04-6692-ag(L);

04-6693-ag; 04-6694-ag; 04-6695-ag; 04-6696-ag;
04-6697-ag; 04-6698-ag; 04-6699-ag (consolidated)

United States Court of Appeals

for the

Second Circuit

SURFRIDER FOUNDATION, STATE OF RHODE ISLAND, STATE OF CONNECTICUT, STATE OF DELAWARE, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW JERSEY, STATE OF NEW YORK, APPALACHIAN POWER COMPANY, RIVERKEEPER, INC., NATURAL RESOURCES DEFENSE COUNCIL, SCENIC HUDSON, INC., SAVE THE BAY-PEOPLE FOR NARRAGANSETT BAY, FRIENDS OF CASCO BAY, AMERICAN LITTORAL SOCIETY,

(For Continuation of Caption See Inside Cover)

ON PETITION FOR REVIEW OF FINAL RULE OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF PETITIONER ENTERGY CORP. IN SUPPORT OF VACATUR AND REMAND OF FINAL RULE

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DATED: July 5, 2005

DELAWARE RIVERKEEPER NETWORK, HACKENSACK RIVERKEEPER, INC., NEW YORK/NEW JERSEY BAYKEEPER, SANTA MONICA BAYKEEPER, SAN DIEGO BAYKEEPER, CALIFORNIA COASTKEEPER, COLUMBIA RIVERKEEPER, PSEG FOSSIL LLC, PSEG NUCLEAR LLC, ENTERGY CORPORATION, ILLINOIS ENERGY ASSOCIATION, WATERKEEPER ALLIANCE, SOUNDKEEPER, INC., UTILITY WATER ACT GROUP,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MICHAEL LEAVITT, in his official capacity as Administrator of the United States Environmental Protection Agency,

Respondents.

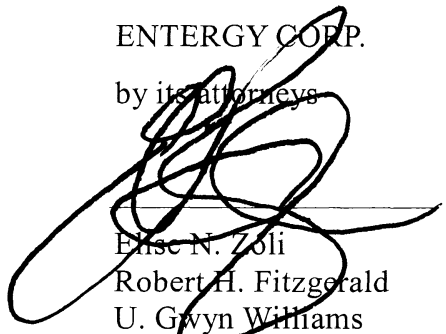
CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Entergy Corp., by and through its undersigned counsel, hereby certifies that Petitioner Entergy Corp., a publicly traded corporation, (1) has no parent company, and (2) no publicly held corporation owns 10% or more of Entergy Corp.'s stock.

Respectfully submitted,

ENTERGY CORP.

by its attorneys



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MISCELLANEOUS

JURISDICTIONAL STATEMENT

This action requests review of a U.S. Environmental Protection Agency ("EPA")-promulgated regulation, the Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities (the "Rule"), that purports to implement §316(b) of the Clean Water Act (the "Act"), 33 U.S.C. §1326(b). Reciting as its authority various sections of the Act, 69 Fed.Reg. 41581, EPA promulgated the Rule at 69 Fed.Reg. 41575, as of 1:00 p.m. Eastern Standard Time on July 23, 2004. 69 Fed.Reg. 41575, 41576-693 (July 9, 2004); 40 C.F.R. §23.2.

The Act, which confers a right of review of EPA's promulgation of any "effluent limitation or other limitation under [33 U.S.C.] 1311, 1312, 1316, or 1345" on any interested person (including a corporation) in the United States Circuit Court of Appeals for the federal judicial district in which such corporation transacts business directly affected by EPA's action, provides the basis for this Court's jurisdiction. 33 U.S.C. §1369(b). EPA asserts the Rule is an effluent or other limitation. 69 Fed.Reg. 41582. Entergy Corp. ("Entergy"), a leading energy services company, and its affiliates own and operate power plants directly affected by the Rule in both the Fifth Circuit, where Entergy filed its petition for review, and in the Second Circuit, among other places. Entergy filed and served its petition within 120 days of July 23, 2004, satisfying 33 U.S.C. §1369(b)(1).

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1. To facilitate review of briefing, full citations are provided, but in the final brief will be replaced with abbreviated references to the deferred appendix, using the form: Joint Appendix ("JA"), ___.

