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August 6, 2010

HAND DELIVERED

Luly Massaro, Clerk
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Docket No. 4185

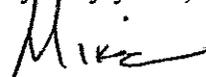
Dear Luly:

As you know, this office represents Toray Plastics (America), Inc. and Polytop Corporation.

Enclosed for filing in this matter are an original and 12 copies of Toray and Polytop's Brief regarding (1) R.I.G.L. § 39-26.1-7(c)(ii), and (2) R.I.G.L. § 39-26.1-7(c)(iii).

If you have any questions, please feel free to call.

Very truly yours,



Michael R. McElroy

MRMc:tmg

cc: Service List

STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF AMENDED PURCHASE :
POWER AGREEMENT BETWEEN :
NARRAGANSETT ELECTRIC COMPANY : Docket No. 4185
d/b/a NATIONAL GRID AND :
DEEPWATER WIND BLOCK ISLAND LLC. :
PURSUANT TO R.I.G.L. § 39-26.1-7 :

BRIEF OF TORAY PLASTICS (AMERICA), INC. AND POLYTOP CORPORATION
REGARDING (1) R.I.G.L. § 39-26.1-7(c)(ii), and (2) R.I.G.L. § 39-26.1-7(c)(iii)

**I. The Amended Power Purchase Agreement (PPA) does not properly provide
for a decrease in pricing if savings can be achieved in the actual cost
of the project pursuant to R.I.G.L. § 39-26.1-7(c)(ii) and (e)(i) and (ii),
and therefore the PPA cannot be approved by this Commission.**

R.I.G.L. § 39-26.1-7(c)(ii) provides in pertinent part:

“The commission shall review the amended power purchase agreement and shall approve it if:

* * *

(ii) the amended agreement contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project pursuant to subsection 39-26.1-7(e)”

Moreover, R.I.G.L. § 39-26.1-7(e) provides in pertinent part in subparts (i) and (ii):

“(i) The amended power purchase agreement subject to subsection 39-26.1-7(a) shall provide for terms that shall decrease the pricing if savings can be achieved in the actual cost of the project, with all realized savings allocated to the benefit of ratepayers. (ii) The amended power purchase agreement shall also provide that the initial fixed price contained in the signed power purchase agreement submitted in docket 4111 shall be the maximum initial price, and any realized savings shall reduce such price.” (Emphasis added).

Moreover, R.I.G.L. § 39-26.1-7(a) provides in pertinent part that the PPA:

“ . . . shall ensure that the pricing can only be lower, and never exceed, the original pricing included in the power purchase agreement that was reviewed in docket 4111.” (Emphasis added).

In fact, the Legislature specifically referenced “docket 4111” at least five (5) times in subsections (a), (b), and (e). It is clear, therefore, that the Legislature mandated that the Commission, in reviewing the PPA, must use as its starting point the review that it conducted in

Docket 4111. In subsection (b), all parties to Docket 4111 were automatically allowed by the Legislature to be parties to the new docket, which became Docket 4185. Accordingly, the only reasonable interpretation of the amended statute in question is that “all realized savings” must be “allocated to the benefit of ratepayers” and “shall reduce [the Docket 4111] price.” This language mandates that the savings calculation must be made with specific reference to the cost and other evidence produced to the Commission in Docket 4111, including the Docket 4111 construction cost estimate of \$219,311,412 submitted by Deepwater Wind (DWW) in Docket 4111.

DWW unequivocally stated in Docket 4111 that “Deepwater Wind’s current estimate of the capital cost is \$219,311,412 for installing eight turbines.” (DWW’s response to Division 1-13 in Docket 4111, emphasis added). Moreover, in testimony to the Legislature regarding the amendments to R.I.G.L. § 39-26.1-7, DWW’s CEO, William Moore, stated that this was a “220 million, 30MW offshore wind farm.” (Exhibit 1, emphasis added).

Therefore, “all realized savings” below the evidentiary \$219,311,412 cost figure presented in Docket 4111 must be “allocated to the benefit of ratepayers” in the PPA in order to comply with section (e)(i) and (ii), and if the PPA does not do so, then the PPA must be rejected. It is beyond question that the PPA contains a new pricing mechanism that causes the starting price for determining savings to be a new estimated cost of \$205,403,512. As a result, it is clear that DWW has been able to “realize savings” of approximately \$14 million in the cost of the project. However, rather than satisfying the mandates of the amended law and allocating those savings 100% to the benefit of the ratepayers by reducing the 24.4¢ contract price, DWW has kept the contract price exactly the same as the 24.4¢ that was rejected by this Commission in Docket 4111. In other words, DWW has retained the entire \$14 million of recently realized savings solely to itself. Under the PPA, the ratepayers would not receive a single dollar in

savings until after DWW has received the benefit of the first \$14 million of savings. This is clearly not in compliance with the strict mandates of R.I.G.L. § 39-26.1-7(c)(ii) and (e)(i) and (ii). Accordingly, for this reason alone, the amended PPA must be rejected.

Moreover, the PPA retains the same wind outperformance provision which shares the benefits of the wind farm exceeding the projected 40% capacity with the ratepayers on a 50/50 basis with DWW. This is also prohibited by the amended law. Although the savings resulting from an achievement of wind performance in excess of the 40% anticipated capacity factor are admittedly not savings in the construction cost of the project, they nevertheless fit within the mandate of R.I.G.L. § 39-26.1-7(e)(ii), which requires that “any realized savings shall reduce such price.” (Emphasis added). It is important to note that this provision in R.I.G.L. § 39-26.1-7(e)(ii) is not limited to cost savings like § 39-26.1-7(e)(i), but is much broader in mandating that “any realized savings shall reduce such price,” not just cost savings. Accordingly, if there are any savings achieved by exceeding the 40% capacity factor, 100% of those savings must be allocated to the ratepayers by reducing the initial fixed price set forth in Docket 4111. However, the PPA violates this provision by allocating only 50% of these savings to the ratepayers and keeping 50% for DWW.

Accordingly, for the foregoing reasons, and also for all of the reasons set forth in detail in the prefiled direct testimony of Richard Hahn submitted on behalf of the Division of Public Utilities and Carriers on July 15, 2010, which are incorporated by reference into this brief, Toray and Polytop respectfully submit that the PPA must be rejected because it does not comply with R.I.G.L. § 39-26.1-7(c)(ii).¹

¹ It should also be noted that R.I.G.L. § 39-26.1-7(d) requires the PUC to either accept or reject the PPA. The PUC may not impose conditions or modify the PPA in any way to make it comply with R.I.G.L. § 39-26.1-7 if the PPA as filed does not comply.

II. R.I.G.L. § 39-26.1-7(c)(iii) requires the Commission to take into account above market costs and whether there is likely to be any negative effect on potential economic development benefits, including new and existing business expansion.

In this case, the evidence is clear, by National Grid's own admission, that the above market costs to be paid by ratepayers of approximately \$390 million over the life of the PPA greatly exceed the potential benefits of approximately \$129 million shown in EDC's corrected advisory opinion.² Under R.I.G.L. § 39-26.1-7, The Commission must reject the PPA unless the evidence demonstrates that the PPA "is likely to provide economic development benefits, including: facilitating new and existing business expansion and . . . the further development of Quonset Business Park" (R.I.G.L. § 39-26.1-7(c)(iii)). In other words, the Commission must determine that the PPA, in and of itself, "is likely" to provide "economic development benefits," which must include "facilitating new and existing business expansion" and "further development of Quonset Business Park." In the hearings on July 27, counsel for National Grid (Grid) for the first time objected to witnesses "applying a net economic benefits test in this case." (tr., at 8-9). Grid argued that "the economic benefits test that's applicable in this case is not a net economic benefits test." (at 9). Grid's argument is that if the Commission finds "benefits in these categories . . . then the test is met" (at 10), and that the Commission cannot consider "the potential above-market costs and the rate impacts against whatever material benefits have been identified." (at 9). This interpretation flies in the face of common sense and violates basic principles of statutory construction.

First, with regard to common sense, if the Commission is required to totally disregard the costs necessary to achieve the estimated benefits, then if the testimony showed, for example, that a single minimum wage job would be created, then the test would be met, even if the above

² The \$390 million above market cost is set forth in Exhibit 3 to the testimony of Mr. Osada in Docket 4185 and Exhibit 9 to the testimony of Mr. Milhous in Docket 4111. Although Mr. Milhous testified on August 3, 2010 to a revised estimate of \$370 million, this was based on Massachusetts figures. The Rhode Island figures are not yet complete, so we will use the \$390 million.

market costs to be paid by the ratepayers were \$1 billion to create this single job! This is absurd and cannot be what the Legislature intended. Clearly, the Legislature wanted a factual, evidentiary demonstration that this project would improve economic development in Rhode Island and facilitate new and existing business expansion and the development of Quonset Business Park, not that it would negatively impact economic development or discourage new and existing business expansion and the development of Quonset Business Park. The only way to determine whether or not the PPA is “likely to provide economic development benefits” such as new and existing business expansion and the further development of Quonset Business Park is to determine whether or not the PPA is likely to have a net positive effect on economic development. No businessperson would ever look only at the income side of a ledger to determine whether or not to establish a new business or expand an existing business. A businessperson would always look at both the income and cost sides of the ledger to determine whether or not the development of a new business or the expansion of an existing business would have a net positive economic effect. This, therefore, is the common sense approach that the Legislature intended and must be applied by the Commission in this case.

The Legislature would never pass a statute requiring the Commission to approve an agreement that is likely to have net negative economic development benefits and discourage new and existing business expansion. The purpose of this amended Act was to have the Commission determine whether or not the PPA would be likely to provide economic development benefits, including the facilitating of new and existing business expansion and the further development of Quonset Business Park. Such economic development benefits will only occur if the PPA provides net positive economic development benefits for business, after weighing the estimated gains against the estimated costs to obtain those gains. Clearly the Legislature intended that if the Commission determined that the PPA is likely to discourage economic development and

discourage new and existing business expansion and the development of Quonset Business Park, the PUC would reject the PPA. This determination can only be made by looking at both sides of the ledger, the positives and the negatives, which is what any businessperson would do in deciding whether or not to establish a new business or to expand an existing business.

This Commission has also made it clear throughout its history that it always looks at both sides of the ledger in ruling on cases before it. For example, although there is no specific reference that we are aware of to performing a cost-benefit analysis in Title 39, the Commission has approved of the Division conducting a cost-benefit analysis in order to make sure that a utility filing properly analyzes both the positive side and the negative side of the ledger in a rate filing. For example, in the case of Interstate Navigation Company v. Burke, 465 A.2d 750 (RI 1983) (copy attached hereto as Exhibit 2), Interstate was constructing a new ferry (the *Nelseco*) to add to its fleet. Interstate made a rate filing seeking a rate increase which, among other things, included estimated expenses for operating the *Nelseco*. The Division argued (and the Commission agreed) that it would be inappropriate to look only at the new expenses that would be required to operate the *Nelseco*. The Division argued that adding the *Nelseco* to Interstate's fleet would also be likely to increase Interstate's revenues, which would offset the need for some of the rate relief needed to cover the new expenses. The Commission agreed with the Division and established an estimated "revenue offset" to reduce the estimated expenses. This offset was specifically based upon a "cost-benefit analysis" prepared by an expert witness for the Division. The Supreme Court upheld the Commission's decision, and in doing so, stated that:

"The division presented James I. Goldman, a certified public accountant, as an expert witness. He had been retained by the division to conduct a cost-benefit analysis in regard to the company's addition of the *Nelseco*." (at p. 753-54, emphasis added).

Mr. Goldman's cost-benefit analysis concluded that there was likely to be new passenger revenue attributable to the *Nelseco*, which must be used to offset the expenses associated with the addition of the *Nelseco*. The Supreme Court ruled:

"After reviewing all of the evidence presented to the commission, we are of the opinion that the commission's finding of a revenue offset in this case was lawful, reasonable, and substantially supported by legal competent evidence." (at p. 758).

This case is clear evidence that a cost-benefit analysis is appropriate for consideration by this Commission in making any determination regarding the impact of a new project, whether it be the addition of a new ferry or a new windmill project. The Commission must therefore not close one eye, but must open both eyes and look at both the positive and the negative sides of the ledger and offset them against each other.

The Declaration of Findings at the beginning of R.I.G.L. § 39-26.1-7(a) also makes it clear that it is the intent of the amended statute to "take advantage of the economic development benefits of the emerging offshore wind industry." Moreover, this same section recognizes that there are "related costs" associated with the Town of New Shoreham project. Therefore, the statute itself mentions that there are "costs" associated with the New Shoreham project that the Commission must take into account. Moreover, as stated above in Section I of this brief, this statute makes specific reference no less than five separate times to Docket 4111 where the \$390 million of above market costs was extensively discussed, including the potential adverse impacts of those above market costs on ratepayers such as Toray and Polytop.

Under cannons of statutory interpretation in the State of Rhode Island, as held in Buonanno v. Village at Waltherman Lake, L.P., C.A. PC/06-5797 (RI Superior) May 17, 2010:

" . . . construction of legislative enactments is a matter reserved for the courts, . . . and, as final arbiter on questions of construction, it is this court's responsibility in interpreting a legislative enactment to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes.

State v. Greenberg, 951 A.2d 481, 489 (R.I. 2008) (quoting *Brennan v. Kirby*, 529 A.2d 633, 637 (R.I. 1987)). To accomplish this task, the Court must scrutinize "the language, nature, and object of the statute[,] to glean the intent of the Legislature." *Id.* (quoting *State v. Pelz*, 765 A.2d 824, 829-30 (R.I. 2001)). However, "[t]his Court will not construe a statute to reach an absurd result." *State v. Flores*, 714 A.2d 581, 583 (R.I. 1998) (quoting *Kaya v. Partington*, 681 A.2d 256, 261 (R.I. 1996))." (Emphasis added).

There is no question that to interpret R.I.G.L. § 39-26.1-7(c)(iii) to prohibit the Commission from considering above market costs and the negative effects on economic development benefits and new and existing business expansion would lead to an absurd result as discussed above (i.e., the creation of a single job at a cost of \$1 billion would satisfy the statute). Not only was this obviously not the intent of the Legislature, but the Supreme Court would never allow such an absurd interpretation of a statute.

Moreover, Grid's objection should be stricken because it was filed out of time. On July 2, 2010, Toray filed a petition to intervene stating:

"It is Toray's position (a) that the dramatic costs that would be imposed upon Toray and others similarly situated renders the PPA commercially unreasonable; (b) that the PPA is not likely to provide economic development benefits, but in fact will result in economic development detriments; (c) that the PPA will not facilitate new and existing business expansion, but in fact will discourage new and existing business expansion; (d) that the PPA will not further the development of Quonset Business Park where Toray is located, but in fact will discourage further development of Quonset Business Park; and (e) that although the PPA agreement may provide some small environmental benefits, those benefits would come at unacceptably high cost." (at 2-3, emphasis added).

Therefore, Grid was on notice that the above market costs and the negative effects on existing businesses were issues being raised by Toray "pursuant to R.I.G.L. § 39-26.1-7(c)" as stated in Toray's petition to intervene.

At the prehearing conference in this matter on July 8, 2010, all parties agreed to an expedited (to say the least) procedural schedule that included a deadline of July 13, 2010 "for Filing Dispositive/'Substantive' Motions." This term was further defined in the procedural scheduling order to mean "Motions related to the statute itself and not related to interpretation of

statutory provisions specifically related to the Amended PPA.” (Emphasis added). (A copy is attached as Exhibit 3). In compliance with this statutory deadline, motions to dismiss were filed by the Conservation Law Foundation, the Attorney General, and TransCanada. However, no motion “related to the statute” was filed by National Grid regarding the issue it orally raised much too late on July 27. This question of statutory interpretation is unrelated to the terms of the PPA; it is a strict question of the legal construction of R.I.G.L. § 39-26.1-7(c)(iii). In fact, on July 27, the Chairman, in considering Grid’s oral motion, made it clear that the issue raised by Grid was one of “interpretation of that statute” and “a very important statutory interpretation.” (at 13).

