

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ENTERGY CORPORATION, :

4 Petitioner :

5 v. : No. 07-588

6 RIVERKEEPER, INC., ET AL.;

7 and :

8 PSEG FOSSIL LLC, ET AL., :

9 Petitioners :

10 v. : No. 07-589

11 RIVERKEEPER, INC., ET AL.;

12 and :

13 UTILITY WATER ACT GROUP, :

14 Petitioner :

15 v. : No. 07-597

16 RIVERKEEPER, INC., ET AL. :

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18 Washington, D.C.

19 Tuesday, December 2, 2008

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

23 APPEARANCES:

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25 Department of Justice, Washington, D.C.; on behalf of

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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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

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 both 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, Congress gave scant attention to that at all and
16 included only this one very general provision in the act
17 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 (b) 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
18 cost-benefit analysis, I'm not sure how it would work.
19 In other words, it seems to me that when you're talking
20 about the -- the possible harm from pulling in a few
21 fish or a few plankton or a few baby clam larvae and so
22 on, as against the cost conceivably of millions of
23 dollars for extending intake pipes or putting technical
24 -- expensive filtering mechanisms, you are dealing with
25 such 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,
15 case-by-case basis.

16 JUSTICE SOUTER: Do we know so far as intake
17 pipes are concerned? I mean, maybe I am being foolish
18 in 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 (Laughter.)

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

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

23 MR. JOSEFFER: Yes. And I mean, just the
24 phrasing of the standard, whether costs are wholly
25 disproportionate to benefits, itself indicates that

1 there is a comparison here.

2 JUSTICE SOUTER: Right. Yes.

3 MR. JOSEFFER: And we cite in our brief one
4 particular -- in our reply brief, one specific example
5 where benefits were clearly not de minimis.

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

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

1 get discretion on.

2 And, second, in terms of the concern that
3 cost-benefit analysis can be difficult because we're
4 comparing benefits that are not easily monetized to
5 economic costs, that is just systematically the case
6 with all cost-benefit analyses, even ones which people
7 do in ordinary life. When I decide whether to buy a TV
8 for this amount or a more expensive TV for a different
9 amount, I don't know exactly how in my head I quantify
10 that, but I do. And with respect to cost-benefit --

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

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

17 JUSTICE SOUTER: It is -- let me -- I will
18 -- I will grant you that agencies purport to do this
19 kind of thing. But my question and I think
20 Justice Ginsburg's question is, does it make any sense
21 in these circumstances to think that you really can do a
22 cost-benefit analysis? And if the answer is no -- we
23 have been purporting to do it but it really doesn't make
24 a lot of sense -- then it either means that there is
25 just going to be an irrational process going on, or it

1 means that the technology-driven standard basically is
2 going to be read right out of the statute, because you
3 are always going to find some disproportion which is --
4 which is going to limit your use of technology.

5 MR. JOSEFFER: No, the -- I think the most
6 irrational thing would be to just throw up one's hands
7 and say that we are going to impose standards whether or
8 not they do more harm than good, whether or not they
9 make any sense. And -- and here, I mean, the agency
10 very carefully considered the relative costs and the
11 relative benefits, and also did so in a way that puts a
12 thumb on the side of the environmental side of the
13 scales --

14 CHIEF JUSTICE ROBERTS: Just to get back to
15 your television hypothetical, if you told somebody that
16 you were going to buy the best TV available, nobody
17 would think you meant that, you know, you were going to
18 buy a very cheap TV because, considering the costs and
19 benefits, that was the best one. They would think you
20 are going to get, you know, the fanciest TV you could.

21 MR. JOSEFFER: Well, these words have
22 different meanings in different contexts, which just
23 underscores their ambiguity. But taking the phrase here
24 as a whole, if I said I was going to acquire the best
25 technology available for winterizing my lawnmower so

1 that it would work again in the spring, the best
2 technology available for winterizing a \$400 lawnmower
3 would not be \$500 fluid, because when one's talking
4 about protecting something, it's -- it's intuitive to
5 think about the value of what's being protected.

6 And again, Congress by expressly requiring
7 cost-benefit analysis for some of the pollution
8 discharge limits was expressly contemplating exactly
9 what seems to concern you, Justice Ginsburg --

10 JUSTICE GINSBURG: Does it make any
11 difference --

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

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

21 MR. JOSEFFER: These -- well, all of these
22 words can have different meanings. I think of the four
23 best technology provisions that are expressly
24 cross-referenced in this provision, the one that's most
25 informative here is the best conventional pollutant

1 control technology, because Congress expressly required
2 cost-benefit consideration in determining the best
3 conventional pollutant control technology. And "best"
4 is the only word in that phrase that is amenable to a
5 cost-benefit reading.

