
7 the reason Congress would have come to that conclusion?

8 MR. LAZARUS: I think that may be part, but
9 I don't think that's --

10 JUSTICE SOUTER: Is that --

11 MR. LAZARUS: -- the real reason in 1972. I
12 think that does happen. I think the real reason, 1972,
13 was that Congress saw what happened before, and they
14 said, it turns out to be really hard in the water
15 quality context to measure and value environmental
16 impact. It's so hard that we think that EPA can get a
17 better, more rational result if we instead say, here's
18 what you focus on, technology available, minimizing, and
19 don't try to compare.

20 JUSTICE SOUTER: But I think -- I see your
21 point, but I think if I accept your point, all I am
22 doing is saying, they may in a kind of smoke and mirrors
23 way take cost-benefit analysis into consideration sub
24 rosa, when they decide what availability is going to
25 mean; and they make take it into consideration when they

1 decide what a -- a -- an undesirable environmental
2 impact is; and that sort of gets the -- the weighing
3 process out of the public focus.

4 And if they do it that way, they -- they can
5 bring in just the considerations that Justice Breyer is
6 talking about, but they don't do it in an obvious way.
7 And I think that's what your argument boils down to.

8 MR. LAZARUS: Well, I think argument boils
9 down to that they can focus on environmental impact,
10 decide what is and isn't environmental impact, they can
11 focus on availability, decides what costs are relevant
12 to that, and when is the technology available --

13 JUSTICE SOUTER: What costs are relevant to
14 that?

15 MR. LAZARUS: Well, the relevant --

16 JUSTICE SOUTER: When they made that
17 decision, are they not in effect anticipating the kind
18 of decision they would make on a more specific basis in
19 a more highly charged political atmosphere, if they
20 engaged in the cost-benefit analysis that you say they
21 can't do?

22 MR. LAZARUS: It may well be one reason why
23 Congress didn't want to compare one to the other, about
24 that charged atmosphere. But what -- they can't do it.
25 I don't think they are doing it sub rosa. Our point is,

1 Your Honor, is they do it according to Congress's
2 instruction, you won't have these kinds of absurd
3 results.

4 JUSTICE BREYER: And the page -- the page of
5 the legislative history or the page of the text of the
6 statute that says what I think is a -- I mean, try it
7 with your son. It costs \$100.

8 MR. LAZARUS: I think that's --

9 JUSTICE BREYER: Your son says, "It costs
10 \$100." You say, "That's too expensive." He says, "But
11 I didn't tell you what it was for." What? I mean --
12 you see?

13 Now you tell me the page, and I have read a
14 lot of it; tell me the page of the legislative history
15 or the phrase of the statute where it says what you just
16 said -- that you cannot take into account what you were
17 buying for that \$100.

18 MR. LAZARUS: Right.

19 JUSTICE BREYER: What page? I will read it
20 again.

21 MR. LAZARUS: I'm -- I'm not going to give
22 you a specific page. I'm going to give you the
23 statutory language in section 316(b).

24 JUSTICE BREYER: I know 316(b).

25 MR. LAZARUS: What Congress is doing

1 systemically in 316(b) and throughout the Clean Water
2 Act is that Congress is saying we want to give EPA the
3 authority for cost feasibility; we don't believe in this
4 -- that it works with cost-benefit analysis because of
5 the weighing against one against the other.

6 JUSTICE SCALIA: Well, it has -- it has
7 required, not just permitted but required cost-benefit
8 analysis in other areas. What --

9 MR. LAZARUS: Well --

10 JUSTICE SCALIA: What -- what is your
11 response to the fact that it -- it seems ridiculous to
12 allow it, and indeed require it in effluent situations
13 where human health is at stake, and yet to forbid it in
14 this intake situation when you were just talking about
15 the snail darter. What -- what's your response to that?