Accordingly, this motion was required to be filed no later than July 13. Because it was not timely filed, it was waived. By springing an oral motion to this effect on all parties two weeks after the July 13 deadline for the filing of motions, in the midst of hearings, National Grid has clearly violated the prehearing procedural scheduling order. Grid’s motion should therefore not be considered for this reason alone, because to do so would prejudice all parties who by July 27 had already prepared their cases, including their witnesses, under the logical assumption that testimony regarding the likelihood of the PPA providing economic development benefits, including facilitating new and existing business expansion and further development of Quonset Business Park, would take into account the above market costs of the project and the negative effects of those costs on new and existing businesses as was discussed in Docket 4111. This sort of “trial by ambush” tactic should not be allowed. It is the very reason why this Commission and its legal counsel was so careful to set a strict time table that all parties, with the exception of Grid

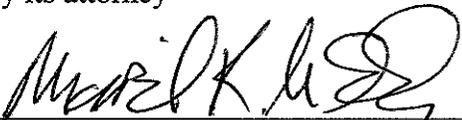
on this issue, have worked extremely hard to strictly adhere to. The Commission should not allow an exception for this motion, especially one so unfounded and contrary to common sense.³

CONCLUSION

Accordingly, for the foregoing reasons, Toray and Polytop submit that the PPA must be rejected because (1) it does not provide that “all realized savings” will be allocated solely to the benefit of ratepayers and reduce the initial price set forth in Docket 4111, and (2) the huge above market costs and negative effects on new and existing businesses greatly exceed any estimated economic development benefits (\$390 million versus \$129 million).

Respectfully submitted,
TORAY PLASTICS (AMERICA), INC.
POLYTOP CORPORATION
By its attorney

Date: August 6, 2010



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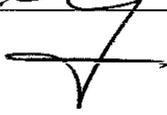
³As pointed out by the Attorney General in his brief, additional support for the fact that this Commission must consider the costs associated with the benefits that are estimated for the New Shoreham project is found in the recent United States Supreme Court case of Entergy Corp. v. River keeper, Inc., 129 S.Ct. 1498, 1505-1506 (US 2009). In that case, a federal statute stated that the best technology available for minimizing adverse environmental impact must be used. The EPA promulgated a regulation that declined to mandate certain cooling systems in part because the cost would greatly exceed the cost of compliance using other technologies. The United States Court of Appeal for the 2nd Circuit concluded that a “cost benefit analysis” was impermissible under the statute and found the regulation unlawful. However, the United States Supreme Court reversed, holding that the EPA had permissibly relied on a cost benefit analysis, even though a cost benefit analysis was not set forth in the language of the statute. As the Supreme Court stated in the Entergy case:

“It seems to us, therefore, that the phrase ‘best technology available,’ even with the added specification ‘for minimizing adverse environmental impact,’ does not unambiguously preclude cost-benefit analysis.” (at 1506). A copy of the Riverkeeper case is attached hereto as Exhibit 4.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2010, I served a true copy of the foregoing on the attached service list.



Michael R. McElroy 

**National Grid – Review of Proposed Town of New Shoreham Project
Docket No. 4185 – Service List Updated 7/23/10**

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The Urgency of Legislation for the Block Island Wind Farm

House Bill 8083/Senate Bill 2819

1. Meeting a 2012 operating deadline for the Block Island Wind Farm

→ Although December 2012 seems a long way away, getting a “first-of-its-kind” **\$220 million**, 30 MW offshore wind farm built in 100 ft. of open ocean, and actually supplying electricity to the mainland grid via a 26 mile submarine cable by 12/31/12, is actually a very large engineering, logistical and scheduling challenge. This means a final *go/no-go decision* has to be made within just weeks, not months.

Federal ITC. As you may know, the pricing in the power purchase agreement between Deepwater Wind and National Grid absolutely requires that the Block Island Wind Farm (BIWF) is eligible for the federal Investment Tax Credit (ITC), which under federal rules requires commercial operation by the end of 2012.

Another requirement of the ITC is that about 5% of the total project cost—or somewhere between \$10 and \$15 million—needs to be spent on qualifying expenditures **by the end of this year**. And to actually spend this much money by year end will require commitments to be made this summer, just a month or two away. Deepwater Wind simply cannot meet these federal spending requirements if the review of our proposed PPA were to be delayed until later this fall.

Permitting schedule. Working backwards, in order to be in construction in the spring of 2012, Deepwater Wind will need to meet the following schedule of events:

- Make commitments to construction companies, vessel owners etc. by **mid-2011** at the latest.
- Submit permit applications by **September 2010**, in order to reliably complete permitting with both the RI (CRMC) and federal government (US Army Corps of Engineers) by the 2nd quarter of 2011

- Complete detailed project description (ie., size, type and location of wind farm and transmission line) by **September 2010**
- Start remaining transmission line route surveys (both marine and terrestrial) in **May of 2010** in order for the survey vessels to be mobilized, the surveys to be conducted and the results to be examined by late summer.

Deepwater Wind will need to start these final route surveys—at a cost of \$1.5 to \$2 million—within two weeks.

There simply is not enough time for the power purchase agreement to be remanded to the RI PUC for another multiple-month review process. Such a process would unquestionably lead to the cancellation of this project, as a 2012 completion date would become impossible.

2. *Why should we bother with a demonstration project, if instead we could go straight to a bigger federal waters project like Cape Wind?*

- **RI's has a headstart.** Since it will be built in RI state waters, has a permitting headstart, and is a smaller scale facility that will be relatively easy to finance compared to much larger projects, only the BIWF has a reliable chance of getting built by 2012, compared to other facilities under development in the region.
- **Cape Wind is not at finish line.** The Cape Wind project has made real progress, but is not yet "shovel-ready." Their power purchase agreement is for only half of their project, and for this contract to be valid, Cape Wind has to install approx. 65 wind towers by the end of 2012, which is a huge challenge given the state of the industry, the apparent lack of wind energy financing and the possibility of additional permit appeals in Massachusetts.
- **Federal waters project delayed until probably later this decade.** Under the federal leasing rules currently in place, it will take up to 8 years to even start construction of the first larger 350 MW project in the federal waters of RI Sound. Deepwater Wind, along with the rest of this industry, is working to reform these federal regulations, but in any case the first larger project for RI Sound is still a long way off. ***These delays mean additional years until this industry creates jobs anywhere.***

- **Only Block Island can be built in near term.** Since only the smaller 8-tower Block Island Wind Farm has a real chance to get built by 2012, RI will continue to be the leader in attracting the investment and new jobs attracted by a first-of-its-kind offshore wind farm. The BIWF's 30-50 construction jobs, and 6 full-time operations and maintenance jobs, are just a start. ***Quonset Point has the deepwater port, and easy access to the Atlantic Ocean, that give it the best chance of becoming the Northeast offshore wind hub if RI proceeds first with a project.***
- **Competition for the "next" project is strong.** If the Block Island Wind Farm is cancelled, RI becomes an also ran state, just another one of the 11 eastern states (from Maine to Georgia) competing to host a federal waters project sometime over the next decade. ***The jobs opportunity will likely be lost to larger states with greater resources to attract a new industry.***
- **Cancellation of the BIWF a bad sign for investment in RI.** A cancellation of the BIWF, after Deepwater Wind has invested **\$9 million** in developing this facility, will have a chilling effect on wind industry investment in RI. If RI decides to abandon the BIWF, it may encourage wind project developers to instead pursue markets in other states where stronger support exists to attract new industries.
- **Function of a demonstration project.** In addition to establishing RI as the leader in the offshore wind industry, Deepwater Wind's first-of-its-kind demonstration project will serve multiple functions:
 - o Establish the commercial viability of using offshore wind to generate significant amounts of emissions-free electric energy;
 - o The first use of deepwater "jacket" foundations in a US offshore wind farm will stimulate R&D into offshore renewable technology;
 - o Deepwater will make the BIWF facility available to the URI as a "Center of Excellence" to support the first actual

research into the environmental impacts of offshore wind project construction and operation;

3. **The contract amendments required by this legislation include extra ratepayer protections**

- **Price reduction provision.** This legislation requires that the parties negotiate a new contract that requires a new “open book” provision. The open book provision requires that the price previously negotiated by Deepwater Wind and National Grid will be a maximum price. It also provides that the maximum price will be reduced if the actual costs of building the BIWF are less than projected. The bill mandates that an outside auditor review the costs of the project at the conclusion of the construction process. The maximum price will be reduced based on any realized savings, with all of that benefit going to the ratepayer.

- **“Open book pricing” is better for the RI ratepayer.** The central requirement of this revised legislation is to require a new contract between Deepwater Wind and National Grid that increases the transparency of the contract and provides additional ratepayer benefits. Given the relative lack of cost information in the newly developing offshore wind industry, it makes more sense to price the first demonstration-scale project on an open-book basis, so that the RI state government, National Grid and ratepayers alike will:
 - o know what it costs Deepwater Wind to build the Block Island Wind Farm;
 - o know the level of return-on-investment being earned by Deepwater Wind, which will be capped at 12% (unlevered);
 - o understand how the contract's power prices are derived; and
 - o have the benefit of lower power prices in the event Deepwater builds the project for a lower cost.



Deepwater Wind's Planned R.I. Offshore Wind Farms

Deepwater Wind, a leading offshore wind development company, is the only such developer active in Rhode Island whose management team *has actually created over 550 MW of wind energy projects now operating in the northeastern United States*. Deepwater Wind is actively planning offshore wind farms off the eastern seaboard, including projects in Massachusetts, New York, and New Jersey, in addition to Rhode Island.

First in Nation Effort

Its proposed small-scale wind farm off the coast of Block Island, R.I., is on target to become the nation's first offshore wind farm. Development of the Block Island Wind Farm would be a crucial first step in establishing a green-jobs hub at Quonset Point that could employ hundreds of people.

Investment in Rhode Island

- Deepwater has invested \$9 million to date in Rhode Island, including \$3.2 million to support the Coastal Resources Management Council's Special Area Management Plan, a historic ocean mapping project.
- Deepwater Wind's combined planned investment for the Block Island Wind Farm and the Rhode Island Sound Wind Farm are expected to total more than \$2 billion—all in private dollars.
- The two Rhode Island wind farms will produce about 1.32 million megawatt hours of energy annually – enough to supply 15 percent of Rhode Island's electricity as well as to satisfy RI's Renewable Energy Standard by 2020.
- And, by displacing the least efficient conventional utility power plants, this new energy will produce billions of dollars in regional wholesale price reductions that will offset much of the expected ratepayer subsidy.

Jobs

Deepwater's offshore wind projects will create many hundreds of construction-related project-specific jobs, many additional wind project operating jobs, and hundreds of additional jobs in the ancillary "supply-chain" businesses that will emerge to manufacture, assemble, install and maintain offshore wind equipment, supply vessels and related activities.

Project Milestones:

- Opened Rhode Island development office in May 2009, staffed by full-time Rhode Island Chief Development Officer

- Began, in summer 2009, a series of ongoing engineering and environmental studies on Block Island, including bird and bat studies and wind assessments, with the assistance of volunteer Block Island resident avian experts
- Awarded U.S. Dept. of Energy grant in May 2009 for bird/bat studies on BI
- Governor Carcieri and General Assembly sign landmark legislation in June 2009 that establishes contracting standards for renewable energy.
- Opened Block Island development office in June 2009
- Signed lease agreement in June 2009 to establish green-manufacturing hub on 117 acres at Quonset Point
- U.S. Department of Transportation awards Quonset Development Corp. a \$22.3 million TIGER stimulus grant in February 2010 to fund, among other things, infrastructure improvements to support wind energy manufacturing

Details on Rhode Island Projects:

- **Block Island Wind Farm**
 - up to 8 turbines producing up to 30 megawatts, in state waters about 3 miles offshore
 - replaces Block Island's costly, and dirty, diesel-powered generators
 - transmission cable links Block Island to mainland Rhode Island, providing Block Island residents with clean power at stable, mainland rates
 - at least 50 new jobs during construction
 - can be in operation by end of 2012
- **Rhode Island Sound Wind Farm**
 - utility-scale wind farm with nameplate capacity in range of 385 - 500 mw
 - will serve renewable energy markets in multiple states
 - located in Rhode Island Sound, approx. 15 to 20 miles from coastline
 - potential to create hundreds of new jobs
 - establishes renewable-energy industry hub for the Northeast at Quonset Point
 - can be in operation in the period 2015-2019, depending on federal regulations

"Open Book" Contract Pricing

- New structure provides for transparent, "open-book" auditing of project costs
- Caps power-purchase price at the rates in the existing contract
- Returns any capital cost savings directly to ratepayers in lower contract prices
- Deepwater Wind retains all financial risks due to construction or operating cost overruns

AK #6
full

Mike Rubin

From: Joe Lindbeck
Sent: Tuesday, May 11, 2010 9:42 AM
To: Mike Rubin; Gregory Schultz
Cc: Jeff Guimond
Subject: FW: Block Island Wind Farm proposal

-----Original Message-----

From: LARRY4REP@aol.com [mailto:LARRY4REP@aol.com]
Sent: Tuesday, May 11, 2010 7:22 AM
To: Joe Lindbeck
Subject: Fwd: Block Island Wind Farm proposal

From: WMoore@dwwind.com
 To: rep-ehrhart@rilin.state.ri.us, rep-ferri@rilin.state.ri.us, rep-gallison@rilin.state.ri.us, rep-giannini@rilin.state.ri.us, rep-handy@rilin.state.ri.us, rep-marcello@rilin.state.ri.us, rep-mcnamara@rilin.state.ri.us, rep-messier@rilin.state.ri.us, rep-naughton@rilin.state.ri.us, rep-mrice@rilin.state.ri.us, rep-rice@rilin.state.ri.us, rep-segal@rilin.state.ri.us, rep-sullivan@rilin.state.ri.us, rep-vaudreuil@rilin.state.ri.us, rep-ucci@rilin.state.ri.us, rep-walsh@rilin.state.ri.us
 CC: WMoore@dwwind.com, PRich@dwwind.com, jgrybowski@haslaw.com
 Sent: 5/10/2010 9:03:10 P.M. Eastern Daylight Time
 Subj: Block Island Wind Farm proposal

Chairman Handy and Members of the House Committee on Environment and Natural Resources:

In anticipation of tomorrow's hearing on House bill 8083 (Block Island Wind Farm), I have attached several documents for your review to provide background:

- (1) A memo from Deepwater Wind explaining in detail the urgency of this legislation and the time constraints that we face in building the nation's first offshore wind farm.
- (2) A fact sheet explaining the Block Island Wind Farm and its benefits to Rhode Island.
- (3) An editorial from the Providence Business News urging that the project be allowed to go forward.
- (4) A letter from the Governor to the Attorney General.

In order to not overburden the committee with paper, I have not attached other letters of support and favorable editorials, many of which I am sure you have seen. This legislation is

supported by the New Shoreham Town Council, the Block Island Residents Association, many organized labor organizations (including the Rhode Island Building Trades), and the Greater Providence Chamber of Commerce. The Providence Journal has also endorsed the project and urged a solution to the impasse we now find the project in.

We look forward to making our case for this legislation tomorrow and to answering any and all questions that your committee may have. Of course, we are also happy to meet with any members of your committee personally to address their concerns.

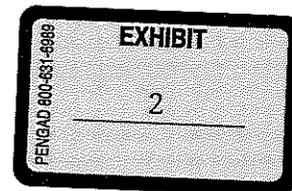
Thank you.

Bill Moore

William M Moore • Chief Executive Officer and Managing Director

Deepwater Wind, LLC
Office (201) 204-1330 • Fax (201) 850 1716

36-42 Newark St., Ste 402, Hoboken NJ 07030 • Email WMoore@DWWind.com



Interstate Nav. Co. v. Burke, 465 A.2d 750 (R.I. 1983)

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465 A.2d 750 (R.I. 1983)

INTERSTATE NAVIGATION CO.

v.

Edward F. BURKE et al.

No. 82-258-M.P.

Supreme Court of Rhode Island.

August 30, 1983.

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W. Slater Allen, Jr., Booth & Brodsky, Providence, for petitioner.

Richard E. Crowell, Jr., Public Utilities Commission, Cranston, for respondents.

OPINION

WEISBERGER, Justice.

This is a statutory petition for certiorari filed by the Interstate Navigation Company (the company or Interstate) pursuant to G.L.1956 (1977 Reenactment) § 39-5-1. The company challenges the May 14, 1981 decision and interim order of the Public Utilities Commission (the commission) and the final report and order that the commission rendered on May 28, 1982. Both of these orders addressed the proposed tariff that the company filed with the commission on February 24, 1981, in docket No. 1572. In its petition the company contends that the commission erred in several respects when it twice denied the company's request for rate relief. The pertinent facts are as follows.