6 JUSTICE KENNEDY: Well, my -- I think maybe
7 what Justice Ginsburg was beginning to get at is my
8 question here. I assume that BTA is the most rigorous
9 of the standards set forth in the statute. You can
10 argue with that assumption, but then grant me the
11 assumption for the moment. If BTA is more rigorous than
12 the other standards, what is it in the regulations that
13 reflects the agency's concurrence with that? What is
14 there in the agency regulations that indicates that
15 there is a more rigorous examination under BTA than the
16 other standards?

17 MR. JOSEFFER: Well, to be clear, the agency
18 does not think -- and therefore did not in its
19 regulation presume -- that the best technology available
20 for minimizing adverse environmental impact was more
21 strict than the other standards.

22 And just two commonsense points on that.
23 The pollutant discharge standards, which are the other
24 ones, establish their goal to be the elimination of
25 discharges, whereas here this provision says that its --

1 that its goal is to minimize. So on its face, this is a
2 more measured standard than the others.

3 And, second, as a practical matter, there's
4 no reason Congress would want greater protection for
5 fish through intake structures than for people through
6 the discharge of pollutants. I mean especially --
7 Congress enacted all of these provisions in 1972, and it
8 provided at that time that in determining pollution
9 discharge, even including toxic pollution discharge, EPA
10 was required to consider the relationship between cost
11 and benefits up until 1989.

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

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

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

19 JUSTICE STEVENS: You don't think --

20 MR. JOSEFFER: -- this provision here for
21 water intake --

22 JUSTICE STEVENS: -- Congress intended a
23 tougher standard?

24 MR. JOSEFFER: Pardon?

25 JUSTICE STEVENS: You do not think Congress

1 intended a tougher standard; is that your --

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

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

7 MR. JOSEFFER: Well, because these are all
8 different standards. One thing -- two things are for
9 certain. One is that this standard is different from
10 all of the others.

11 JUSTICE KENNEDY: If they are different,
12 then one -- then it's either less rigorous or more
13 rigorous.

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

18 Here we have "best technology available" --
19 "best technology available for minimizing adverse
20 environmental impact." And, first, "best," as some of
21 the examples earlier demonstrated, is not necessarily
22 the way that most single-mindedly pursues a goal at all
23 costs and without regard to all of the consequences,
24 which is why -- for example, if you were talking about
25 the best way to get home, it would not necessarily be

1 the most direct route if that required payment of a
2 toll.

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

7 And, second, "minimize" is also an important
8 word, because "minimize" has two perfectly common and
9 ordinary meanings. One is to reduce to the greatest
10 extended possible. The other in ordinary usage is to
11 reduce to some lesser, reasonable level.

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

18 JUSTICE GINSBURG: So it would have said --

19 MR. JOSEFFER: -- I was being prudent.

20 JUSTICE GINSBURG: So it would have said
21 "available to reduce"? If "for minimizing" is no
22 stronger than if it had said "available" -- if it meant
23 what you suggest, why didn't it read "available to
24 reduce"?

25 MR. JOSEFFER: Well, elsewhere in the Clean

1 -- in the Clean Water Act, Congress clearly did use
2 "minimize" to mean reduction, because Congress called
3 for a, quote, "drastic minimization of paperwork."
4 That's in 33 U.S. Code 1251(f). And a "drastic
5 minimization" has to mean a drastic reduction, which is
6 a perfectly ordinary meaning of the -- of the word.

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

9 JUSTICE SCALIA: "Reduce" in any event is --
10 is not -- is not the same as what you are arguing. You
11 are arguing reduce to the maximum extent reasonably
12 possible. The word "reduce" alone doesn't convey that.
13 The word "reduce" would just mean, you know, if you --
14 if you knock it down any amount, you have reduced it.

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

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

22 JUSTICE SCALIA: Just to reduce.

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

1 reasonable.

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

6 MR. JOSEFFER: Well, I guess --

7 JUSTICE SCALIA: You think any reduction
8 constitutes minimizing?

9 MR. JOSEFFER: No, because it does have to
10 be a reasonable reduction, which would not be -- in this
11 context would not be a trivial one. Reasonableness --
12 we may -- we may agree, depending on what one means by
13 "reasonable." "Reasonableness" tends to connote a
14 consideration of -- of all relevant factors.

15 JUSTICE SCALIA: Yes.

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

22 JUSTICE SCALIA: Let me say it again, and
23 you tell me whether you agree. I had thought that what
24 you meant the meaning of "minimize" was is that you
25 reduce the -- the harm to the maximum extent reasonably

1 possible, not merely that you reduce it to some extent.