16 MR. LAZARUS: Two responses, Your Honor.
17 The first is that in 1972, which is when 316(b) was
18 enacted, Congress did not allow cost-benefit analysis
19 for toxic pollutants. Toxic pollutants were not
20 regulated under section 301 and 304 of the statute.
21 They were not subject to best practicable technology;
22 they were not subject to best available technologies.
23 They were subject to a separate provision, and that this
24 section 307 at that time. That's a subsequent amendment
25 to the law. Where Congress originally --

1 JUSTICE SCALIA: And did that section 307
2 not allow cost-benefit?

3 MR. LAZARUS: It did not allow cost-benefit.
4 The way Congress originally approached hazardous water
5 pollutants and toxic air pollutants, the Clean Water Act
6 is the same. They said EPA, this is so harmful that we
7 actually want you to do an assessment to figure out at
8 what level will it no longer be harmful to humans? And
9 what they found out when they tried that, is they found
10 out, boy, that information is unbelievably hard to come
11 up with. And so, they had -- the regulation depended on
12 this incredible information, and the result was that EPA
13 did nothing. They did the nothing for water toxics,
14 they did nothing for air toxics. So in 1977, when they
15 learned how more information could lead to less
16 regulation, they said all right: we've got to change
17 that. That doesn't work, so we are going to move to a
18 technology-based performance approach in the first
19 instance, and then couple it with -- still keeping the
20 health-based as a backup, to be able to go past that.

21 So they put the technology-based as the
22 first step and they kept the 307, but in 1972, Your
23 Honor, there was only one provision of the Clean Water
24 Act in which Congress delegated any authority to EPA to
25 compare costs and benefits; and that was under 301(b)(2)

1 and 304(b)(2). And in that provision they said until
2 1977 only, EPA for best practical control technology,
3 you can and you must do cost-benefit analysis.

4 CHIEF JUSTICE ROBERTS: Counsel --

5 MR. LAZARUS: That's the only provision.

6 CHIEF JUSTICE ROBERTS: You would have to
7 agree, wouldn't you, that the panel's decision in this
8 case overruled the prior panel's decision in judge
9 Katzman's decision in Riverkeeper 1?

10 MR. LAZARUS: No, they certainly didn't
11 overrule it for two different reasons. If you look at
12 the Riverkeeper 2 opinion, I think it's on 25a, note 11,
13 they explain that in Riverkeeper 1, dry cooling was
14 rejected because it was too expensive. That's an
15 availability consideration, not a cost-benefit
16 consideration.

17 CHIEF JUSTICE ROBERTS: Well, in Riverkeeper
18 1 what Judge Katzman said is that we think EPA was
19 permitted to consider costs and energy efficiency in
20 determining the best technology available. He was
21 deciding it on the basis of availability, too.

22 MR. LAZARUS: He gave -- he gave several
23 reasons, Your Honor. Also included was the fact that it
24 was too expensive. Which is why the Riverkeeper 2 court
25 characterized that as dictum. In all events, with all

1 due respect to my former colleagues on the Georgetown
2 faculty, Judge Katzman was wrong.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
4 Mr. Joseffer, you have four minutes remaining.

5 REBUTTAL ARGUMENT OF DARYL JOSEFFER
6 ON BEHALF OF THE ENVIRONMENTAL
7 PROTECTION AGENCY, ET AL,
8 SUPPORTING THE PETITIONERS

9 MR. JOSEFFER: Thank you. If I could start
10 where I left off, the fact that Riverkeeper 1 in their
11 view is wrong, I think does confirm what anyone would
12 conclude after reading the two opinions, which is that
13 they are not consistent. At a minimum that helps to
14 demonstrate ambiguity.

15 JUSTICE GINSBURG: It's an ambiguity the
16 government said it could live with. Now the government
17 advised this Court not to grant cert in this case, isn't
18 that so?

19 MR. JOSEFFER: Our -- our -- what we said
20 was we thought the court of appeals was dead wrong, that
21 it was a very important issue, but in the interlocutory
22 posture of this case, which was a remand, we did not
23 think that it was -- was so important as to warrant your
24 cert standards. Frankly, we were delighted to find out
25 we were wrong about that.