Interstate runs a ferry service between points on the mainland and Block Island.

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Prior to filing the proposed tariff, the company contracted for the construction of a new ship, the Nelseco II (the Nelseco), which would be added to a fleet comprised of the Quonset, the Manisee, the Manitou and the Yankee. The company intended to route all of these vessels, except for the Yankee, between Point Judith and Block Island during the summer of 1981.

The company's proposed tariff reflected a rate increase in the amount of \$179,078. The company estimated that its expenses for fuel and wages would increase significantly in 1981. In addition, the company sought rate relief for interest and depreciation expenses that the company would incur during 1981 because of the addition of the Nelseco to the company's fleet.

Public hearings were held on April 6, 1981, at the offices of the commission and on May 11, 1981, at the New Shoreham Town Hall. At these hearings, the Division of Public Utilities and Carriers (the division) opposed the company's proposed rate increase and offered evidence to rebut the company's projected increases for 1981 in fuel, payroll, interest, and depreciation expenses. The division suggested that the company was entitled to a rate increase of \$76,538.

The commission rendered its decision and interim order in docket No. 1572 on May 14, 1981. The commission allowed Interstate increases in fuel and payroll expenses in amounts lower than those that the company had requested but higher than those that the division had proposed. The May 14 decision fully resolved these issues. The company's request for rate relief in respect to the expenses attributable to the Nelseco, however, posed questions that were not fully adjudicated.

Noting that the Nelseco was not in service during the test year (1980), the commission determined that it could include the ship's depreciation and interest expenses in the revised tariff only if "the charges are known and measurable for the twelve months ended [sic] December 31, 1981." After reviewing the company's justification for including these expenses in the proposed tariff, the commission disallowed them because they were not known and measurable on May 14, 1981. More specifically, the commission held that

"the costs of completing and outfitting the Nelseco II are too speculative at this time but should be reviewed in the near future. * * * We do believe, however, that it will be in the public interest to place the Nelseco II in service and to afford it proper rate treatment as soon as possible.

"Most importantly * * * the Commission feels that it cannot approve some changes without considering all possible revenue increases and expense savings. Therefore, the Commission agrees with the Division and will disallow these expenses until a later time when they are known and measurable."

The commission therefore issued only an interim order regarding rate relief for the depreciation and interest expenses of the Nelseco.

This order instructed the company to file, no later than September 30, 1981, a complete report of expenses and revenue for the period from January 1, 1981, to September 7, 1981. The commission specified that this report should itemize all expenses for constructing and outfitting the Nelseco and should analyze the most efficient use of the company's vessels for service to Block Island.

The commission awarded Interstate a rate increase of \$105,637, which was well below the company's proposed tariff. The final issue that the commission addressed was the company's proposed rate design. Although the division had not disputed the company's plan, the commission ordered the company to apply the rate increase to all

categories of passenger-related rates equally. Moreover, motivated by a concern that cargo rates might be unfairly subsidized by passenger-related rates, the commission instructed the company to conduct a cargo rate study, which the company was to file

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by September 30, 1981, with its 1981 revenue and expense report.

After a continuance, the company filed a report with the commission on October 15, 1981. This report supplied data concerning revenue and expenses for the period January 1, 1981, through September 7, 1981. A balance sheet that was dated September 7, 1981 accompanied the report. However, the company did not file the cargo rate study that the commission had requested in its interim order.

On November 4, 1981, Interstate notified the commission that the company was seeking a rate increase of \$73,441 through further proceedings in docket No. 1572. Further, the company asserted that the requested cargo rate study was not feasible. Accordingly, the company requested that the remaining issues be resolved and that the study be deferred to a future docket.

The commission held the first hearing on the company's requests on March 1, 1982. This hearing dealt solely with the company's failure to conduct the cargo rate study. Citing the difficulty of conducting such a study during the off season, the company suggested that it be allowed to defer completion of the study until after the expenses for Nelseco were given appropriate rate treatment. The division, on the other hand, interpreted the May 14, 1981 interim order of the commission as requiring the cargo rate study's completion prior to further proceedings in docket No. 1572. The commission disagreed. Rather, it ordered the division to conduct an audit of Interstate to facilitate the resolution of the remaining issues in the case. The commission, however, instructed the company to complete the cargo rate study prior to any requests for rate relief in future dockets.

Further hearings were held on April 1, 1982, and on April 16, 1982. As they had done in the spring of 1981, representatives of Interstate testified at these hearings in support of the company's request for rate relief. Similarly, representatives of the division urged the commission to grant no relief to the company for the depreciation and interest expenses attributable to the Nelseco, which started service on the Block Island run on or about July 1, 1981.

The April 1982 hearings disclosed the following evidence. ^[1] According to the company, the interest expense for the Nelseco in 1981 equaled \$87,500, and the ship's depreciation expense for the same period was \$24,500. Although the sum of these figures was \$112,000, Interstate felt constrained by the previous proceedings in docket No. 1572. The company therefore requested only \$73,441 in rate relief, which represented the difference between the original proposed tariff and the rate increase that the commission had awarded on May 14, 1981.

The division, on the other hand, proposed to allow the company \$44,265 in interest expense and \$4,500 for depreciation but would offset these costs by revenue increases of \$207,619 that were attributable to the Nelseco's operation during the summer of 1981. Accordingly, the division recommended to the commission a zero increase in rates.

Raymond Linda, general manager of Interstate, admitted that the Nelseco generated extra revenue but could not specify the amount because canceled tickets for the various ships were burned after collection. John G. Kanabis, the

company's certified public accountant, verified that the company did not segregate passenger revenue on a vessel-by-vessel basis. Mr. Kanabis attributed the increase in passenger revenue to the Nelseco's operation and to the increased popularity of Block Island with summer tourists.

The division presented James I. Goldman, a certified public accountant, as an expert witness. He had been retained by the division to conduct a **cost-benefit** analysis in



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regard to the company's addition of the Nelseco. Mr. Goldman ascertained the costs and expenses that the company incurred because of the new vessel and determined what benefits the company derived from the use of the ship in the areas of labor and fuel costs. In addition, Mr. Goldman allocated total passenger revenue among all of Interstate's vessels, except for the Yankee, relying on a comparison of the total passenger capacity of each vessel to the total passenger capacity of all vessels for the period the ships were in operation. This formula resulted in Mr. Goldman's concluding that passenger revenue attributable to the Nelseco during the summer of 1981 amounted to \$220,599.

The commission rendered its final report and order in docket No. 1572 on May 28, 1982. First, the commission interpreted the portion of the interim order in which the commission had held that it could not approve rate relief for the charges attributable to the Nelseco without considering revenue increases and expense savings that the vessel might produce. The commission posited that by "revenue increases and expense savings" it had meant "the extra revenues generated as a result of the Nelseco II being put in service and any possible expense savings which may have evolved as a result of using the Nelseco II rather than one of the less efficient boats."

Next, the commission noted that the company had not contested the division's assertion that the Nelseco had generated extra revenue. The commission rejected Interstate's claim that the destruction of canceled tickets prevented the company from calculating precisely the amount of increased revenue attributable to the Nelseco. Consequently, the commission held that

"[s]ince the Company totally failed to meet its burden of proof by supplying adequate information relating to revenue offsets and expense savings *** it would be imprudent *** to approve any additional charges absent the necessary offsets."

The commission therefore denied and dismissed Interstate's request for rate relief and instructed the company to file a complete rate case if, in the future, the company determines that revenue increases are not offsetting additional expenses. The commission further ordered Interstate to supply a cargo rate study prior to any future rate filing. The company filed a petition for certiorari with this court on June 4, 1982. The writ issued and was returned before the specified date.

In its brief the company raises issues that relate to the commission's findings in both the May 1981 decision and interim order and the May 1982 final report and order. Before we specify the issues that we shall address, we must consider the commission's contention that Interstate's noncompliance with the provision of § 39-5-1 renders the commission's interim order nonreviewable at this time.

Section 39-5-1, which authorizes judicial review in public utilities cases, provides:

"Any person aggrieved by a decision or order of the commission may, within seven (7) days from the date of such decision or order, petition the supreme court for a writ of certiorari to review the legality and reasonableness of said decision or order. The petition for a writ of certiorari shall fully set forth the specific reasons for which it is claimed that the decision or order is unlawful or unreasonable. Chapter 35 of title 42 shall not be applicable to appeals from the commission. The procedure established by this chapter shall constitute the exclusive remedy for persons and companies aggrieved by any order or judgment of the commission; provided, however, any person aggrieved by a final decision or order of the administrator may appeal therefrom to the superior court pursuant to the provisions of § 42-35-15." (Emphasis added.)

Although the company filed its petition for certiorari within seven days of the commission's final order in docket No. 1572, the filing date was more than a year later than the date of the commission's interim order.

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Contending that the interim order was not appealable, the company cites *Boston Gas Co. v. Department of Public Utilities*, 368 Mass. 780, 336 N.E.2d 713 (1975). In that case the Massachusetts Supreme Judicial Court interpreted the state's counterpart to G.L. § 39-5-1. Unlike our statute, the Massachusetts statute authorizes appeals "from any final decision, order or ruling of the commission * * *." Mass.Gen.Laws Ann. ch. 25, § 5 (West 1981). (Emphasis added.)

Section 39-5-1, on the other hand, refers to finality only in respect to an aggrieved party's ability to appeal a final order or decision of the administrator of the division pursuant to section 15 of chapter 35 of title 42, which chapter embodies the Administrative Procedures Act. Moreover, § 39-5-1 expressly excludes the applicability of all provisions of the Administrative Procedures Act, including § 42-35-15, to appeals from the commission. *Providence Gas Co. v. Burke*, 119 R.I. 487, 502 n. 5, 380 A.2d 1334, 1342 n. 5 (1977). The Legislature therefore intended that all decisions and orders of the commission be appealable to this court through petitions for certiorari.

We are of the opinion that all of the findings contained in the commission's decision and interim order were appealable on May 14, 1981. [2] Consequently, Interstate's failure to petition for a writ of certiorari within seven days of that date, as required by § 39-5-1, renders these findings nonreviewable. Accordingly, we dismiss the company's petition to review the commission's decision and interim order. We shall address only those issues that relate to the report and order of May 28, 1982.

The role of this court in reviewing findings of the commission is clearly defined by statute and case law. See e.g., *New England Telephone & Telegraph Co. v. Public Utilities Commission, R.I.*, 446 A.2d 1376, 1380 (1982); *Valley Gas Co. v. Burke, R.I.*, 406 A.2d 366, 369 (1979); *Michaelson v. New England Telephone & Telegraph Co.*, 121 R.I. 722, 728, 404 A.2d 799, 803 (1979); G.L.1956 (1977 Reenactment) § 39-5-3. The commission engages in factfinding; we do not. Instead, we determine whether the commission's findings are lawful and reasonable, fairly and substantially supported by legal evidence, and sufficiently specific to enable us to ascertain if the evidence upon which the commission based its findings reasonably supports the result. *Blackstone Valley Chamber of Commerce v. Public Utilities Commission*, 121 R.I. 122, 128, 396 A.2d 102, 105 (1979). Applying these standards, we now consider the contentions of the company which relate to the commission's final report and order.

Disallowance of Interest and Depreciation Expenses Attributable to the Nelseco II Because of Revenue Offsets

The company contends that the Nelseco's expenses warranted rate relief because there was no nexus between the ship's being placed into service and the increase in revenue that the company realized during 1981. According to Interstate, delays caused by long passenger lines had plagued the Block Island run in the past. The company used the Nelseco between Block Island and existing terminals that had suffered from these delays. The company asserts, therefore, that the Nelseco did not generate

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any new revenue, as it might have done had the company used the vessel between Block Island and newly established terminals.

We find this contention perplexing in light of Mr. Linda's admission that the Nelseco had generated new revenue for the company. In its brief, the company explains this inconsistency by claiming that the Nelseco, along with the company's other vessels, was used to transport an unexpected increase in the company's passenger pool as well as passengers in what the company characterizes as the "basic pool." The company suggests to this court, therefore, that Mr. Linda meant that all of the vessels generated new revenue.

We are of the opinion that our acceptance of this line of reasoning would have no effect upon the disposition of the company's petition. Even if all of the vessels in Interstate's fleet, rather than only the Nelseco, generated new revenue during 1981, our review would still focus on the commission's finding that those revenues attributable to the Nelseco offset the ship's interest and depreciation expenses. Our determination of the validity of this finding, in turn, is affected by the legitimacy of two contentions that the company has set forth: (1) the nexus argument, to which we have already referred, and (2) the contention that Mr. Goldman's formula for allocating increased revenue among the company's ships was hypothetical and, as such, constituted illegal, incompetent evidence that the commission should have disregarded. If we accept the company's challenge to the evidence adduced through Mr. Goldman's testimony, we must reverse the report and order of May 28, 1982, because the commission's disallowance of rate relief for the Nelseco's expenses was based solely upon this evidence.

Prior to considering this issue, however, we must make clear that we find the company's nexus argument unpersuasive. Interstate seems to suggest that a capital investment, such as a new vessel, must service customers to whom a company had never previously offered service for that investment to generate new revenue. In this case, the general manager of Interstate attributed the growth in revenue during 1981, in part, to an upsurge in the popularity of Block Island with summer tourists. If the company had not placed the Nelseco in service during the summer of 1981, it is quite likely that the company's fleet would have been incapable of adequately handling the increased demand for passenger space. Other palliatives, such as additional trips to the island, would probably have failed to meet the need. Consequently, the company would have lost revenue that it would have realized had the Nelseco been placed in service. It is therefore illogical to contend that no connection exists between the Nelseco and increased passenger revenue. In any event, it should be noted that an application for rate relief must be based upon the total revenues and expenses of the company. In arriving at a determination of revenue offsets to expenses, the experience of a particular vessel is of interest and may well be a significant factor in the determination. It is not, however, the only factor or indeed even a sine qua non in the determination of entitlement to the privilege of charging higher fares to customers. Such a determination should be made, as it was made in this case, on the basis of the total income and expense statement for the relevant period. [3] Accordingly, the sole issue before us is whether the commission's decision in respect to the denial of rate relief

was based upon legally competent evidence relating to income and expenses of the company.

Mr. Goldman was retained by the division to conduct a financial review of Interstate based upon income statements and other information that the company supplied. This review was intended to result in a determination of whether increases in passenger revenue attributable to the Nelseco offset the ship's depreciation and interest expenses. He visited the company's office

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in New London, Connecticut, and met with officers of the company. During the course of his analysis, Mr. Goldman learned from Mr. John Kanabis, the company's general manager, that passenger revenue was not segregated by vessel, except for the Yankee. ^[4] According to Mr. Goldman's report and his prefiled testimony he therefore developed a formula for allocating passenger revenue among the various ships, after discussing the reasonableness of the formula with Mr. Kanabis. Mr. Goldman allocated total passenger revenue for the period January 1, 1981, to September 7, 1981, among the Manitou, the Manisee, the Quonset and the Nelseco by comparing each vessel's pro-rata share of passenger capacity with the total passenger capacity of all of the vessels and applying that ratio to total passenger revenues. He applied the same formula to the entire year 1981. ^[5] This procedure resulted in a determination that the company's total passenger revenue increased by \$194,228 from 1980 to 1981. According to the allocation formula, the company realized \$226,942 in passenger revenue during 1981 from the operation of the Nelseco. ^[6] This entire amount represented an increase in revenue because the Nelseco was not in service during 1980. Of the total amount of passenger revenue that the Nelseco generated during 1981, Mr. Goldman calculated that the ship generated \$220,599 between January 1, 1981, and September 7, 1981.

Mr. Goldman suggested that the commission apply this entire amount to offset the Nelseco's expenses. The division adopted this theory but, in the alternative, proposed that the commission apply a revenue offset of \$207,619. The reason for this strategy was as follows. The company's income statement for the years 1979 through 1981, which the company filed prior to the end of 1981, projected an increase in expenses for the company from 1980 to 1981 in the amount of \$334,307. ^[7] Mr. Goldman's financial review, however, indicated that the expense increase was \$311,519. ^[8] This discrepancy resulted from adjustments that Mr. Goldman made to the company's overall interest and depreciation expense for 1981. In a memorandum filed with the commission, the division suggested that the company's 1981 expense figure was too high but addressed the commission's possible acceptance of the figure and the effect of that acceptance on the revenue offset attributable to the Nelseco.