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

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

7 MR. JOSEFFER: Yes.

8 And if -- if I could reserve the remainder
9 of my time for rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Ms. Mahoney.

12 ORAL ARGUMENT OF MAUREEN E. MAHONEY

13 ON BEHALF OF THE PETITIONERS

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

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

23 So this Court should not be quick to
24 conclude that Congress intended to deprive the agency of
25 the tools that it needs to come up with reasoned answers

1 to these vexing problems in the absence -- -

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

4 MS. MAHONEY: Well, it is a Chevron case,
5 Your Honor. We think -- certainly think it could be
6 resolved under step one, meaning the following: Can you
7 read the statute reasonably to say that Congress
8 unambiguously foreclosed cost-benefit analysis under
9 316(b)? I think the answer to that is no.

10 JUSTICE BREYER: Well, the -- the -- one
11 question I have on this is if I look at the two
12 standards, and the first one, "best practical" -- it
13 talks about cost-benefit. It says you shall consider
14 the total cost of application of technology in relation
15 to the effluent-reduction benefits.

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

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

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

23 MS. MAHONEY: They do.

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

1 MS. MAHONEY: Yes.

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

12 Now, that's ambiguous. But, as I read it,
13 it says: Of course, you can't avoid taking into account
14 costs, but don't do it too much.

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

21 Now, that's the whole background to the
22 question. My question is, of course: Why not let
23 sleeping dogs lie? Let the agency take into account the
24 way it has done it to prevent absurd results, but not
25 try to do it so that it's so refined you can't even take

1 account of what a fish is worth unless they happen to be
2 one of the 1.2 percent that goes to market.

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

7 JUSTICE BREYER: Okay, fine. Then what are
8 you arguing? Are you arguing that you should take costs
9 into account? Because I don't think -- or I don't think
10 you should reach much disagreement on that point, that
11 sometimes you take them into account --

12 MS. MAHONEY: Well --

13 JUSTICE BREYER: -- the way that Senator
14 Muskie suggested.

15 MS. MAHONEY: But, Your Honor, the -- the
16 Second Circuit held, and Respondents argue, that the
17 benefits have to be essentially the same before you can
18 look at the cost of the technology.

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

22 MS. MAHONEY: But that's what the Second
23 Circuit held --

24 JUSTICE BREYER: And then you would be
25 satisfied with the following ruling: The Second Circuit

1 went too far in saying that you can never take costs
2 into account.

3 MS. MAHONEY: Well, Your Honor --

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

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

14 JUSTICE BREYER: All right. So you are
15 happy with that?

16 MS. MAHONEY: Well, as long as costs can be
17 compared to benefits, and the Second Circuit said they
18 could not be; that the benefits have to be essentially
19 the same. That's what "cost-effectiveness analysis"
20 means. Of course the statute doesn't say
21 "cost-effectiveness."

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

25 MS. MAHONEY: Of comparison.

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

4 MS. MAHONEY: Well, if --

5 JUSTICE BREYER: Is it or not?

6 MS. MAHONEY: Vague, grossly
7 disproportionate --

8 JUSTICE BREYER: The one they used for 30
9 years at EPA.

10 MS. MAHONEY: Your Honor, I think the point
11 is --

12 JUSTICE BREYER: Is that all right or not
13 all right?

14 MS. MAHONEY: Yes, if for 30 years they have
15 not been mandating closed-cycle cooling under that
16 standing -- standard, so from the industry's
17 perspective, that probably is an acceptable standard.

18 But the real point here is that when we
19 start talking about what degree can you compare the
20 costs, is it significantly greater than, is it wholly
21 disproportionate, that's exactly where Chevron comes in.
22 If everyone concludes that you can compare costs to
23 benefits, then certainly the agency should have some
24 flexibility.

25 With respect to the question of whether it

1 should be the same standard as the -- what I think
2 you're referring to as the B-A-T standard, which governs
3 discharges of even toxic pollutants, I think the answer
4 to that is not necessarily by any means, because the
5 acronyms are similar, but the text isn't. That standard
6 actually talks about the goal of eliminating discharges.

7 Congress did not say eliminate all
8 impingement and entrainment. To the contrary. They
9 could have; they didn't. They said minimize adverse
10 environmental impact, which is necessarily a broad
11 delegation of discretion to the agency. In addition,
12 that standard --

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

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

20 JUSTICE SCALIA: Wholly disproportionate?

21 MS. MAHONEY: Wholly disproportionate, not
22 grossly disproportionate.

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

25 MS. MAHONEY: Well, the point is that I -- I

1 think what I am happy with is saying that the agency
2 should have discretion to formulate what test it's going
3 to use. But under the wholly disproportionate test --

4 JUSTICE SCALIA: Okay. You think they can
5 use a wholly disproportionate --

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

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

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

16 JUSTICE SCALIA: I see.

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

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

21 JUSTICE KENNEDY: -- for old plants? Could
22 they -- under your view, could the agency, given its
23 Chevron latitude, mandate closed circulation?