1 The other point I need to make is that this
2 case is, after all, about the one sentence in the Act
3 that deals with water intake, not about all the other
4 detailed provisions about the discharge of pollutants,
5 which is important because about half of the last
6 argument dealt with the discharge of pollutants.

7 The fact that there is no list of factors
8 here, and instead just one general sentence, just
9 underscores that on this issue, Congress was delegating
10 especially broad authority to the agency to address a
11 problem that at the time was relatively novel, and that
12 legislative record confirms Congress itself did not give
13 any real weight to. If we want to look at floor
14 statements, thought I would not look to the floor
15 statement of Congressman Muskey concerning a different
16 standard, which was the BAT standard, but instead the
17 only floor statement that addresses this standard, and
18 it says that economic practicability is the test, and
19 everyone agrees that practicably considers costs and
20 benefits.

21 JUSTICE BREYER: Well, that was the House
22 side, which the House side was against that. And the --
23 the question I have from your point of view is the --
24 the obverse question: if you look at this particular
25 cost-benefit analysis, I mean, it goes through all these

1 things which, they don't know what the numbers are,
2 nobody knows what the values of the fishes are, which
3 98% are never even eaten, they are fast swimmers or
4 whatever.

5 (Laughter.)

6 JUSTICE BREYER: But the -- the -- you see
7 the point here. That all of his fears, your -- your
8 opponent, brother here, seem to be manifest in this kind
9 of a document which, if you do read Senator Muskey,
10 seems to be the very things he was against.

11 So -- so what is -- I am still left with
12 your suggestion of what to do, other than just, "well,
13 it's all fine."

14 MR. JOSEFFER: Well, look -- first off.
15 What EPA did here was not among the most robust forms of
16 cost-benefit analysis. In other words we don't think
17 the Court necessarily needs to expand -- to opine on the
18 outer limit here. EPA did two things. First, as you
19 mentioned, it first created national performance
20 standards; second it did a variance when an facility's
21 costs are significantly greater than the benefits.

22 So first in determining -- so -- well, the
23 second of those is easiest, because there is an obvious
24 thumb on the environmental side of the scales there.
25 Costs have been to be significantly greater than

1 benefits, which is not all that aggressive.

2 Here, with respect to the nationwide
3 performance standards, EPA again did not just try to do
4 a strict -- costs are, you know, one penny greater than
5 benefits. Instead it weighed up a number of
6 considerations. It looked to the incremental benefits
7 of closed cycle cooling versus the technology it chose.
8 And then it -- it determined that those incremental
9 benefits were outweighed by a variety of other things,
10 including -- one was the extremely high costs of
11 closed-cycle cooling, three and a half billion; second,
12 the cost-benefit ratio, which was extremely
13 disproportionate; third, the energy impacts which you
14 mentioned are really quite significant.

15 We are talking about 40% of the Nation's
16 power supply. If we are going to reduce that by 4
17 percent and require 20 new plants to be built and
18 require each of those plants to be taken offline for 10
19 months while it's retrofitted, that's really a very
20 significant concern of EPA's. And then the fourth is
21 air pollution.

22 And so when EPA is weighing benefits against
23 all the other thing and is not purporting to assign
24 artificial monetary values to everything, I argue that
25 this just underscores that we are well within the

1 agency's discretion here.

2 If I could also turn then to just the main
3 point. One of the main points here is that I really
4 don't think Respondents have any logic to their
5 position, because when we are talking about the text
6 they say costs have to be considered against
7 affordability and not against benefits. But when we are
8 talking about absurd results, they say, oh sure, you can
9 consider costs against benefits, when it would otherwise
10 be absurd. But under Chevron it's the agency's
11 gap-filling discretion to decide when where to draw that
12 line, and nothing draw a de minimis line in the statute
13 any more than the line EPA has drawn.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel,
15 the case is submitted.

16 (Whereupon, at 11:07 a.m., the case in the
17 above-entitled matter was submitted.)

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