First, the division calculated, relying on the product of the number of vessels and the number of months they were in service during 1981, a total of fifty-four vessel/months during 1981. ^[9] Next, since the period in question (July 1 to September 7) was only 2.5 months, or 4.1 percent of fifty-four, the division determined that 4.1 percent of the company's 1981 expense increase was attributable to the Nelseco during the relevant period. The division therefore purported to apply the percentage to the expense-increase figure that the company had set forth and to reduce the division's revenue offset by this amount.

A reapplication of this formula reveals that the division made some minor mistakes when calculating the adjusted revenue offset.

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We believe however that these miscalculations are not prejudicial to the company. Even though the commission ultimately adopted the division's version of the adjusted revenue offset, an application of more accurate calculations regarding the revenue offset would have led the commission to the same result; the revised figure would still far exceed the company's request for rate relief in the amount of \$73,441.

After reviewing all of the evidence presented to the commission, we are of the opinion that the commission's finding of a revenue offset in this case was lawful, reasonable, and substantially supported by legally competent evidence. Mr. Goldman's formula for allocating the increased revenue among the ships was reasonable and fair to the company. Interstate, after all, made absolutely no attempt to comply with the commission's request for data concerning expense savings and revenue increases specifically attributable to the Nelseco. As the party seeking rate relief, the company had the burden of establishing its entitlement to such relief. General Laws § 39-3-12; see *Providence Gas Co. v. Burke, R.I.*, 419 A.2d 263, 266 (1980); *Valley Gas Co. v. Burke, R.I.*, 406 A.2d 366, 370 (1979); *Michaelson v. New England Telephone & Telegraph Co.*, 121 R.I. at 734, 404 A.2d at 806; see also *United States v. Public Utilities Commission*, 120 R.I. 959, 963, 393 A.2d 1092, 1094 (1978) (by enacting § 39-3-12 the Legislature has recognized the "general principle that a moving party must prove its case").

Moreover, there is no merit to the company's implicit comparison of Mr. Goldman's revenue allocation formula to the deduction of a "theoretical deficiency" from the rate base, resulting from a retroactive application of a new rate of depreciation, which practice we most recently invalidated in *Blackstone Valley Electric Co. v. Public Utilities Commission, R.I.*, 447 A.2d 1152 (1982). Mr. Goldman developed his formula after consulting with Interstate's general manager and based it upon ascertainable facts, namely, the passenger capacity of each vessel in the company's fleet during the relevant periods, the total passenger capacity of the entire fleet, the number of months that each ship was in service, and the total amount of passenger revenue that the company realized. The formula was by no means theoretical in the sense that we used that word in *Blackstone Valley*. Rather, it was a well-reasoned, rational method of completing a task that the company should have undertaken--that is, calculating the amount of passenger revenue attributable to the Nelseco during the summer of 1981. Accordingly, we find no error in the commission's reliance upon Mr. Goldman's testimony.

II

The Absence of the Commission's May 28, 1982 Report and Order of Any Reference to Testimony Regarding Nonrecurring Items of Income

We decline to address the company's argument in respect to this issue because it does not relate to this docket. From the outset, the commission addressed a claim for rate relief in docket No. 1572 which was based solely upon the company's addition of the Nelseco to its fleet. The commission's interim order left the docket open only in respect to the Nelseco. Although the company was free, absent objection, to introduce irrelevant evidence, the commission properly ignored the company's assertions regarding nonrecurring items of income.

III

Due Process Issues

As its final claim the company asserts that the commission deprived it of procedural due process during the travel of docket No. 1572 because the commission (1) rendered a nonappealable order on May 14, 1981, (2) delayed

resolution of the company's request for rate relief unreasonably, (3) lacked appropriate standards for addressing

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the company's request and, without warning, deviated from standards that it had previously applied to regulate the company, and (4) failed to undertake its duties with expertise. The company's first point is controlled by our finding that the May 14, 1981 decision and interim order was appealable. As for the other contentions, they do not warrant lengthy discussion because they are wholly without merit.

A review of the record in this case indicates that the commission complied with its own rules of practice and procedure and with the provisions of the Administrative Procedures Act. ^[10] Any delays that resulted were not unreasonable and were caused, in part, by the company's failure to appeal the May 14, 1981 decision and interim order and to comply with the commission's data requests. The commission, under the circumstances, acted expeditiously in resolving the company's claim for rate relief.

Finally, the company's challenge to the commission's standard and level of expertise is untenable. By accepting the testimony of the division's expert witness, the commission acted fairly and professionally. Furthermore, the company was well aware, as of May 14, 1981, of the standards that the commission would apply when determining whether the Nelseco's interest and depreciation expense should be afforded rate relief.

IV

The Motion to Dismiss

On March 16, 1983, the commission filed a motion to dismiss further proceedings before this court in respect to the company's petition. We deferred action on the motion to dismiss because, since the date for oral argument in this case was imminent, the commission could raise at oral argument the contentions that formed the basis of the motion.

It is unnecessary for us to review these contentions or to address their validity because they are rendered moot by the determinations that we have set forth today: (1) the decision and interim order was appealable and the company's noncompliance with proper appellate procedure rendered the findings contained therein nonreviewable; (2) the findings of the commission on May 28, 1982, were valid; and (3) the company's claim that the commission's lack of expertise and adequate regulatory guidelines deprived the company of procedural due process was without merit. Consequently, we deny the motion to dismiss without further discussion.

V

Conclusion

For the reasons stated, the company's petition for certiorari is denied and dismissed. The writ heretofore issued is quashed. The records certified to this court are remanded to the commission with our decision endorsed thereon.

APPENDIX A

INTERSTATE NAVIGATION COMPANY
PASSENGER REVENUE

FOR THE PERIOD	TOTAL	YANKEE	MANITOU	MANISEE	QUONSET	NELSECO II
January 1, 1981, to September 7, 1981	\$825,629	\$76,040	\$205,899	\$205,899	\$117,192	\$220,599
January 1, 1981, to December 31, 1981	\$936,095	\$76,323	\$242,014	\$270,254	\$120,562	\$226,942
January 1, 1980, to December 31, 1980	\$741,867	\$98,263	\$260,486	\$209,887	\$173,231	---

APPENDIX B

INTERSTATE NAVIGATION CO., INC.
INCOME STATEMENT FOR THE YEARS
1981 - 1980 - 1979

	1981	1980	1979
Operating revenues	\$1,448,505	\$1,105,688	\$ 937,242
Operating Expenses:			
Maintenance payroll	\$ 75,339	\$ 56,473	\$ 39,290
Maintenance expense	139,322	91,669	135,616
Depreciation	54,697	36,415	27,123
Crew payroll	269,596	236,187	200,929
Fuel	209,096	156,249	94,911
Wharfage	28,540	28,280	30,150
Supplies	52,548	46,807	57,281
Freight agents	58,482	39,037	27,836
Utilities	17,335	14,883	12,013
Vehicle expense	10,979	13,864	9,672
Other terminal expenses	16,185	14,035	14,433
Pursers	28,141	19,971	17,337
Traffic expenses	19,705	19,191	13,574
General salaries	69,209	46,824	35,400
Other general-office expenses	53,196	46,726	26,241
Insurance and casualties	56,737	59,829	69,178
Payroll taxes	59,402	45,643	28,239
Other taxes	41,633	36,585	31,824
Interest	89,951	17,552	-0-
Other vessel expense	22,644	16,120	-0-
Rate-case expenses	6,000	2,000	-0-
Total operating expenses	\$1,378,647	\$1,044,340	\$ 871,047
Operating income	\$ 69,858	\$ 61,348	\$ 66,195

APPENDIX C

INTERSTATE NAVIGATION COMPANY
INCOME STATEMENT
FOR THE PERIOD JANUARY 1, 1981, to DECEMBER 31, 1981

	Per company	Adjustments	Adjusted income statement
	-----	-----	-----
Revenue			
Passengers	\$ 936,095		\$ 936,095
Cars	181,325		181,325
Freight	166,803		166,803
Bar	58,723		58,723
Bikes	55,558		55,558
Charter	27,825		27,825
Mail	22,176		22,176
	-----		-----
Total Revenue	\$1,448,505		\$1,448,505
	-----		-----
Selling, administrative, and operating expenses			
Payroll	469,567		469,567
Fuel and lubrication	216,956		216,956
Boat repairs	123,590		123,590
Interest *	89,951 **	(19,954) 3***	69,997

Casualties and insurance	65,741		65,741
Payroll taxes	59,402		59,402
Depreciation *	54,697 **	(2,834) 2***	51,863

Food	47,782		47,782
Taxes	41,633		41,633
Officers' payroll	31,200		31,200
Wharfage	28,540		28,540
Professional fees	20,195		20,195
Utilities, telephone, and water	17,335		17,335
Supplies	13,731		13,731
Auto and truck expenses	10,979		10,979
Building repairs	10,404		10,404
Telephone	10,311		10,311
Other traffic expenses	10,247		10,247
Advertising	9,458		9,458
Office expenses	8,454		8,454
Local transportation	8,430		8,430
Travel	7,002		7,002
Public Utilities	6,000		6,000
Commission			

Other vessel expense	5,729		5,729
Miscellaneous	5,232		5,232
Terminal repairs	3,585		3,585
Other maintenance and repair	1,743		1,743
Other terminal expense	753		753
	-----		-----
Total selling, administrative and operating expenses	1,378,647	22,788	1,355,859
	-----		-----
Net income before income taxes	\$ 69,858	\$ 22,788	\$ 92,646
	-----		-----

*: Emphasis added.

** The figures for interest and depreciation include the interest and depreciation expenses attributable to the Nelseco.

*** Mr. Goldman included these footnotes to refer readers to his report to the portion in which he comprehensively explained the sources of his downward adjustments to interest and depreciation expenses. We have not included these explanatory charts in this series of appendices because the downward adjustment is not relevant to the case before us.

Notes:

[1]In addition to presenting witnesses at these hearings, both the division and Interstate introduced prefiled testimony into evidence. For the sake of clarity and convenience, we shall incorporate information derived from both sources when reviewing the relevant testimony of the witnesses.

[2]Even if we were to interpret G.L.1956 (1977 Reenactment) § 39-5-1 as requiring finality, we believe that several findings that the commission set forth in its decision and interim order were final and appealable on May 14, 1981. We need not specify these findings or address, for the sake of argument, their validity because the company failed to comply with § 39-5-1. We note, however, that the May 14, 1981 findings of the commission prospectively addressed the company's financial situation. The May 28, 1982 final report and order, on the other hand, dealt with circumstances as they actually developed during the summer of 1981. At this juncture, therefore, it would be confusing and quite possibly futile for this court to review findings that have been rendered nugatory through the passage of time, changed circumstances, and a subsequent report and order of the commission.

[3]See note 7 infra.

[4]The company recorded the Yankee's passenger revenue separately because it originated from a different terminal than the other vessels.

[5]Mr. Goldman's breakdown of passenger revenue appears as Appendix A to this opinion.

[6]The passenger revenue attributable to the Nelseco during 1981 exceeds the overall increase for 1981 because several of the company's other ships generated less revenue during 1981 than they had during 1980.

[7]Appendix B is the company's income-statement comparison of the years 1979 through 1981. It should be noted that operating income increased from 1980 to 1981.

[8]We have denoted as Appendix C Mr. Goldman's version of the company's 1981 income statement. Mr. Goldman's statement shows a greater net operating income than does the company's statement in Appendix B.

[9]Four of the company's vessels were in service for twelve months during 1981, but the Nelseco operated for the last six months of the year only.

[10]The notice and hearing requirements of the Administrative Procedures Act apply to all "contested cases" before the commission. Providence Gas Co. v. Burke, 119 R.I. 487, 502, 380 A.2d 1334, 1342 (1977); see G.L.1956 (1977 Reenactment) § 42-35-1. These requirements are set forth in § 42-35-9, as amended by P.L.1979, ch. 370, § 1, and P.L.1981, ch. 424, § 1.

State of Rhode Island and Providence Plantations

**Public Utilities Commission
Memorandum**

To: Service List – Docket No. 4111
From: Cynthia G. Wilson-Frias, Senior Legal Counsel
Re: **Docket No. 4111 – Review of Amended Power Purchase Agreement between Narragansett Electric Company d/b/a National Grid and Deepwater Wind Block Island, LLC Pursuant to R.I. Gen. Laws § 39-26.1-7 (as amended)**

PROCEDURAL SCHEDULE

Date: July 9, 2010

Thank you for your participation yesterday. The following represents the procedural schedule.

The parties to the docket are: National Grid, Deepwater Wind, Town of New Shoreham, Economic Development Corporation, Conservation Law Foundation, Rhode Island Building and Construction Trades Council, and Division of Public Utilities and Carriers (collectively "Dkt. 4111 Parties"), Attorney General, Toray, Polytop, TransCanada, and Citizen Intervenors (collectively "New Parties"). OSPRI was granted intervention on the condition that a Rhode Island attorney enter an appearance on its behalf by 4:00 p.m. on Monday, July 12, 2010. Otherwise, OSPRI will not be a party to the docket.

PPA REVIEW SCHEDULE

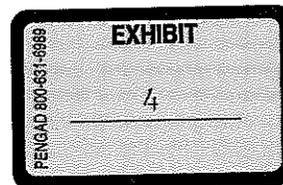
- 7/13/10 (1) Deadline for Written Responses to Motion for Stay
- (2) Deadline for Filing Dispositive/"Substantive" Motions* ←
- 7/15/10 (1) 9:30 AM – Oral Argument on Motion for Stay
- (2) Filing of Dkt. 4111 Parties' Pre-Filed Direct Testimony
- (3) Filing of Written Pleadings in Support of Motion to Dismiss with Memoranda
- 7/16/10 New Parties shall identify their respective witnesses, provide CVs, and provide a short statement of the scope and subject of the witness' testimony, referring to the portion of the law to which the testimony applies.
- 7/19/10 (1) Objections to Motion to Dismiss
- (2) Deadline for Filing Responses to any Motions filed 7/13/10

- (3) Last Day for Parties to Issue Discovery Requests to Dkt. 4111 Parties (discovery sent prior to 7/19/10 should be responded to in seven days)
- 7/20/10
 - (1) Filing of New Parties' Pre-Filed Direct Testimony
 - (2) Filing of EDC's Testimony
 - (3) Filing of Advisory Opinions by DEM and EDC
- 7/21/10
 - (1) 10:00 AM – Oral Argument on Motion to Dismiss and any other Dispositive/"Substantive" Motions
 - (2) Pre-hearing conference following Oral Argument Hearing
- 7/22/10
 - (1) 10:00AM – Public Comment Hearing – Block Island School Gymnasium
 - (2) 6:00PM – Public Comment Hearing – Public Utilities Commission Hearing Room A
- 7/22/10 Last Day for Parties to Issue Discovery Requests to New Parties (discovery sent prior to 7/22/10 should be responded to in seven days)
- 7/26/10 9:30 AM – Hearings - Rebuttal Testimony Commence – Hearing Room A
- 7/26/10 Deadline for Dkt. 4111 Parties to file Discovery Responses
- 7/29/10 Deadline for New Parties to file Discovery Responses
- 8/2/10 9:30 AM – Hearings – Cross-Examination of Witnesses - Commence – Hearing Room A
- 8/11/10 Open Meeting
- 8/16/10 Written Order to be Issued



*Other Dispositive/"Substantive" Motions (these are Motions related to the statute itself and not related to interpretation of statutory provisions specifically related to the Amended PPA)

cc: Commissioners/Staff
Division



129 S.Ct. 1498, 68 ERC 1001, 173 L.Ed.2d 369, 77 USLW 4248, 09 Cal. Daily Op. Serv. 4095, 2009 Daily Journal D.A.R. 4885, 21 Fla. L. Weekly Fed. S 747
(Cite as: 129 S.Ct. 1498)

Supreme Court of the United States
ENERGY CORPORATION, Petitioner,

v.

RIVERKEEPER, INC., et al.
PSEG Fossil LLC, et al., Petitioners,

v.

Riverkeeper, Inc., et al.
Utility Water Act Group, Petitioner,

v.

Riverkeeper, Inc., et al.
Nos. 07-588, 07-589 and 07-597.

Argued Dec. 2, 2008.
Decided April 1, 2009.