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

1 JUSTICE KENNEDY: Just under the statute.

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

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

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

21 MS. MAHONEY: Well, here's -- here's how I
22 would say it, Your Honor. There may be some locations
23 where that -- where it would not be wholly
24 disproportionate. If -- if for some reason you couldn't
25 design an alternative system that would protect, for

1 instance, a balanced population of fish in that water
2 body, then it might be that -- that -- that
3 closed-cycled cooling would be required.

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

17 So given that, given the variances
18 throughout the Act and even, you know, these kinds of
19 limits on the discharge standards, which are designed to
20 protect human health, why would you read the mandate for
21 the maximum technology on intake structures which has
22 nothing to do with human health, nothing. It is just to
23 protect fish in the water body.

24 So, it doesn't make sense that in a single
25 sentence added in conference in a voluminous act about

1 discharges of pollutants, that Congress would mandate
2 the maximum technology for --

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

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

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

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

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

20 MS. MAHONEY: I -- I don't think that's the
21 most reasonable inference because it would lead to very
22 irrational results, 200-foot cooling towers in -- in --
23 in town -- in historic old towns --

24 JUSTICE SOUTER: You've got the -- I mean
25 everybody agrees that there is kind of an ultimate

1 irrationality standard here. So that's -- that's not --
2 that -- that kind of a horrible is not really to the
3 point.

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MS. MAHONEY: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Lazarus.

15 ORAL ARGUMENT OF RICHARD J. LAZARUS

16 ON BEHALF OF THE RESPONDENTS

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

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

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

25 MR. LAZARUS: No, Your Honor.

1 JUSTICE SCALIA: Where -- where -- where do
2 you find that or the Second Circuit said, anyway?

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

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

19 They would -- that would never happen. I
20 mean, it would never happen, but not because EPA can
21 decide it's not worth it. This is why it would never
22 happen: three reasons, and these are contributing
23 reasons.

24 The first reason is if you actually had some
25 exorbitant, huge increase in costs, if that would

1 happen, most of those cases would be triggered by the
2 availability requirement, and that is that EPA could
3 deem that cost not to be reasonably borne by the
4 industry. That's the ground they --

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

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

14 JUSTICE ALITO: It's not the plain meaning
15 of the word. If I look in the real estate page of
16 the -- of the "Washington Post" on Sunday and I look for
17 the best house that is available, the best house that is
18 available might cost \$50 million. Now, that would be
19 available to me. I couldn't afford it, but it would be
20 available. So I just don't see how cost can be fit into
21 that concept of availability.

22 MR. LAZARUS: I think because it's clear
23 that in the context of the Clean Water Act what Congress
24 meant in "available" -- and this is throughout the
25 statute -- all the technology-based performance

1 standards, the availability was both technologically
2 available and economically available. And that's just
3 not --

4 JUSTICE SCALIA: You are using the word in a
5 strange -- "economically available"?

6 MR. LAZARUS: Yes.

7 JUSTICE SCALIA: Economically feasible
8 maybe. But you wouldn't say "economically available."
9 You wouldn't say, I can't buy the house because for me
10 it's not economically available. I might say it's not
11 economically feasible, it's not economically possible,
12 but it's not economically available? That's weird.

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

19 JUSTICE SCALIA: I disagree with that.

20 JUSTICE SOUTER: If "availability" -- if
21 "availability" includes economic availability, why
22 doesn't "best" include "economically best"?

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

1 minimizing."

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

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

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

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

22 MR. LAZARUS: Well, there is no -- there is
23 no question, Your Honor, that the word "available," and
24 perhaps the word "best" -- we think the word "available"
25 includes an inquiry into whether or not it could be

1 borne by industry. We also wouldn't doubt, Your
2 Honor -- we wouldn't doubt --

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

6 MR. LAZARUS: No, no --

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

9 MR. LAZARUS: We're not, Your Honor, and let
10 me try to explain because I think we are confusing
11 different inquiries here.

12 JUSTICE SCALIA: Okay.

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

23 CHIEF JUSTICE ROBERTS: Isn't that -- isn't
24 that exactly what they did here in listing what they
25 called a suite of technologies or approaches that is

1 available? I thought that was exactly what they did.
2 They said for different locations, different
3 technologies may be the best available.

