IN THE SUPREME COURT OF THE UNITED STATES

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ENTERGY CORPORATION, :

Petitioner :

v. : No. 07-588

RIVERKEEPER, INC., ET AL.; :

and :

PSEG FOSSIL LLC, ET AL., :

Petitioners :

v. : No. 07-589

RIVERKEEPER, INC., ET AL.; :

and :

UTILITY WATER ACT GROUP, :

Petitioner :

v. : No. 07-597

RIVERKEEPER, INC., ET AL. :

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Washington, D.C.

Tuesday, December 2, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

DARYL JOSEFFER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of

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

MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on behalf of the Petitioners.

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

C O N T E N T S

P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Joseffer.

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

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

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

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

of the relationship between costs and benefits.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Yes.

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

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

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

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

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

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

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

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

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

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

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

MR. JOSEFFER: I think the most irrational

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

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

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

And again, Congress by expressly requiring

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

JUSTICE GINSBURG: Does it make any difference --

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: You don't think --

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

JUSTICE STEVENS: -- Congress intended a tougher standard?

MR. JOSEFFER: Pardon?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Just to reduce.

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

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

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

JUSTICE SCALIA: You think any reduction constitutes minimizing?

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

consideration of -- of all relevant factors.

JUSTICE SCALIA: Yes.

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

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

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

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

MR. JOSEFFER: Yes.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

MS. MAHONEY: They do.

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

MS. MAHONEY: Yes.

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

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

costs, but don't do it too much.

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

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

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

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

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

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

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

MS. MAHONEY: But that is what they --

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

MS. MAHONEY: Well, Your Honor --

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

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

JUSTICE BREYER: You are happy with that?

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

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

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

MS. MAHONEY: Of comparison.

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

MS. MAHONEY: Well, if --

JUSTICE BREYER: Is it or not?

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Wholly disproportionate?

MS. MAHONEY: Wholly disproportionate, not grossly disproportionate.

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

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

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

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

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

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

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

MS. MAHONEY: Well, they haven't.

JUSTICE KENNEDY: -- for a whole plant?

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

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

JUSTICE KENNEDY: Just under the statute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. MAHONEY: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Lazarus.

ORAL ARGUMENT OF RICHARD J. LAZARUS

ON BEHALF OF THE RESPONDENTS

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

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

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

MR. LAZARUS: No, Your Honor.

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

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

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

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

reasons.

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

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

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

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

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

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

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

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

JUSTICE SCALIA: I disagree with that.

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Okay.

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

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

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

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

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

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

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

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

MR. LAZARUS: No --

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

MR. LAZARUS: But --

JUSTICE BREYER: Or it kills three, and

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

(Laughter.)

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

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

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

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

MR. LAZARUS: Right. Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. LAZARUS: But --

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

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

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

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

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

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

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

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

JUSTICE ALITO: Right. But --

MR. LAZARUS: And for reasons that --

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

MR. LAZARUS: Absolutely.

JUSTICE SOUTER: Is that what --

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

MR. LAZARUS: It's quite possible --

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

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

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

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

MR. LAZARUS: -- phase to closed cycle.

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

MR. LAZARUS: That's right.

JUSTICE STEVENS: What about if it bankrupts three firms?

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Yes.

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

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

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

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

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

MR. LAZARUS: No --

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

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

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

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

MR. LAZARUS: No, that --

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

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

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

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

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

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

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

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

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

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

MR. LAZARUS: Right.

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

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

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

JUSTICE BREYER: I agree.

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

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

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

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

JUSTICE SOUTER: Is that --

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

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

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

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

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

JUSTICE SOUTER: What costs are relevant to that?

MR. LAZARUS: Well, the relevant --

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

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

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

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

MR. LAZARUS: I think that's --

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

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

MR. LAZARUS: Right.

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

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

JUSTICE BREYER: I know 316(b).

MR. LAZARUS: What Congress is doing

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

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

MR. LAZARUS: Well --

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Counsel --

MR. LAZARUS: That's the only provision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

benefits, which is not all that aggressive.

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

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

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

agency's discretion here.

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

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

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

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