Background: Environmental groups, states, and industry associations petitioned for review of final rule promulgated by Environmental Protection Agency (EPA) pursuant to Clean Water Act (CWA), regulating cooling-water intake structures at existing power plants. Petitions were consolidated by Judicial Panel on Multidistrict Litigation, and transferred. The United States Court of Appeals for the Second Circuit, Sotomayor, Circuit Judge, 475 F.3d 83, set regulations aside. Certiorari was granted.

Holding: The Supreme Court, Justice Scalia, held that EPA permissibly relied on cost-benefit analysis in promulgating regulations.

Reversed and remanded.

Justice Breyer filed an opinion concurring in part and dissenting in part.

Justice Stevens dissented in an opinion joined by Justice Souter and Justice Ginsburg.

West Headnotes

[1] Environmental Law 149E ↪186

149E Environmental Law
149EV Water Pollution
149Ek182 Effluent Limitations and Guidelines
149Ek186 k. Particular limitations and guidelines. Most Cited Cases
Environmental Protection Agency's (EPA) interpretation

of Clean Water Act (CWA) provision mandating use of best technology available for minimizing adverse environmental impact of point sources' cooling water intake structures governs if it is a reasonable interpretation of the statute, not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts. 33 U.S.C.A. § 1326(b).

[2] Statutes 361 ↪219(4)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(4) k. Erroneous construction; conflict with statute. Most Cited Cases
If Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.

[3] Environmental Law 149E ↪186

149E Environmental Law
149EV Water Pollution
149Ek182 Effluent Limitations and Guidelines
149Ek186 k. Particular limitations and guidelines. Most Cited Cases
Environmental Protection Agency (EPA) permissibly relied on cost-benefit analysis in setting national performance standards, and in providing for cost-benefit variances from those standards, as part of regulations promulgated under Clean Water Act (CWA) provision mandating use of best technology available for minimizing adverse environmental impact of point sources' cooling water intake structures; phrase "best technology available," even with the added specification "for minimizing adverse environmental impact," did not unambiguously preclude cost-benefit analysis, and statute's silence on the use of cost-benefit analysis did not display an intent to forbid its use, given that statute was silent not only with respect to cost-benefit analysis but with respect to all potentially relevant factors. 33 U.S.C.A. § 1326(b); 40 CFR § 125.94(a)(5)(i, ii), (b)(1, 2).

[4] Statutes 361 ↪219(1)

129 S.Ct. 1498, 68 ERC 1001, 173 L.Ed.2d 369, 77 USLW 4248, 09 Cal. Daily Op. Serv. 4095, 2009 Daily Journal D.A.R. 4885, 21 Fla. L. Weekly Fed. S 747
(Cite as: 129 S.Ct. 1498)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(1) k. In general. Most Cited

Cases

Under *Chevron*, that an agency is not required to engage in cost-benefit analysis in setting certain standards does not mean that an agency is not permitted to do so.

1499 Syllabus^{FN}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioners' powerplants have "cooling water intake structures" that threaten the environment by squashing against intake screens ("impingement") or suctioning into the cooling system ("entrainment") aquatic organisms from the water sources tapped to cool the plants. Thus, the facilities are subject to regulation under the Clean Water Act, which mandates that "[a]ny standard established pursuant to section 1311 ... or section 1316 ... and applicable to a point source shall require that the location, design, construction, and capacity of *1500 cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b). Sections 1311 and 1316, in turn, employ a variety of "best technology" standards to regulate effluent discharge into the Nation's waters. The Environmental Protection Agency (EPA) promulgated the § 1326(b) regulations at issue after nearly three decades of making the "best technology available" determination on a case-by-case basis. Its "Phase I" regulations govern new cooling water intake structures, while the "Phase II" rules at issue apply to certain large existing facilities. In the latter rules, the EPA set "national performance standards," requiring most Phase II facilities to reduce "impingement mortality for [aquatic organisms] by 80 to 95 percent from the calculation baseline," and requiring a subset of facilities to reduce entrainment of such organisms by "60 to 90 percent from [that] baseline." 40 CFR § 125.94(b)(1), (2). However, the EPA expressly declined to mandate closed-cycle cooling systems, or equivalent reductions in impingement and entrainment, as it had done in its Phase I rules, in part because the cost of rendering existing facilities

closed-cycle compliant would be nine times the estimated cost of compliance with the Phase II performance standards, and because other technologies could approach the performance of closed-cycle operation. The Phase II rules also permit site-specific variances from the national performance standards, provided that the permit-issuing authority imposes remedial measures that yield results "as close as practicable to the applicable performance standards." § 125.94(a)(5)(i), (ii). Respondents-environmental groups and various States-challenged the Phase II regulations. Concluding that cost-benefit analysis is impermissible under 33 U.S.C. § 1326(b), the Second Circuit found the site-specific cost-benefit variance provision unlawful and remanded the regulations to the EPA for it to clarify whether it had relied on cost-benefit analysis in setting the national performance standards.

Held: The EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations. Pp. 1505 - 1510.

(a) The EPA's view that § 1326(b)'s "best technology available for minimizing adverse environmental impact" standard permits consideration of the technology's costs and of the relationship between those costs and the environmental benefits produced governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844, 104 S.Ct. 2778, 81 L.Ed.2d 694. The Second Circuit took "best technology" to mean the technology that achieves the greatest reduction in adverse environmental impacts at a reasonable cost to the industry, but it may also describe the technology that *most efficiently* produces a good, even if it produces a lesser quantity of that good than other available technologies. This reading is not precluded by the phrase "for minimizing adverse environmental impact." Minimizing admits of degree and is not necessarily used to refer exclusively to the "greatest possible reduction." Other Clean Water Act provisions show that when Congress wished to mandate the greatest feasible reduction in water pollution, it used plain language, e.g., "elimination of discharges of all pollutants," § 1311(b)(2)(A). Thus, § 1326(b)'s use of the less ambitious goal of "minimizing adverse environmental impact" suggests that *1501 the EPA has some discretion to determine the extent of reduction warranted under the circumstances, plausibly involving a consideration of the benefits derived from reductions and the costs of achieving them. Pp. 1505- 1507.

129 S.Ct. 1498, 68 ERC 1001, 173 L.Ed.2d 369, 77 USLW 4248, 09 Cal. Daily Op. Serv. 4095, 2009 Daily Journal D.A.R. 4885, 21 Fla. L. Weekly Fed. S 747
(Cite as: 129 S.Ct. 1498)

(b) Considering § 1326(b)'s text, and comparing it with the text and statutory factors applicable to parallel Clean Water Act provisions, prompts the conclusion that it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden. In the Phase II rules the EPA sought only to avoid extreme disparities between costs and benefits, limiting variances from Phase II's "national performance standards" to circumstances where the costs are "significantly greater than the benefits" of compliance. 40 CFR § 125.94(a)(5)(ii). In defining "national performance standards" the EPA assumed the application of technologies whose benefits approach those estimated for closed-cycle cooling systems at a fraction of the cost. That the EPA has for over thirty years interpreted § 1326(b) to permit a comparison of costs and benefits, while not conclusive, also tends to show that its interpretation is reasonable and hence a legitimate exercise of its discretion. Even respondents and the Second Circuit ultimately recognize that some comparison of costs and benefits is permitted. The Second Circuit held that § 1326(b) mandates only those technologies whose costs can be reasonably borne by the industry. But whether it is reasonable to bear a particular cost can very well depend on the resulting benefits. Likewise, respondents concede that the EPA need not require that industry spend billions to save one more fish. This concedes the principle, and there is no statutory basis for limiting the comparison of costs and benefits to situations where the benefits are *de minimis* rather than significantly disproportionate. Pp. 1506 - 1510.

475 F.3d 83, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

Daryl Joseffer, for the Environmental Protection Agency, et al.

Maureen Mahoney, for the petitioners.

Richard J. Lazarus, for the respondents.

Gregory G. Garre, Solicitor General, Counsel of Record, Department of Justice, Washington, D.C., for the Federal Parties as Respondents Supporting Petitioners.

Elise E. Zoli, Counsel of Record, Kevin P. Martin, Robert H. Fitzgerald, Aladdine D. Joroff, Kevin P. Pechulis, Goodwin Procter LLP, Boston, MA, Maureen E. Mahoney, Counsel of Record, Philip J. Perry, J. Scott Ballenger, Cassandra Sturkie, Drew C. Ensign, Latham & Watkins LLP, Washington, DC, Abigail Hemani, Goodwin Procter LLP, New York, NY, Chuck D. Barlow, Entergy Services, Inc., Jackson, MS, Karl S. Lytz, Latham & Watkins LLP, San Francisco, CA, John G. Valeri, Jr., PSEG Services Corp., Office of Environmental Counsel, Newark, NJ, for Petitioners Entergy Corp., PSEG Fossil LLC, and PSEG Nuclear LLC.

Kristy A. N. Bulleit, Counsel of Record, Hunton & Williams LLP, Washington, DC, for Petitioner Utility Water Act Group.

Edward Lloyd, Environmental Law Clinic, Columbia University School of Law, New York, NY, P. Kent Correll, New York, NY, Richard J. Lazarus, Counsel of Record, Washington, DC, Reed W. Super, *1502 New York, NY, for Respondents Riverkeeper, Inc., et al.

Patrick C. Lynch, Attorney General of Rhode Island, Tricia O'Hare Jedele, Counsel of Record, Special Assistant Attorney General, Providence, RI, Richard Blumenthal, Attorney General of Connecticut, Kimberly Massicotte, Matthew Levine, Assistant Attorneys General, Hartford, CT, Martha Coakley, Attorney General of Massachusetts, Andrew Goldberg, Assistant Attorney General, Boston, MA, Andrew M. Cuomo, Attorney General of New York, Barbara D. Underwood, Solicitor General, Andy D. Bing, Deputy Solicitor General, Denise A. Hartman, Assistant Solicitor General, Maureen F. Leary, Assistant Attorney General, Albany, NY, Joseph R. Biden III, Attorney General of Delaware, Kevin Maloney, Deputy Attorney General, Wilmington, DE, Anne Milgram, Attorney General of New Jersey, Ellen Barney Balint, Deputy Attorney General, Trenton, NJ, for States as respondents.

Patricia K. Hirsch, Acting General Counsel, Richard T. Witt, Attorney, Environmental Protection Agency, Washington, D.C., Gregory G. Garre, Acting Solicitor General, Counsel of Record, Ronald J. Tenpas, Assistant Attorney General, Edwin S. Kneeder, Deputy Solicitor General, Daryl Joseffer, Assistant to the Solicitor General, David S. Gualtieri, Cynthia J. Morris, Jessica O'Donnell, Attorneys, Department of Justice, Washington, D.C., for the Federal Parties as Respondents Supporting Petitioners.

129 S.Ct. 1498, 68 ERC 1001, 173 L.Ed.2d 369, 77 USLW 4248, 09 Cal. Daily Op. Serv. 4095, 2009 Daily Journal D.A.R. 4885, 21 Fla. L. Weekly Fed. S 747
(Cite as: 129 S.Ct. 1498)

For U.S. Supreme Court Briefs, see:2008 WL 2753247 (Pet.Brief)2008 WL 2753248 (Pet.Brief)2008 WL 2774463 (Pet.Brief)2008 WL 4441077 (Resp.Brief)2008 WL 4441078 (Resp.Brief)2008 WL 4751535 (Reply.Brief)2008 WL 4757368 (Reply.Brief)2008 WL 4772094 (Reply.Brief)

Justice SCALIA delivered the opinion of the Court.

These cases concern a set of regulations adopted by the Environmental Protection Agency (EPA or agency) under § 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b). 69 Fed.Reg. 41576 (2004). Respondents—environmental groups and various States^{FN1}—challenged those regulations, and the Second Circuit set them aside. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 99-100 (2007). The issue for our decision is whether, as the Second Circuit held, the EPA is not permitted to use cost-benefit analysis in determining the content of regulations promulgated under § 1326(b).

FN1. The EPA and its Administrator appeared as respondents in support of petitioners. See Brief for Federal Parties as Respondents Supporting Petitioners. References to “respondents” throughout the opinion refer only to those parties challenging the EPA rules at issue in these cases.

I

Petitioners operate—or represent those who operate—large powerplants. In the course of generating power, those plants also generate large amounts of heat. To cool their facilities, petitioners employ “cooling water intake structures” that extract water from nearby water sources. These structures pose various threats to the environment, chief among them the squashing against intake screens (elegantly called “impingement”) or suction into the cooling system (“entrainment”) of aquatic organisms that live in the affected water sources. See 69 Fed.Reg. 41586. Accordingly, the facilities are subject to regulation under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, which mandates:

***1503** “Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” § 1326(b).

Sections 1311 and 1316, in turn, employ a variety of “best technology” standards to regulate the discharge of effluents into the Nation’s waters.

The § 1326(b) regulations at issue here were promulgated by the EPA after nearly three decades in which the determination of the “best technology available for minimizing [cooling water intake structures] adverse environmental impact” was made by permit-issuing authorities on a case-by-case basis, without benefit of a governing regulation. The EPA’s initial attempt at such a regulation came to nought when the Fourth Circuit determined that the agency had failed to adhere to the procedural requirements of the Administrative Procedure Act. *Appalachian Power Co. v. Train*, 566 F.2d 451, 457 (1977). The EPA withdrew the regulation, 44 Fed.Reg. 32956 (1979), and instead published “draft guidance” for use in implementing § 1326(b)’s requirements via site-specific permit decisions under § 1342. See EPA, Office of Water Enforcement Permits Div., {Draft} Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) P.L. 92-500, (May 1, 1977), at http://www.epa.gov/waterscience/316b/files/1977_AEIGuid.pdf, (all Internet materials as visited Mar. 30, 2009, and available in Clerk of Court’s case file); 69 Fed.Reg. 41584 (describing system of case-by-case permits under the draft guidance).

In 1995, the EPA entered into a consent decree which, as subsequently amended, set a multiphase timetable for the EPA to promulgate regulations under § 1326(b). See *Riverkeeper, Inc. v. Whitman*, No. 93 Civ. 0314(AGS), 2001 WL 1505497, *1 (S.D.N.Y., Nov. 27, 2001). In the first phase the EPA adopted regulations governing certain new, large cooling water intake structures. 66 Fed.Reg. 65256 (2001) (Phase I rules); see 40 CFR §§ 125.80(a), 125.81(a) (2008). Those rules require new facilities with water-intake flow greater than 10 million gallons per day to, among other things, restrict their inflow “to a level commensurate with that which can be attained by a closed-cycle recirculating cooling water system.”^{FN2} § 125.84(b)(1). New facilities with water-intake flow between 2 million and 10 million gallons per day may alternatively comply by, among other things, reducing the volume and velocity of water removal to certain levels. § 125.84(c). And all facilities may alternatively comply by demonstrating, among other things, “that the technologies employed will reduce the level of adverse environmental impact ... to a comparable level” to what would be achieved by using a closed-cycle cooling system. § 125.84(d). These regulations were upheld in large part by

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the Second Circuit in *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2004).

FN2. Closed-cycle cooling systems recirculate the water used to cool the facility, and consequently extract less water from the adjacent waterway, proportionately reducing impingement and entrainment. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 182, n. 5 (C.A.2 2004); 69 Fed.Reg. 41601, and n. 44 (2004).

The EPA then adopted the so-called “Phase II” rules at issue here.^{FN3} 69 Fed.Reg.*1504 41576. They apply to existing facilities that are point sources, whose primary activity is the generation and transmission (or sale for transmission) of electricity, and whose water-intake flow is more than 50 million gallons of water per day, at least 25 percent of which is used for cooling purposes. *Ibid.* Over 500 facilities, accounting for approximately 53 percent of the Nation’s electric-power generating capacity, fall within Phase II’s ambit. See EPA, Economic and Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule, A3-13, Table A3-4 (Feb.2004), online at <http://www.epa.gov/waterscience/316b/phase2/econbenefits/final/a3.pdf>. Those facilities remove on average more than 214 billion gallons of water per day, causing impingement and entrainment of over 3.4 billion aquatic organisms per year. 69 Fed.Reg. 41586.

FN3. The EPA has also adopted Phase III rules for facilities not subject to the Phase I and Phase II regulations. 71 Fed.Reg. 35006 (2006). A challenge to those regulations is currently before the Fifth Circuit, where proceedings have been stayed pending disposition of these cases. See *ConocoPhillips Co. v. EPA*, No. 06-60662.