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

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

22 Then let's say that the national -- EPA
23 says, well, but that will only save -- you know, your
24 cheaper technology will only save a million fish. We
25 actually think you have to save a million and one fish.

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

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

13 MR. LAZARUS: No --

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

21 MR. LAZARUS: But --

22 JUSTICE BREYER: Or it kills three, and
23 don't tell me de minimis, because as soon as you say "de
24 minimis," I'm going to add one, okay?

25 (Laughter.)

1 JUSTICE BREYER: But what I'm trying to show
2 here is that -- that there -- it isn't meaningful to
3 talk about cost being available for an end, without some
4 -- about something not being available for an end in
5 light of its costs, unless you take into account what
6 that end is. I mean, we'd spend trillions to make
7 America secure so not 50,000 people die, but we won't
8 spend trillions for a road accident. And -- and of
9 course you take those things into account.

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

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

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

3 MR. LAZARUS: Right. Right.

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

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

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

18 MR. LAZARUS: Well, I don't, because it's
19 two fundamentally different policy decisions. What
20 Congress decided in 1972 was that EPA should be allowed
21 to consider costs in determining whether technology was
22 available, but not -- and they did this for a reason,
23 Your Honor -- but not to weigh those costs against those
24 benefits in deciding whether or not those costs were
25 worth it.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Counsel, your

1 argument is focused on proving that your interpretation
2 won't lead to insane results, as you put it. But you've
3 got to do a lot more than that. I mean, you have to
4 establish that this is not ambiguous language.

5 MR. LAZARUS: Well, I think it's not
6 ambiguous language because if you look at the statutory
7 language, it says, right, in section 316(b), EPA is
8 required, right -- instructed, required -- that
9 location, design, construction, capacity of cooling
10 water intake structures reflect the best technology
11 available for minimizing adverse environmental impact.

12 And what we argue -- and I think this is
13 quite compelling, Your Honor -- is that with that
14 language Congress itself struck the cost-benefit
15 balance. Congress said for costs, EPA has to ensure the
16 technology be available either on industry wide, and it
17 can take site into account site-specific factors. For
18 benefits, Congress said, EPA, you have to ensure that
19 the environmental benefits -- the adverse environmental
20 impact -- be minimized to the extent that can be done
21 with available technology.

22 JUSTICE ALITO: You have a -- you have a
23 good argument based on the language of the statute, I
24 think, that costs cannot be taken into account at all.

25 MR. LAZARUS: But --

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

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

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

7 MR. LAZARUS: No, it's a -- it's a complete
8 line. Whether the word "available" can extend to cost
9 feasibility analysis is one question. Whether the word
10 "available" can be -- allow EPA to compare costs and
11 benefits, to weigh one against the other, that's a
12 completely different question. So the fact that we say
13 the first half, it doesn't mean the second. Congress
14 really had a -- what they were doing in 1972, was
15 Congress was --

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

25 So is -- is the line you are drawing a money

1 in the bank line? Is that the point you are making?

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

4 JUSTICE ALITO: Right. But --

5 MR. LAZARUS: And for reasons that you
6 suggested --

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

12 MR. LAZARUS: Absolutely.

13 JUSTICE SOUTER: Is that your point?

14 MR. LAZARUS: Absolutely.

15 JUSTICE SOUTER: Okay.

16 MR. LAZARUS: What -- in 1972, this is what
17 Congress was faced with.

18 JUSTICE ALITO: When you say whether the
19 industry can afford it, does that take into account at
20 all the effect on the price that consumers have to pay?
21 If the effect of achieving a very small gain in
22 protecting fish is to increase electricity costs 10
23 times, is that something that cannot be taken into
24 account?

25 MR. LAZARUS: If it can be reasonably borne

1 by the industry or some site-specific, they can't make
2 any other judgment. And if I can, Your Honor --

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

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

22 JUSTICE BREYER: That's exactly where I
23 agree with you. So I go back to page 170 of the
24 legislative history, which I have read now six times,
25 and I agree with you that it is not totally clear.

1 Maybe you think it is. But it seemed to me what he is
2 saying there is just what you've said: Don't go into
3 this with some elaborate thing, but remember costs are
4 still relevant. And what I've been searching for
5 throughout is a set of words that would help me
6 translate that thought into a legal reality.

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

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

19 (Laughter.)

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

1 CHIEF JUSTICE ROBERTS: So you think they
2 could have said, two years ago, this is what you have to
3 do, but today they would say you don't have to do that
4 anymore --

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

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

8 MR. LAZARUS: But notice -- notice -- not
9 economically. Notice in this case, what the Second
10 Circuit said in remanding was EPA might well be able to
11 justify the same decision it made on an availability
12 basis, but they didn't make that determination here.

13 What's happened for the past 30 years, which
14 is how counsel over here posited the case -- what's
15 happened over the last 30 years is the EPA has ignored
16 the statutory language and has engaged in this wholly
17 disproportionate analysis as a result, which has led to
18 the very kind of underregulation that Senator Muskie was
19 worried about, and that is that they have never looked
20 to see whether closed-cycle cooling is in fact
21 available, economically available. Instead, they've
22 tried to compare these things. They've just kept on
23 going with once-through cycle cooling. They've never
24 given a serious look at closed-cycle cooling. And the
25 kind of increment we're talking about, if they actually

1 looked at closed-cycle cooling, if they'd make an
2 availability determination, we are not talking about
3 increments; it's a 98 percent reduction in the water
4 flow that happens if you go from --

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

6 MR. LAZARUS: -- once-through to
7 closed-cycle.

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

11 MR. LAZARUS: That's right.

12 JUSTICE STEVENS: What about if it bankrupts
13 three firms?

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

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

23 MR. LAZARUS: No, but here's what happens:
24 What the EPA said -- and you can see this in this
25 Court's decision in the Crushed Stone case, where the

1 Court drew this distinction. A particular facility can
2 seek a variance based on cost impact to them, if they
3 can show that the cost to them is much greater because
4 of some particular circumstances to them than it is for
5 the industry as a whole. This Court said they could do
6 that. EPA has long said it. We don't question it, that
7 they can do a cost --

8 JUSTICE STEVENS: No, but this -- it's --
9 they are just not quite as strong a company.

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

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

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

21 JUSTICE STEVENS: Yes.

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

25 JUSTICE SOUTER: Why -- why isn't that

1 simply another name for cost-benefit analysis?

2 MR. LAZARUS: Because you can't do it on a
3 cost-benefit -- it's not a cost-benefit variance.

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

6 MR. LAZARUS: No --

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

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

24 JUSTICE SCALIA: I assume you can't get a
25 variance -- and you also would say the EPA cannot take

1 it into account -- if this particular plant -- although
2 the company as a whole is quite prosperous, this is a
3 small plant, and it's not generating that much
4 electricity. It's really just not worth it to put in
5 this big tower. We are going to close down.

6 MR. LAZARUS: No, that --

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

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

17 JUSTICE BREYER: So, what about the
18 particular case? What they said here is that, if you
19 require the closed circuit for everybody, we are going
20 to have to build -- we are going to have to pay an
21 energy penalty of 2.4 to 5.3 percent. You will have to
22 build 20 additional 400-megawatt plants, which is huge,
23 many, many, many billions of dollars, and the -- just to
24 replace the capacity you have lost. And the result,
25 which seems quite logical, would be to increase by a

1 lot, not just a little, the consumption of fossil fuel.

2 Well, now how are they not -- you seem to
3 be arguing that they can't take that into account,
4 which, for an environmental agency, I would have
5 thought, "But they must take it into account."

6 MR. LAZARUS: We're not saying they can't
7 take that into account. EPA has said they can. The
8 Second Circuit said they could, and we agree. But
9 here's how they can take it into account. They can take
10 it into account in deciding what will be necessary to
11 minimize adverse environmental impact. So they can take
12 into account those things that in decided whether or not
13 --

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

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

1 impact. We -- here are the things we're going to take
2 into account in deciding whether or not this technology,
3 this cost, makes it available or not." They have some
4 authority here, but once they decide whether technology
5 is available, once they decide what "environmental
6 impact" means and what it means to minimize, once they
7 decide that, they can't then say, "Well, we don't think
8 these impacts are worth those costs."

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

20 MR. LAZARUS: Right.

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

24 MR. LAZARUS: Well, we are doing the exact
25 opposite, Your Honor. What we are trying to do is say

1 that the information that EPA has to focus on, the way
2 Congress constrained them, is limited and it doesn't
3 allow them to weigh one against the other.

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

18 JUSTICE BREYER: I agree.

19 MR. LAZARUS: And that's why they said, we
20 want to take out this particular. Remember, before
21 1972, there was cost-benefit analysis based upon
22 assessment of water quality impacts. And Congress saw
23 what happened with that. It completely paralyzed the
24 regulatory decisionmaking process. They ended up with
25 very little regulation. So they said: All right, we're

1 not -- we think EPA can do cost-feasibility analysis
2 well. We don't think they do cost-benefit analysis
3 well. We think that kind of information is several
4 orders of magnitude greater and more imponderable, and
5 it's --

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

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

13 JUSTICE SOUTER: Is that --

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

23 JUSTICE SOUTER: But I think -- I see your
24 point, but I think if I accept your point, all I am
25 doing is saying, they may in a kind of smoke and mirrors

1 way take cost-benefit analysis into consideration sub
2 rosa, when they decide what availability is going to
3 mean; and they make take it into consideration when they
4 decide what a -- a -- an undesirable environmental
5 impact is; and that sort of gets the -- the weighing
6 process out of the public focus.