To address those environmental impacts, the EPA set “national performance standards,” requiring Phase II facilities (with some exceptions) to reduce “impingement mortality for all life stages of fish and shellfish by 80 to 95 percent from the calculation baseline”; a subset of facilities must also reduce entrainment of such aquatic organisms by “60 to 90 percent from the calculation baseline.” 40 CFR § 125.94(b)(1), (2); see § 125.93 (defining “calculation baseline”). Those targets are based on the environmental improvements achievable through deployment of a mix of remedial technologies, 69 Fed.Reg. 41599, which the EPA determined were “commercially available and economically practicable,” *id.*, at 41602.

In its Phase II rules, however, the EPA expressly declined to mandate adoption of closed-cycle cooling systems or equivalent reductions in impingement and entrainment, as it had done for new facilities subject to the Phase I rules. *Id.*, at 41601. It refused to take that step in part because of the “generally high costs” of converting existing facilities to closed-cycle operation, and because “other technologies approach the performance of this option.” *Id.*, at 41605. Thus, while closed-cycle cooling systems could reduce impingement and entrainment mortality by up to 98 percent, *id.*, at 41601, (compared to the Phase II targets of 80 to 95 percent impingement reduction), the cost of rendering all Phase II facilities closed-cycle-compliant would be approximately \$3.5 billion per year, *id.*, at 41605, nine times the estimated cost of compliance with the Phase II performance standards, *id.*, at 41666. Moreover, Phase II facilities compelled to convert to closed-cycle cooling systems “would produce 2.4 percent to 4.0 percent less electricity even while burning the same amount of coal,” possibly requiring the construction of “20 additional 400-MW plants ... to replace the generating capacity lost.” *Id.*, at 41605. The EPA thus concluded that “[a]lthough not identical, the ranges of impingement and entrainment reduction are similar under both options [Benefits of compliance with the Phase II rules] can approach those of closed-cycle recirculating at less cost with fewer implementation problems.” *Id.*, at 41606.

The regulations permit the issuance of site-specific variances from the national performance standards if a facility can demonstrate either that the costs of compliance are “significantly greater than” the costs considered by the agency in setting the standards, 40 CFR § 125.94(a)(5)(i), or that the costs of compliance “would be significantly greater than the benefits of complying with the applicable performance *1505 standards,” § 125.94(a)(5)(ii). Where a variance is warranted, the permit-issuing authority must impose remedial measures that yield results “as close as practicable to the applicable performance standards.” § 125.94(a)(5)(i), (ii).

Respondents challenged the EPA’s Phase II regulations, and the Second Circuit granted their petition for review and remanded the regulations to the EPA. The Second Circuit identified two ways in which the EPA could permissibly consider costs under 33 U.S.C. § 1326(b): (1) in determining whether the costs of remediation “can be ‘reasonably borne’ by the industry,” and (2) in determining which remedial technologies are the most cost-effective, that is, the technologies that reach a specified level of

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benefit at the lowest cost. 475 F.3d, at 99-100. See also *id.*, at 98, and n. 10. It concluded, however, that cost-benefit analysis, which “compares the costs and benefits of various ends, and chooses the end with the best net benefits,” *id.*, at 98, is impermissible under § 1326(b), *id.*, at 100.

The Court of Appeals held the site-specific cost-benefit variance provision to be unlawful. *Id.*, at 114. Finding it unclear whether the EPA had relied on cost-benefit analysis in setting the national performance standards, or had only used cost-effectiveness analysis, it remanded to the agency for clarification of that point. *Id.*, at 104-105. (The remand was also based on other grounds which are not at issue here.) The EPA suspended operation of the Phase II rules pending further rulemaking. 72 Fed.Reg. 37107 (2007). We then granted certiorari limited to the following question: “Whether [§ 1326(b)] ... authorizes the [EPA] to compare costs with benefits in determining ‘the best technology available for minimizing adverse environmental impact’ at cooling water intake structures.” 552 U.S. ----, 128 S.Ct. 1867, 170 L.Ed.2d 743 (2008).

II

[1][2] In setting the Phase II national performance standards and providing for site-specific cost-benefit variances, the EPA relied on its view that § 1326(b)'s “best technology available” standard permits consideration of the technology's costs, 69 Fed.Reg. 41626, and of the relationship between those costs and the environmental benefits produced, *id.*, at 41603. That view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).^{FN4}

FN4. The dissent finds it “puzzling” that we invoke this proposition (that a reasonable agency interpretation prevails) at the “outset,” omitting the supposedly prior inquiry of “‘whether Congress has directly spoken to the precise question at issue.’” *Post*, at 1519, n. 5 (opinion of STEVENS, J.) (quoting *Chevron*, 467 U.S., at 842, 104 S.Ct. 2778). But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.

What is truly “puzzling” is the dissent's accompanying charge that the Court's failure to

conduct the *Chevron* step-one inquiry at the outset “reflects [its] reluctance to consider the possibility ... that Congress' silence may have meant to foreclose cost-benefit analysis.” *Post*, at 1519, n. 5. Our discussion of that issue, *infra*, at 1521, speaks for itself.

[3] As we have described, § 1326(b) instructs the EPA to set standards for cooling water intake structures that reflect “the best technology available for minimizing adverse environmental impact.” The Second Circuit took that language to mean the technology that achieves the greatest reduction in adverse environmental impacts*1506 at a cost that can reasonably be borne by the industry. 475 F.3d, at 99-100. That is certainly a plausible interpretation of the statute. The “best” technology—that which is “most advantageous,” Webster's New International Dictionary 258 (2d ed.1953)—may well be the one that produces the most of some good, here a reduction in adverse environmental impact. But “best technology” may also describe the technology that *most efficiently* produces some good. In common parlance one could certainly use the phrase “best technology” to refer to that which produces a good at the lowest per-unit cost, even if it produces a lesser quantity of that good than other available technologies.

Respondents contend that this latter reading is precluded by the statute's use of the phrase “for minimizing adverse environmental impact.” Minimizing, they argue, means reducing to the smallest amount possible, and the “best technology available for minimizing adverse environmental impacts,” must be the economically feasible technology that achieves the greatest possible reduction in environmental harm. Brief for Respondents Riverkeeper, Inc. et al. 25-26. But “minimize” is a term that admits of degree and is not necessarily used to refer exclusively to the “greatest possible reduction.” For example, elsewhere in the Clean Water Act, Congress declared that the procedures implementing the Act “shall encourage the drastic minimization of paperwork and interagency decision procedures.” 33 U.S.C. § 1251(f). If respondents' definition of the term “minimize” is correct, the statute's use of the modifier “drastic” is superfluous.

Other provisions in the Clean Water Act also suggest the agency's interpretation. When Congress wished to mandate the greatest feasible reduction in water pollution, it did so in plain language: The provision governing the discharge of toxic pollutants into the Nation's waters requires the EPA to set “effluent limitations [which] shall require the *elimination* of discharges of all pollutants if the Adminis-

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trator finds ... that such elimination is technologically and economically achievable,” § 1311(b)(2)(A) (emphasis added). See also § 1316(a)(1) (mandating “where practicable, a standard [for new point sources] permitting *no discharge* of pollutants” (emphasis added)). Section 1326(b)'s use of the less ambitious goal of “minimizing adverse environmental impact” suggests, we think, that the agency retains some discretion to determine the extent of reduction that is warranted under the circumstances. That determination could plausibly involve a consideration of the benefits derived from reductions and the costs of achieving them. Cf. 40 CFR § 125.83 (defining “minimize” for purposes of the Phase I regulations as “reduc[ing] to the smallest amount, extent, or degree reasonably possible”). It seems to us, therefore, that the phrase “best technology available,” even with the added specification “for minimizing adverse environmental impact,” does not unambiguously preclude cost-benefit analysis.^{FN5}

FN5. Respondents concede that the term “available” is ambiguous, as it could mean either technologically feasible or economically feasible. But any ambiguity in the term “available” is largely irrelevant. Regardless of the criteria that render a technology “available,” the EPA would still have to determine which available technology is the “best” one. And as discussed above, that determination may well involve consideration of the technology's relative costs and benefits.

Respondents' alternative (and, alas, also more complex) argument rests upon the structure of the Clean Water Act. The Act provided that during its initial implementation period existing “point sources”-discrete*1507 conveyances from which pollutants are or may be discharged, 33 U.S.C. § 1362(14)-were subject to “effluent limitations ... which shall require the application of the *best practicable control technology* currently available.” § 1311(b)(1)(A) (emphasis added). (We shall call this the “BPT” test.) Following that transition period, the Act initially mandated adoption, by July 1, 1983 (later extended to March 31, 1989), of stricter effluent limitations requiring “application of the *best available technology economically achievable* for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.” § 1311(b)(2)(A) (emphasis added); see *EPA v. National Crushed Stone Assn.*, 449 U.S. 64, 69-70, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980). (We shall call this the “BATEA” test.) Subsequent amendment limited application of this stan-

dard to toxic and nonconventional pollutants, and for the remainder established a (presumably laxer) test of “best conventional-pollutant control technology.” § 1311(b)(2)(E).^{FN6} (We shall call this “BCT.”) Finally, § 1316 subjected certain categories of new point sources to “the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the *best available demonstrated control technology*.” § 1316(a)(1) (emphasis added); § 1316(b)(1)(B). (We shall call this the “BADT” test.) The provision at issue here, applicable not to effluents but to cooling water intake structures, requires, as we have described, “the *best technology available for minimizing adverse environmental impact*,” § 1326(b) (emphasis added). (We shall call this the “BTA” test.)

FN6. The statute does not contain a hyphen between the words “conventional” and “pollutant.” “Conventional pollutant” is a statutory term, however, see 33 U.S.C. § 1314(a)(4), and it is clear that in § 1311(b)(2)(E) the adjective modifies “pollutant” rather than “control technology.” The hyphen makes that clear.

The first four of these tests are elucidated by statutory factor lists that guide their implementation. To take the standards in (presumed) order of increasing stringency, see *Crushed Stone, supra*, at 69-70, 101 S.Ct. 295: In applying the BPT test the EPA is instructed to consider, among other factors, “the total cost of application of technology in relation to the effluent reduction benefits to be achieved.” § 1314(b)(1)(B). In applying the BCT test it is instructed to consider “the *reasonableness of the relationship* between the costs of attaining a reduction in effluents and the effluent reduction benefits derived.” § 1314(b)(4)(B) (emphasis added). And in applying the BATEA and BADT tests the EPA is instructed to consider the “cost of achieving such effluent reduction.” §§ 1314(b)(2)(B), 1316(b)(1)(B). There is no such elucidating language applicable to the BTA test at issue here. To facilitate comparison, the texts of these five tests, the clarifying factors applicable to them, and the entities to which they apply are set forth in the Appendix, *infra*.

The Second Circuit, in rejecting the EPA's use of cost-benefit analysis, relied in part on the propositions that (1) cost-benefit analysis is precluded under the BATEA and BADT tests; and (2) that, insofar as the permissibility of cost-benefit analysis is concerned, the BTA test (the one at issue here) is to be treated the same as those two. See 475 F.3d, at 98. It is not obvious to us that the first of these

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propositions is correct, but we need not pursue that point, since we assuredly do not agree with the second. It is certainly reasonable for the agency to conclude that the BTA test need not be interpreted to permit only what those other two tests permit. Its text is not identical to theirs. *1508 It has the relatively modest goal of “minimizing adverse environmental impact” as compared with the BATEA’s goal of “eliminating the discharge of all pollutants.” And it is unencumbered by specified statutory factors of the sort provided for those other two tests, which omission can reasonably be interpreted to suggest that the EPA is accorded greater discretion in determining its precise content.

Respondents and the dissent argue that the mere fact that § 1326(b) does not expressly authorize cost-benefit analysis for the BTA test, though it does so for two of the other tests, displays an intent to forbid its use. This surely proves too much. For while it is true that two of the other tests authorize cost-benefit analysis, it is also true that *all four* of the other tests expressly authorize *some* consideration of costs. Thus, if respondents’ and the dissent’s conclusion regarding the import of § 1326(b)’s silence is correct, it is *a fortiori* true that the BTA test permits *no consideration of cost whatsoever*, not even the “cost-effectiveness” and “feasibility” analysis that the Second Circuit approved, see *supra*, at 1505, that the dissent would approve, *post*, at 1512, and that respondents acknowledge. The inference that respondents and the dissent would draw from the silence is, in any event, implausible, as § 1326(b) is silent not only with respect to cost-benefit analysis but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing § 1326(b)—an obvious logical impossibility. It is eminently reasonable to conclude that § 1326(b)’s silence is meant to convey nothing more than a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used, and if so to what degree.

Contrary to the dissent’s suggestion, see *post*, at 1517, our decisions in *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), and *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981), do not undermine this conclusion. In *American Trucking*, we held that the text of § 109 of the Clean Air Act, “interpreted in its statutory and historical context ... unambiguously bars cost considerations” in setting air quality standards under that provision. 531 U.S., at 471, 121 S.Ct. 903. The relevant “statutory context” included other provisions in the Clean Air Act that expressly authorized consideration of

costs, whereas § 109 did not. *Id.*, at 467-468, 121 S.Ct. 903. *American Trucking* thus stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion. For the reasons discussed earlier, § 1326(b)’s silence cannot bear that interpretation.

[4] In *American Textile*, the Court relied in part on a statute’s failure to mention cost-benefit analysis in holding that the relevant agency was not required to engage in cost-benefit analysis in setting certain health and safety standards. 452 U.S., at 510-512, 101 S.Ct. 2478. But under *Chevron*, that an agency is not *required* to do so does not mean that an agency is not *permitted* to do so.

This extended consideration of the text of § 1326(b), and comparison of that with the text and statutory factors applicable to four parallel provisions of the Clean Water Act, lead us to the conclusion that it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden. Other arguments may be available to preclude such a rigorous form of cost-benefit analysis as that which was prescribed under the statute’s former BPT standard, which required weighing “the total*1509 cost of application of technology” against “the ... benefits to be achieved.” See, *supra*, at 1507. But that question is not before us.

In the Phase II requirements challenged here the EPA sought only to avoid extreme disparities between costs and benefits. The agency limited variances from the Phase II “national performance standards” to circumstances where the costs are “significantly greater than the benefits” of compliance. 40 CFR § 125.94(a)(5)(ii). In defining the “national performance standards” themselves the EPA assumed the application of technologies whose benefits “approach those estimated” for closed-cycle cooling systems at a fraction of the cost: \$389 million per year, 69 Fed.Reg. 41666, as compared with (1) at least \$3.5 billion per year to operate compliant closed-cycle cooling systems, *id.*, at 41605 (or \$1 billion per year to impose similar requirements on a subset of Phase II facilities, *id.*, at 41606), and (2) significant reduction in the energy output of the altered facilities, *id.*, at 41605. And finally, EPA’s assessment of the relatively meager financial benefits of the Phase II regulations that it adopted—reduced impingement and entrainment of 1.4 billion aquatic organisms, *id.*, at 41661, Exh. XII-6, with annualized use-benefits of \$83 million, *id.*, at 41662, and non-use benefits of indeterminate value, *id.*, at 41660-41661—when compared to annual costs of \$389 million, demonstrates quite clearly that the

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agency did not select the Phase II regulatory requirements because their benefits equaled their costs.

While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs that the agency has been proceeding in essentially this fashion for over 30 years. See *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 487, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004); *Barnhart v. Walton*, 535 U.S. 212, 219-220, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002). As early as 1977, the agency determined that, while § 1326(b) does not *require* cost-benefit analysis, it is also not reasonable to “interpret Section [1326(b)] as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained.” *In re Public Service Co. of New Hampshire*, 1 E.A.D. 332, 340 (1977). See also *In re Central Hudson Gas and Electric Corp.*, EPA Decision of the General Counsel, NPDES Permits, No. 63, pp. 371, 381 (July 29, 1977) (“EPA ultimately must demonstrate that the present value of the cumulative annual cost of modifications to cooling water intake structures is not wholly out of proportion to the magnitude of the estimated environmental gains”); *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 311 (C.A.1 1979) (rejecting challenge to an EPA permit decision that was based in part on the agency's determination that further restrictions would be “‘wholly disproportionate to any environmental benefit’”). While the EPA's prior “wholly disproportionate” standard may be somewhat different from its current “significantly greater than” standard, there is nothing in the statute that would indicate that the former is a permissible interpretation while the latter is not.