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

11 MR. LAZARUS: Well, I think our argument
12 boils down to that they can focus on environmental
13 impacts, define what is and isn't an environmental
14 impact, they can focus on availability, decides what
15 costs are relevant to that, and when a technology is
16 available --

17 JUSTICE SOUTER: What costs are relevant to
18 that?

19 MR. LAZARUS: Well, the relevant --

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

1 MR. LAZARUS: It may well be one reason why
2 Congress didn't want to compare one to the other, about
3 that charged atmosphere. But what -- they can't do it.
4 I don't think they are doing it sub rosa. Our point is,
5 Your Honor, that they do it according to Congress's
6 instruction, you won't have these kinds of absurd
7 results.

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

12 MR. LAZARUS: Sorry, I couldn't quite hear
13 you.

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

17 (Laughter.)

18 JUSTICE BREYER: I mean -- you see?

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

24 MR. LAZARUS: Right.

25 JUSTICE BREYER: What page? I will read it

1 again.

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

5 JUSTICE BREYER: I know 316(b).

6 MR. LAZARUS: What Congress is doing
7 systemically in 316(b) and throughout the Clean Water
8 Act was that Congress was saying we want to give EPA the
9 authority for cost feasibility; we don't believe in this
10 -- that it works with cost-benefit analysis because of
11 the weighing against one against the other.

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

15 MR. LAZARUS: Well --

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

22 MR. LAZARUS: Two responses, Your Honor.
23 The first is that in 1972, which is when 316(b) was
24 enacted, Congress did not allow cost-benefit analysis
25 for toxic pollutants. Toxic pollutants were not

1 regulated under section 301 and 304 of the statute.
2 They were not subject to best practicable technology;
3 they were not subject to best available technologies.
4 They were subject to a separate provision, and that was
5 section 307 at that time. That's a subsequent amendment
6 to the law. Where Congress originally --

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

9 MR. LAZARUS: It did not allow cost-benefit.
10 What -- the way Congress originally approached hazardous
11 water pollutants and toxic air pollutants, the Clean Air
12 Act, was the same. They said EPA, this is so harmful
13 that we actually want you to do an assessment to figure
14 out at what level will it no longer be harmful to
15 humans? And what they found out when they tried that,
16 is they found out, boy, that information is unbelievably
17 hard to come up with.

18 And so, they had -- the regulation depended
19 on this incredible information, and the result was that
20 EPA did nothing. They did nothing for water toxics,
21 they did nothing for air toxics. So in 1977, when they
22 learned how more information basically could lead to
23 less regulation, they said all right: We've got to
24 change that. That doesn't work, so we are going to move
25 to a technology-based performance approach in the first

1 instance, and then couple it with -- still keeping the
2 health base as a backup, to be able to go past that.

3 So they put the technology base as a first
4 step and they kept the 307, but in 1972, Your Honor,
5 there was only one provision of the Clean Water Act in
6 which Congress delegated any authority to EPA to compare
7 costs and benefits; and that was under 301(b)(2) and
8 304(b)(2). And in that provision they said until 1977
9 only, EPA, for best practical control technology, you
10 can and you must do cost-benefit analysis.

11 CHIEF JUSTICE ROBERTS: Counsel --

12 MR. LAZARUS: But that's the only provision.

13 CHIEF JUSTICE ROBERTS: You would have to
14 agree, wouldn't you, that the panel's decision in this
15 case overruled the prior panel's decision, in Judge
16 Katzmann's opinion in Riverkeeper I?

17 MR. LAZARUS: No, they certainly didn't
18 overrule it for two different reasons. If you look at
19 the Riverkeeper II opinion -- I think it's on 25a, note
20 11 -- they explain that in Riverkeeper I, dry cooling
21 was rejected because it was too expensive. That's an
22 availability consideration, not a cost-benefit
23 consideration.

24 CHIEF JUSTICE ROBERTS: Well, in Riverkeeper
25 I, what Judge Katzmann said is that we think the EPA was

1 permitted to consider costs and energy efficiency in
2 determining the best technology available. So he was
3 deciding it on the basis of availability, too.