Indeed, in its review of the EPA's Phase I regulations, the Second Circuit seemed to recognize that § 1326(b) permits some form of cost-benefit analysis. In considering a challenge to the EPA's rejection of dry cooling systems^{FN7} as the “best technology available” for Phase I facilities the *1510 Second Circuit noted that “while it certainly sounds substantial that dry cooling is 95 percent more effective than closed-cycle cooling, it is undeniably relevant that that difference represents a relatively small improvement over closed-cycle cooling at a very significant cost.” *Riverkeeper*, 358 F.3d, at 194, n. 22. And in the decision below rejecting the use of cost-benefit analysis in the Phase II regulations, the Second Circuit nonetheless interpreted “best technology available” as mandating only those technologies that can “be reasonably borne by the industry.” 475 F.3d, at 99. But whether it is “reasonable” to

bear a particular cost may well depend on the resulting benefits; if the only relevant factor was the feasibility of the costs, their reasonableness would be irrelevant.

FN7. Dry cooling systems use air drafts to remove heat, and accordingly remove little or no water from surrounding water sources. See 66 Fed.Reg. 65282 (2001).

In the last analysis, even respondents ultimately recognize that some form of cost-benefit analysis is permissible. They acknowledge that the statute's language is “plainly not so constricted as to require EPA to require industry petitioners to spend billions to save one more fish or plankton.” Brief for Respondents Riverkeeper, Inc. et al. 29. This concedes the principle—the permissibility of at least some cost-benefit analysis—and we see no statutory basis for limiting its use to situations where the benefits are *de minimis* rather than significantly disproportionate.

* * *

We conclude that the EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations. The Court of Appeals' reliance in part on the agency's use of cost-benefit analysis in invalidating the site-specific cost-benefit variance provision, 475 F.3d, at 114, was therefore in error, as was its remand of the national performance standards for clarification of whether cost-benefit analysis was impermissibly used, *id.*, at 104-105. We of course express no view on the remaining bases for the Second Circuit's remand which did not depend on the permissibility of cost-benefit analysis. See *id.*, at 108, 110, 113, 115, 117, 120.^{FN8} The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

FN8. Justice BREYER would remand for the additional reason of what he regards as the agency's inadequate explanation of the change in its criterion for variances—from a relationship of costs to benefits that is “‘wholly disproportionate’” to one that is “‘significantly greater.’” *Post*, at 1515 - 1516 (opinion concurring in part and dissenting in part). That question can have no bearing upon whether the EPA can use cost-benefit analysis, which is the only question presented here. It seems to us, in any case, that the EPA's explanation was ample. It explained that

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the “wholly out of proportion” standard was inappropriate for the existing facilities subject to the Phase II rules because those facilities lack “the greater flexibility available to new facilities for selecting the location of their intakes and installing technologies at lower costs relative to the costs associated with retrofitting existing facilities,” and because “economically impracticable impacts on energy prices, production costs, and energy production ... could occur if large numbers

of Phase II existing facilities incurred costs that were more than ‘significantly greater’ than but not ‘wholly out of proportion’ to the costs in the EPA’s record.” 68 Fed.Reg. 13541 (2003).

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Statutory Standard	Statutorily Mandated Factors	Entities Subject to Regulation
BPT: “[E]ffluent limitations ... which shall require the application of the <i>best practicable control technology currently available</i> .” 33 U.S.C. § 1311(b)(1)(A)(emphasis added).	“Factors relating to the assessment of best practicable control technology currently available ... shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved.” 33 U.S.C. § 1314(b)(1)(B).	Existing point sources during the Clean Water Act’s initial implementation phase.
BCT: “[E]ffluent limitations ... which shall require application of the <i>best conventional pollutant control technology</i> .” 33 U.S.C. § 1311(b)(2)(E)(emphasis added).	“Factors relating to the assessment of best conventional pollutant control technology ... shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived.” 33 U.S.C. § 1314(b)(4)(B).	Existing point sources that discharge “conventional pollutants” as defined by the EPA under 33 U.S.C. § 1314(a)(4).
BATEA: “[E]ffluent limitations ... which ... shall require application of the <i>best available technology economically achievable</i> ... which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.” 33 U.S.C. § 1311(b)(2)(A)(emphasis added).	“Factors relating to the assessment of best available technology shall take into account ... the cost of achieving such effluent reduction.” 33 U.S.C. § 1314(b)(2)(B).	Existing point sources that discharge toxic pollutants and non-conventional pollutants.
BADT: “[A] standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction with the Administrator determines to be achievable through application of the <i>best available demonstrated control technology</i> .” 33 U.S.C. § 1316(a)(1)(emphasis added)	“[T]he Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.” 33 U.S.C. § 1316(b)(1)(B).	New point sources within the categories of sources identified by the EPA under 33 U.S.C. § 1316(b)(1)(A).
BTA: “Any standard ... applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” 33 U.S.C. § 1326(b).	N/A	Point sources that operate cooling water intake structures.

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*1512 Justice BREYER, concurring in part and dissenting in part.

I agree with the Court that the relevant statutory language authorizes the Environmental Protection Agency (EPA) to compare costs and benefits. *Ante*, at 1505 - 1506. Nonetheless the drafting history and legislative history of related provisions, Pub.L. 92-500, §§ 301, 304, 86 Stat. 844, 850, as amended, 33 U.S.C. §§ 1311, 1314, makes clear that those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost-benefit comparisons. And I would apply that text accordingly.

I

Section 301 provides that, not later than 1977, effluent limitations for point sources shall require the application of “*best practicable* control technology,” § 301(b)(1)(A), 86 Stat. 845 (emphasis added); and that, not later than 1983 (later extended to 1989), effluent limitations for categories and classes of point sources shall require application of the “*best available* technology economically achievable,” § 301(b)(2)(A), *ibid.* (emphasis added). Section 304(b), in turn, identifies the factors that the Agency shall take into account in determining (1) “*best practicable* control technology” and (2) “*best available* technology.” 86 Stat. 851 (emphasis added).

With respect to the first, the statute provides that the factors taken into account by the Agency “shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application ... and such other factors as the Administrator deems appropriate.” § 304(b)(1)(B), *ibid.* With respect to the second, the statute says that the Agency “shall take into account ... the cost of achieving such effluent reduction” and “such other factors as the Administrator deems appropriate.” § 304(b)(2)(B), *ibid.*

The drafting history makes clear that the statute reflects a compromise. In the House version of the legislation, the Agency was to consider “the cost and the economic, social, and environmental impact of achieving such effluent reduction” when determining both “*best practicable*” and “*best available*” technology. H.R. 11896, 92d Cong., 2d Sess., §§ 304(b)(1)(B), (b)(2)(B) (1972) (as reported from committee). The House Report explained that the “*best available* technology” standard was needed—as opposed to mandating the elimination of discharge of pollutants—because “the difference in the cost of 100 percent

elimination of pollutants as compared to the cost of removal of 97-99 percent of the pollutants in an effluent can far exceed any reasonable benefit to be achieved. In most cases, the cost of removal of the last few percentage points increases exponentially.” H.R.Rep. No. 92-911, p. 103 (1972).

In the Senate version, the Agency was to consider “the cost of achieving such effluent reduction” when determining both “*best practicable*” and “*best available*” technology. S. 2770, 92d Cong., 1st Sess., §§ 304(b)(1)(B), (b)(2)(B) (1971) (as reported from committee). The Senate Report explains that “the technology must be available at a cost ... which the Administrator determines to be reasonable.” S.Rep. No. 92-414, p. 52 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3718 (hereinafter S. Rep.). But it said nothing about comparing costs and benefits.

*1513 The final statute reflects a modification of the House's language with respect to “*best practicable*,” and an adoption of the Senate's language with respect to “*best available*.” S. Conf. Rep. No. 92-1236, pp. 124-125 (1972), U.S.Code Cong. & Admin.News 1972, p. 3776. The final statute does not *require* the Agency to compare costs to benefits when determining “*best available* technology,” but neither does it expressly *forbid* such a comparison.

The strongest evidence in the legislative history supporting the respondents' position—namely, that Congress intended to forbid comparisons of costs and benefits when determining the “*best available* technology”—can be found in a written discussion of the Act's provisions distributed to the Senate by Senator Edmund Muskie, the Act's principal sponsor, when he submitted the Conference Report for the Senate's consideration. 118 Cong. Rec. 33693 (1972). The relevant part of that discussion points out that, as to “*best practicable* technology,” the statute requires application of a “balancing test between total cost and effluent reduction benefits.” *Id.*, at 33696; see § 304(b)(1)(B). But as to “*best available* technology,” it states: “While cost should be a factor in the Administrator's judgment, no balancing test will be required.” *Ibid.*; see § 304(b)(2)(B). And Senator Muskie's discussion later speaks of the agency “evaluat[ing] ... what needs to be done” to eliminate pollutant discharge and “what is achievable,” both “without regard to cost.” *Ibid.*

As this language suggests, the Act's sponsors had reasons for minimizing the EPA's investigation of, and reliance upon, cost-benefit comparisons. The preparation of formal

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cost-benefit analyses can take too much time, thereby delaying regulation. And the sponsors feared that such analyses would emphasize easily quantifiable factors over more qualitative factors (particularly environmental factors, for example, the value of preserving non-marketable species of fish). See S. Rep., at 47. Above all, they hoped that minimizing the use of cost-benefit comparisons would force the development of cheaper control technologies; and doing so, whatever the initial inefficiencies, would eventually mean cheaper, more effective cleanup. See *id.*, at 50-51.

Nonetheless, neither the sponsors' language nor the underlying rationale requires the Act to be read in a way that would *forbid* cost-benefit comparisons. Any such total prohibition would be difficult to enforce, for every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs. Moreover, an absolute prohibition would bring about irrational results. As the respondents themselves say, it would make no sense to require plants to "spend billions to save one more fish or plankton." Brief for Respondents Riverkeeper, Inc., et al. 29. That is so even if the industry might somehow afford those billions. And it is particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.

Thus Senator Muskie used nuanced language, which one can read as leaving to the Agency a degree of authority to make cost-benefit comparisons in a manner that is sensitive both to the need for such comparisons and to the concerns that the law's *1514 sponsors expressed. The relevant statement begins by listing various factors that the statute *requires* the Administrator to take into account when applying the phrase "practicable" to "classes and categories." 118 Cong. Rec. 33696. It states that, when doing so, the Administrator *must* apply (as the statute specifies) a "balancing test between total cost and effluent reduction benefits." *Ibid.* At the same time, it seeks to reduce the likelihood that the Administrator will place too much weight upon high costs by adding that the balancing test "is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving" a "marginal level of reduction." *Ibid.*

Senator Muskie's statement then considers the "*different*

test" that the statute requires the Administrator to apply when determining the "*best available*" technology. *Ibid.* (emphasis added). Under that test, the Administrator "may consider a broader range of technological alternatives." *Ibid.* And in determining what is "*best available*" for a category or class, the Administrator is expected to apply the same principles involved in making the determination of "*best practicable*" ... except as to cost-benefit analysis." *Ibid.* (emphasis added). That is, "[w]hile cost should be a factor ... no balancing test will be *required*." *Ibid.* (emphasis added). Rather, "[*t*]he Administrator will be bound by a test of reasonableness." *Ibid.* (emphasis added). The statement adds that the "*best available*" standard "is intended to reflect the need to press toward increasingly higher levels of control." *Ibid.* (emphasis added). And "the reasonableness of what is 'economically achievable' should *reflect* an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology-without regard to cost." *Ibid.* (emphasis added).

I believe, as I said, that this language is deliberately nuanced. The statement says that where the statute uses the term "*best practicable*," the statute *requires* comparisons of costs and benefits; but where the statute uses the term "*best available*," such comparisons are not "*required*." *Ibid.* (emphasis added). Senator Muskie does not say that all efforts to compare costs and benefits are *forbidden*.

Moreover, the statement points out that where the statute uses the term "*best available*," the Administrator "will be bound by a test of *reasonableness*." *Ibid.* (emphasis added). It adds that the Administrator should apply this test in a way that *reflects* its ideal objective, moving as closely as is technologically possible to the elimination of pollution. It thereby says the Administrator should consider, *i.e.*, take into account, how much pollution would still remain if the *best available* technology were to be applied everywhere—"without regard to cost." *Ibid.* It does not say that the Administrator *must* set the standard based solely on the result of that determination. (It would be difficult to reconcile the alternative, more absolute reading of this language with the Senator's earlier "test of reasonableness.")

I say that one *may*, not that one *must*, read Senator Muskie's statement this way. But to read it differently would put the Agency in conflict with the test of reasonableness by threatening to impose massive costs far in excess of any benefit. For 30 years the EPA has read the statute and its history in this way. The EPA has thought

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that it would not be “reasonable to interpret*1515 Section 316(b) as requiring use of technology whose cost is *wholly disproportionate* to the environmental benefit to be gained.” *In re Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2)*, 1 E.A.D. 332, 340 (1977), remanded on other grounds, *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (C.A.1 1978) (emphasis added); see also *In re Central Hudson Gas & Elec. Corp.*, EPA Decision of the General Counsel, NPDES Permits, No. 63, p. 371 (July 29, 1977) (also applying a “wholly disproportionate” test); *In re Pub. Serv. Co. of N. H.*, 1 E.A.D. 455 (1978) (same). “[T]his Court will normally accord particular deference to an agency interpretation of ‘longstanding’ duration.” *Barnhart v. Walton*, 535 U.S. 212, 220, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002). And for the last 30 years, the EPA has given the statute a permissive reading without suggesting that in doing so it was ignoring or thwarting the intent of the Congress that wrote the statute.

The EPA's reading of the statute would seem to permit it to describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge. The Agency can thereby avoid lengthy formal cost-benefit proceedings and futile attempts at comprehensive monetization, see 69 Fed.Reg. 41661-41662; take account of Congress' technology-forcing objectives; and still prevent results that are absurd or unreasonable in light of extreme disparities between costs and benefits. This approach, in my view, rests upon a “reasonable interpretation” of the statute-legislative history included. Hence it is lawful. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Most of what the majority says is consistent with this view, and to that extent I agree with its opinion.

II

The cases before us, however, present an additional problem. We here consider a rule that permits variances from national standards if a facility demonstrates that its costs would be “significantly greater than the benefits of complying.” 40 CFR § 125.94(a)(5)(ii) (2008). The words “significantly greater” differ from the words the EPA has traditionally used to describe its standard, namely, “wholly disproportionate.” Perhaps the EPA does not mean to make much of that difference. But if it means the new words to set forth a new and different test, the EPA must adequately explain why it has changed its standard. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42-43, 103 S.Ct. 2856, 77

L.Ed.2d 443 (1983); *National Cable & Telecommunications Assn. v. Brand X Internet*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524, n. 3, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (THOMAS, J., dissenting).

I am not convinced the EPA has successfully explained the basis for the change. It has referred to the fact that existing facilities have less flexibility than new facilities with respect to installing new technologies, and it has pointed to special, energy-related impacts of regulation. 68 Fed.Reg. 13541 (2003) (proposed rule). But it has not explained why the traditional “wholly disproportionate” standard cannot do the job now, when the EPA has used that standard (for existing facilities and otherwise) with apparent success in the past. See, e.g., *Central Hudson*, *supra*.

*1516 Consequently, like the majority, I would remand these cases to the Court of Appeals. But unlike the majority I would permit that court to remand the cases to the EPA so that the EPA can either apply its traditional “wholly disproportionate” standard or provide an adequately reasoned explanation for the change.

Justice STEVENS, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

Section 316(b) of the Clean Water Act (CWA), 33 U.S.C. § 1326(b), which governs industrial powerplant water intake structures, provides that the Environmental Protection Agency (EPA or Agency) “shall require” that such structures “reflect the best technology available for minimizing adverse environmental impact.” The EPA has interpreted that mandate to authorize the use of cost-benefit analysis in promulgating regulations under § 316(b). For instance, under the Agency's interpretation, technology that would otherwise qualify as the best available need not be used if its costs are “significantly greater than the benefits” of compliance. 40 CFR § 125.94(a)(5)(ii) (2008).

Like the Court of Appeals, I am convinced that the EPA has misinterpreted the plain text of § 316(b). Unless costs are so high that the best technology is not “available,” Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact. Section 316(b) neither expressly nor implicitly authorizes the EPA to use cost-benefit analysis when setting regulatory standards; fairly read, it prohibits such use.