4 MR. LAZARUS: He gave -- he gave several
5 reasons, Your Honor. Also included was the fact that it
6 was too expensive. Which is why the Riverkeeper II
7 court characterized that as dictum. In all events, with
8 all due respect to my former colleague on the Georgetown
9 faculty, Judge Katzmann was wrong.

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Joseffer, you have four minutes
13 remaining.

14 REBUTTAL ARGUMENT OF DARYL JOSEFFER

15 ON BEHALF OF THE ENVIRONMENTAL

16 PROTECTION AGENCY, ET AL.,

17 SUPPORTING THE PETITIONERS

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

24 JUSTICE GINSBURG: It's an ambiguity the
25 government said it could live with. Now, the government

1 advised this Court not to grant cert in this case, isn't
2 that so?

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

10 (Laughter.)

11 MR. JOSEFFER: The other point I need to
12 make is that this case is, after all, about the one
13 sentence in the Act that deals with water intake, not
14 about all the other detailed provisions about the
15 discharge of pollutants, which is important because
16 about half of the last argument dealt with the discharge
17 of pollutants.

18 The fact that there's no list of factors
19 here, and instead just one general sentence, just
20 underscores that on this issue, Congress was delegating
21 especially broad authority to the agency to address a
22 problem that at the time was relatively novel and that
23 legislative record confirms Congress itself did not give
24 any real weight to.

25 If we want to look at the floor statements,

1 though, I would not look to the floor statement of
2 Congressman Muskie concerning a different standard,
3 which was the BAT standard, but instead to the only
4 floor statement that addresses this standard, and it
5 says that economic practicability is the test, and
6 everyone agrees that practicably considers costs and
7 benefits.

8 JUSTICE BREYER: Well, that was the House
9 side, which the House side was against that. And the --
10 the question I have from your point of view is -- is the
11 obverse question: If you look at this particular
12 cost-benefit analysis, I mean, it goes through all these
13 things which, they don't know what the numbers are,
14 nobody knows what the values of the fishes are, which 98
15 percent are never even eaten, they are fast swimmers or
16 whatever.

17 (Laughter.)

18 JUSTICE BREYER: But they -- the -- you see
19 the point here. That all of his fears, your -- your
20 opponent, brother here, seem to be manifest in this kind
21 of a document which, if you do read Senator Muskie,
22 seems to be the very thing he was against.

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

1 MR. JOSEFFER: Well, look -- first off.
2 What EPA did here is not among the more robust forms of
3 cost-benefit analysis. And, therefore, we don't think
4 the Court necessarily needs to expand -- to opine on the
5 outer limits here.

6 EPA did two things: First, as you
7 mentioned, first it created nationwide performance
8 standards; second, it did a variance when an individual
9 facility's costs are significantly greater than the
10 benefits.

11 So, first, in determining -- so -- well, the
12 second of those is easy because there is an obvious
13 thumb on the environmental side of the scales there.
14 Costs have been to be significantly greater than
15 benefits, which is not all that aggressive.

16 Here, with respect to the nationwide
17 performance standards, EPA again did not just try to do
18 a strict -- are costs, you know, one penny greater than
19 benefits. Instead it weighed up a number of
20 considerations. It looked to the incremental benefits
21 of closed-cycle cooling versus the technologies that it
22 chose. And then it -- and then it determined that those
23 incremental benefits were outweighed by a variety of
24 other things, including, one, the extremely high costs
25 of closed-cycle cooling, three and a half billion;

1 second, the cost-benefit ratio, which was extremely
2 disproportionate; third, the energy impacts which, as
3 you mentioned, are really quite significant.

4 We are talking about 40 percent of the
5 Nation's power supply. And if we are going to reduce
6 that by 4 percent and require 20 new plants to be built
7 and require each of those plants to be taken offline for
8 10 months while it's retrofitted, that's really a very
9 significant concern of EPA's. And then the fourth is
10 air pollution.

11 And so when EPA is weighing benefits against
12 all of those other things and is not purporting to
13 assign artificial monetary values to everything, I argue
14 that that just underscores that we are well within the
15 agency's discretion here.

16 If I could also turn then to just the main
17 point. One of the main points here is that I really
18 don't think Respondents have any logic to their
19 position, because when we are talking about the text
20 they say costs have to be considered against
21 affordability and not against benefits. But when we are
22 talking about absurd results, they say, oh sure, you can
23 consider costs against benefits, when it would otherwise
24 be absurd. But under Chevron it's the agency's
25 gap-filling discretion to decide where to draw that

1 line, and nothing draws a de minimis line in the statute
2 any more than the line EPA has drawn.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

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

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