I

As typically performed by the EPA, cost-benefit analysis

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requires the Agency to first monetize the costs and benefits of a regulation, balance the results, and then choose the regulation with the greatest net benefits. The process is particularly controversial in the environmental context in which a regulation's financial costs are often more obvious and easier to quantify than its environmental benefits. And cost-benefit analysis often, if not always, yields a result that does not maximize environmental protection.

For instance, although the EPA estimated that water intake structures kill 3.4 billion fish and shellfish each year,^{FN1} see 69 Fed.Reg. 41586, the Agency struggled to calculate the value of the aquatic life that would be protected under its § 316(b) regulations, *id.*, at 41661. To compensate, the EPA took a shortcut: Instead of monetizing all aquatic life, the Agency counted only those species that are commercially or recreationally harvested, a tiny slice (1.8 percent to be precise) of all impacted fish and shellfish. This narrow focus in turn skewed the Agency's calculation of benefits. When the EPA attempted to value all aquatic life, the benefits measured \$735 million.^{FN2} But when the EPA decided to give *1517 zero value to the 98.2 percent of fish not commercially or recreationally harvested, the benefits calculation dropped dramatically—to \$83 million. *Id.*, at 41666. The Agency acknowledged that its failure to monetize the other 98.2 percent of affected species “ ‘could result in serious misallocation of resources,’ ” *id.*, at 41660, because its “comparison of complete costs and incomplete benefits does not provide an accurate picture of net benefits to society.”^{FN3}

FN1. To produce energy, industrial powerplants withdraw billions of gallons of water daily from our Nation's waterways. Thermoelectric powerplants alone demand 39 percent of all freshwater withdrawn nationwide. See Dept. of Energy, Addressing the Critical Link Between Fossil Energy and Water 2 (Oct.2005), [http:// www. netl. doe. gov/ technologies/ coalpower/ ewr/ pubs/ NETL_ Water_ Paper_ Final_ Oct. 2005. pdf](http://www.netl.doe.gov/technologies/coalpower/ewr/pubs/NETL_Water_Paper_Final_Oct_2005.pdf) (all Internet materials as visited Mar. 18, 2009, and available in Clerk of Court's case file). The fish and shellfish are killed by “impingement” or “entrainment.” Impingement occurs when aquatic organisms are trapped against the screens and grills of water intake structures. Entrainment occurs when these organisms are drawn into the intake structures. See *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 89 (C.A.2 2007); 69 Fed.Reg. 41586 (2004).

FN2. EPA, Economic and Benefits Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule, p. D1-4 (EPA-821-R-02-001, Feb. 2002), [http:// www. epa. gov/ waterscience/ 316 b/ phase 2/ econbenefits](http://www.epa.gov/waterscience/316b/phase2/econbenefits).

FN3. EPA, Economic and Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule, p. D1-5 (EPA-821-R-04-005, Feb. 2004), [http:// www. epa. gov/ waterscience/ 316 b/ phase 2/ econbenefits/ final. htm](http://www.epa.gov/waterscience/316b/phase2/econbenefits/final.htm).

Because benefits can be more accurately monetized in some industries than in others, Congress typically decides whether it is appropriate for an agency to use cost-benefit analysis in crafting regulations. Indeed, this Court has recognized that “[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.” *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 510, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981). Accordingly, we should not treat a provision's silence as an implicit source of cost-benefit authority, particularly when such authority is elsewhere expressly granted and it has the potential to fundamentally alter an agency's approach to regulation. Congress, we have noted, “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 467-468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001).

When interpreting statutory silence in the past, we have sought guidance from a statute's other provisions. Evidence that Congress confronted an issue in some parts of a statute, while leaving it unaddressed in others, can demonstrate that Congress meant its silence to be decisive. We concluded as much in *American Trucking*. In that case, the Court reviewed the EPA's claim that § 109 of the Clean Air Act (CAA), 42 U.S.C. § 7409(a) (2000 ed.), authorized the Agency to consider implementation costs in setting ambient air quality standards. We read § 109, which was silent on the matter, to prohibit Agency reliance on cost considerations. After examining other provisions in which Congress had given the Agency authority to consider costs, the Court “refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.” 531 U.S., at 467, 121 S.Ct. 903. Studied silence, we thus concluded, can be as much a prohibition as an explicit “no.”

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Further motivating the Court in *American Trucking* was the fact that incorporating implementation costs into the Agency's calculus risked countermanding Congress' decision to protect public health. The cost of implementation, we said, "is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in [the text] had Congress meant it to be considered." *Id.*, at 469, 121 S.Ct. 903.

American Trucking's approach should have guided the Court's reading of *1518 § 316(b). Nowhere in the text of § 316(b) does Congress explicitly authorize the use of cost-benefit analysis as it does elsewhere in the CWA. And the use of cost-benefit analysis, like the consideration of implementation costs in *American Trucking*, "pad[s]" § 316(b)'s environmental mandate with tangential economic efficiency concerns. *Id.*, at 468, 121 S.Ct. 903. Yet the majority fails to follow *American Trucking* despite that case's obvious relevance to our inquiry.

II

In 1972, Congress amended the CWA to strike a careful balance between the country's energy demands and its desire to protect the environment. The Act required industry to adopt increasingly advanced technology capable of mitigating its detrimental environmental impact. Not all point sources were subject to strict rules at once. Existing plants were granted time to retrofit with the best technology while new plants were required to incorporate such technology as a matter of design. Although Congress realized that technology standards would necessarily put some firms out of business, see *EPA v. National Crushed Stone Assn.*, 449 U.S. 64, 79, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980), the statute's steady march was toward stricter rules and potentially higher costs.

Section § 316(b) was an integral part of the statutory scheme. The provision instructs that "[a]ny standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the *best technology available for minimizing adverse environmental impact.*" 33 U.S.C. § 1326(b) (2006 ed.) (emphasis added).^{FN4} The "best technology available," or "BTA," standard delivers a clear command: To minimize the adverse environmental impact of water intake structures, the EPA must require industry to adopt the best technology available.

FN4. The two cross-referenced provisions, §§ 1311 and 1316, also establish "best technology" standards, the first applicable to existing point sources and the second to new facilities. The reference to these provisions in § 316(b) merely requires any rule promulgated under those provisions, when applied to a point source with a water intake structure, to incorporate § 316(b) standards.

Based largely on the observation that § 316(b)'s text offers little guidance and therefore delegates some amount of gap-filling authority to the EPA, the Court concludes that the Agency has discretion to rely on cost-benefit analysis. See *ante*, at 1507 - 1508. The Court assumes that, by not specifying how the EPA is to determine BTA, Congress intended to give considerable discretion to the EPA to decide how to proceed. Silence, in the majority's view, represents ambiguity and an invitation for the Agency to decide for itself which factors should govern its regulatory approach.

The appropriate analysis requires full consideration of the CWA's structure and legislative history to determine whether Congress contemplated cost-benefit analysis and, if so, under what circumstances it directed the EPA to utilize it. This approach reveals that Congress granted the EPA authority to use cost-benefit analysis in some contexts but not others, and that Congress intend to control, not delegate, when cost-benefit analysis should be used. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).^{FN5}

FN5. The majority announces at the outset that the EPA's reading of the BTA standard "governs if it is a reasonable interpretation of the statute-not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Ante*, at 1505. This observation is puzzling in light of the commonly understood practice that, as a first step, we ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S., at 842, 104 S.Ct. 2778. Only later, if Congress' intent is not clear, do we consider the reasonableness of the agency's action. *Id.*, at 843, 104 S.Ct. 2778. Assuming ambiguity and moving to the second step reflects the Court's reluctance to consider the possibility, which it later laments is "more complex," *ante*, at 1506, that Congress'

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silence may have meant to foreclose cost-benefit analysis.

*1519 Powerful evidence of Congress' decision not to authorize cost-benefit analysis in the BTA standard lies in the series of standards adopted to regulate the outflow, or effluent, from industrial powerplants. Passed at the same time as the BTA standard at issue here, the effluent limitation standards imposed increasingly strict technology requirements on industry. In each effluent limitation provision, Congress distinguished its willingness to allow the EPA to consider costs from its willingness to allow the Agency to conduct a cost-benefit analysis. And to the extent Congress permitted cost-benefit analysis, its use was intended to be temporary and exceptional.

The first tier of technology standards applied to existing plants-facilities for which retrofitting would be particularly costly. Congress required these plants to adopt "effluent limitations ... which shall require the application of the best practicable control technology currently available." 33 U.S.C. § 1311(b)(1)(A). Because this "best practicable," or "BPT," standard was meant to ease industry's transition to the new technology-based regime, Congress gave BPT two unique features: First, it would be temporary, remaining in effect only until July 1, 1983.^{FN6} Second, it specified that the EPA was to conduct a cost-benefit analysis in setting BPT requirements by considering "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application."^{FN7} § 1314(b)(1)(B). Permitting cost-benefit analysis in BPT gave the EPA the ability to cushion the new technology requirement. For a limited time, a technology with costs that exceeded its benefits would not be considered "best."

FN6. Congress later extended the deadline to March 31, 1989.

FN7. Senator Muskie, the Senate sponsor of the legislation, described the cost-benefit analysis permitted under BPT as decidedly narrow, asserting that "[t]he balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources." 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of

Congress), Ser. No. 93-1, p. 170 (1973) (hereinafter Leg. Hist.)

The second tier of technology standards required existing powerplants to adopt the "best available technology economically achievable" to advance "the national goal of eliminating the discharge of all pollutants." § 1311(b)(2)(A). In setting this "best available technology," or "BAT,"^{FN8} standard, Congress gave the EPA a notably different command for deciding what technology would qualify as "best": The *1520 EPA was to consider, among other factors, "the cost of achieving such effluent reduction," but Congress did not grant it authority to balance costs with the benefits of stricter regulation. § 1314(b)(2)(B). Indeed, in *Crushed Stone* this Court explained that the difference between BPT and BAT was the existence of cost-benefit authority in the first and the absence of that authority in the second. See 449 U.S., at 71, 101 S.Ct. 295 ("Similar directions are given the Administrator for determining effluent reductions attainable from the BAT except that in assessing BAT total cost is no longer to be considered in comparison to effluent reduction benefits").

FN8. Although the majority calls this "BATEA," the parties refer to the provision as "BAT," and for simplicity, so will I.

The BAT standard's legislative history strongly supports the view that Congress purposefully withheld cost-benefit authority for this tier of regulation. See *ibid.*, n. 10. The House of Representatives and the Senate split over the role cost-benefit analysis would play in the BAT provision. The House favored the tool, see H.R.Rep. No. 92-911, p. 107 (1972), 1 Leg. Hist. 794, while the Senate rejected it, see 2 *id.*, at 1183; *id.*, at 1132. The Senate view ultimately prevailed in the final legislation, resulting in a BAT standard that was "not subject to any test of cost in relation to effluent reduction benefits or any form of cost/benefit analysis." 3 Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act (Committee Print compiled for the Senate Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 427 (1978).

The third and strictest regulatory tier was reserved for new point sources-facilities that could incorporate technology improvements into their initial design. These new facilities were required to adopt "the best available demonstrated control technology," or "BADT," which Congress de-

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scribed as “a standard ... which reflect[s] the greatest degree of effluent reduction.” § 1316(a)(1). In administering BADT, Congress directed the EPA to consider “the cost of achieving such effluent reduction.” § 1316(b)(1)(B). But because BADT was meant to be the most stringent standard of all, Congress made no mention of cost-benefit analysis. Again, the silence was intentional. The House's version of BADT originally contained an exemption for point sources for which “the economic, social, and environmental costs bear no reasonable relationship to the economic, social, and environmental benefit to be obtained.” 1 Leg. Hist. 798. That this exemption did not appear in the final legislation demonstrates that Congress considered, and rejected, reliance on cost-benefit analysis for BADT.

It is in this light that the BTA standard regulating water intake structures must be viewed. The use of cost-benefit analysis was a critical component of the CWA's structure and a key concern in the legislative process. We should therefore conclude that Congress intended to forbid cost-benefit analysis in one provision of the Act in which it was silent on the matter when it expressly authorized its use in another.^{FN9} See, e.g., *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. —, —, 128 S.Ct. 2123, 2129-30, 170 L.Ed.2d 1030 (2008); *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotation marks omitted)). This is particularly true given Congress' decision that cost-benefit analysis would play a temporary and exceptional role in the CWA to help existing plants transition to the Act's ambitious environmental standards.^{FN10} Allowing cost-benefit analysis in the BTA standard, a permanent mandate applicable to all powerplants, serves no such purpose and instead fundamentally weakens the provision's mandate.^{FN11}

FN9. The Court argues that, if silence in § 316(b) signals the prohibition of cost-benefit analysis, it must also foreclose the consideration of *all* other potentially relevant discretionary factors in setting BTA standards. *Ante*, at 1508. This all-or-nothing reasoning rests on the deeply flawed assumption that Congress treated cost-benefit analysis as just one among many factors upon which the EPA could potentially rely to establish BTA. Yet, as explained above, the structure and legislative history of the CWA

demonstrate that Congress viewed cost-benefit analysis with special skepticism and controlled its use accordingly. The Court's assumption of equivalence is thus plainly incorrect. Properly read, Congress' silence in § 316(b) forbids reliance on the cost-benefit tool but does not foreclose reliance on all other considerations, such as a determination whether a technology is so costly that it is not “available” for industry to adopt.

FN10. In 1977, Congress established an additional technology-based standard, commonly referred to as “best conventional pollutant control technology,” or “BCT,” to govern conventional pollutants previously covered by the BAT standard. See 33 U.S.C. § 1311(b)(2)(E). The BCT standard required the EPA to consider, among other factors, “the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived.” § 1314(b)(4)(B). That Congress expressly authorized cost-benefit analysis in BCT further confirms that Congress treated cost-benefit analysis as exceptional and reserved for itself the authority to decide when it would be used in the Act.

FN11. The Court attempts to cabin its holding by suggesting that a “rigorous form of cost-benefit analysis,” such as the form “prescribed under the statute's former BPT standard,” may not be permitted for setting BTA regulations. *Ante*, at 1508. Thus the Court has effectively instructed the Agency that it can perform a cost-benefit analysis so long as it does not resemble the kind of cost-benefit analysis Congress elsewhere authorized in the CWA. The majority's suggested limit on the Agency's discretion can only be read as a concession that cost-benefit analysis, as typically performed, may be inconsistent with the BTA mandate.

Accordingly, I would hold that the EPA is without authority to perform cost-benefit analysis in setting BTA standards. To the extent the EPA relied on cost-benefit analysis in establishing its BTA regulations,^{FN12} that action was contrary to law, for Congress directly foreclosed such reliance in the statute itself.^{FN13} *Chevron*, 467 U.S., *1522 at 843, 104 S.Ct. 2778. Because we granted certiorari to decide only whether the EPA has authority to conduct cost-benefit analysis, there is no need to define the un-

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iverse of considerations upon which the EPA can properly rely in administering the BTA standard. I would leave it to the Agency to decide how to proceed in the first instance.

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FN12. The “national performance standards” the EPA adopted were shaped by economic efficiency concerns at the expense of finding the technology that best minimizes adverse environmental impact. In its final rulemaking, the Agency declined to require industrial plants to adopt closed-cycle cooling technology, which by recirculating cooling water requires less water to be withdrawn and thus fewer aquatic organisms to be killed. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 182, n. 5 (C.A.2 2004); 69 Fed.Reg. 41601, and n. 44. This the Agency decided despite its acknowledgment that “closed-cycle, recirculating cooling systems ... can reduce mortality from impingement by up to 98 percent and entrainment by up to 98 percent.” *Id.*, at 41601. The EPA instead permitted individual plants to resort to a “suite” of options so long as the method used reduced impingement and entrainment by the more modest amount of 80 and 60 percent, respectively. See 40 CFR § 125.94(b). The Agency also permitted individual plants to obtain a site-specific variance from the national performance standards if they could prove (1) that compliance costs would be “significantly greater than” those the Agency considered when establishing the standards, or (2) that compliance costs “would be significantly greater than the benefits of complying with the applicable performance standards,” § 125.94(a)(5).

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FN13. Thus, the Agency's past reliance on a “wholly disproportionate” standard, a mild variant of cost-benefit analysis, is irrelevant. See *ante*, at 1509. Because “Congress has directly spoken to the precise question at issue,” *Chevron*, 467 U.S., at 842, 104 S.Ct. 2778, longstanding yet impermissible agency practice cannot ripen into permissible agency practice.

III

Because the Court unsettles the scheme Congress established, I respectfully dissent.

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