On August 10, 2004, following EPA notification, the Judicial Panel on Multidistrict Litigation selected the Ninth Circuit, issuing an order consolidating all petitions for review in that court. On December 14, 2004, the consolidated petitions were transferred to this Court.

STATEMENT OF ISSUES

The issues for this Court's review are as follows:

1. Whether, employing traditional tools of statutory construction, the Rule fails the test set forth in Chevron, U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984), because Congress did not intend §316(b) of the Act to apply to power plants with existing intake structures that already necessarily have been located, designed, constructed, and sized with respect to capacity?

2. Whether the Rule is arbitrary and capricious, unsupported by the Record, or otherwise contrary to law because EPA improperly requires nuclear power plants to employ technologies which the Record indicates are not "available" to such facilities, and the Rule otherwise disproportionately impacts nuclear power plants?

3. Whether the Rule is arbitrary and capricious, unsupported by the Record, or otherwise contrary to law because EPA's application of §316(b) to existing facilities is not economically practicable as required by federal law?

STATEMENT OF THE CASE

This challenge implicates the Clean Water Act, the landmark legislation designed to eliminate the discharge of most pollutants to navigable waters through the imposition of uniform national effluent (or discharge) limitations promulgated by EPA. A unique provision of the Act forms the context for this challenge: Section 316, titled "Thermal Discharges," was specifically enacted to relieve power plants (and others) from the otherwise unyielding application of uniform thermal-discharge limitations by allowing regulated facilities to exceed those limitations in circumstances where their discharges nonetheless assure a balanced indigenous population of fish, shellfish and wildlife. 33 U.S.C. §1326(a); 118 CONG.REC. 33761-66 (1972). At issue here is §316(b), a single sentence within §316's comparatively extensive Thermal Discharges provision, which requires that "the location, design, construction, and capacity of cooling water intake structures," the physical structures used to withdraw cooling water subsequently returned to its source, "reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. §1326(b).

In violation of Chevron and its progeny, EPA promulgated the Rule to implement §316(b) at the existing steam-electricity generating stations ("power plants") that daily power this nation. The Rule requires existing intake technology to be redesigned, relocated, reconstructed and reconfigured (relative to capacity) with new technology that EPA has selected as having the potential to reduce the possibility that minute aquatic organisms – fish eggs and larvae – travel through power plant cooling systems (known as "entrainment"), or that somewhat larger organisms

– mostly juvenile fish – are drawn against screening mechanisms (known as "impingement"). The Rule rests on EPA's presumption that a handful of technologies are "available" to power plants nationwide, as §316(b) requires. According to EPA, use of its pre-selected technologies will allow every facility to meet the Rule's performance standards of 60 to 90% reductions in entrainment, and 80 to 95% reductions in impingement mortality. EPA plans to implement the Rule in the Act's discharge-permitting program, which would subject every power plant intake structure to reconsideration every five years. Lastly, EPA seeks to validate the Rule on the assumption that American taxpayers will assume over $300 million in costs annually to offset EPA's estimated shortfalls in the benefits of the Rule as proposed.

This challenge identifies three fundamental errors requiring the Rule to be set aside in its entirety. First, the Rule's application of §316(b) to existing power plants manifestly exceeds EPA's authority. The customary tools of statutory construction – the plain language of §316(b) and its context within the Act as a whole – confirm that §316(b) is, and can only be, a pre-construction mandate. The integrated phrase "design, construction, location, and capacity" simply cannot be made to apply to intake structures that already have been designed, constructed, located and sized for a facility's particular electric-generating capacity. The plain language of the Act, reinforced by Congress' use of the same terms in other legislation, limits §316(b) to new facilities. The structure and content of the Act underscore this limitation. For instance, for EPA to regulate *intake* structures at existing power plants as the Rule proposes, EPA must convince this Court to extend the Act's *discharge*

permitting system beyond its unequivocal jurisdictional limit – a restructuring that the Act cannot support. While it need not be considered, the legislative history of §316 further attests to that section's indisputable focus on discharges (not intakes) and the exclusive pre-construction application of §316(b). Accordingly, no reasonable construction of the Act, and certainly none advanced by EPA in the Rule, allows §316(b) to apply to existing facilities. Infra at pp. 14-35.

Second, the Rule rests on an incorrect and unsupported presumption: Because §316(b) requires that the technology be "available," 33 U.S.C. §1326(b), EPA presumes that the technology it selected to satisfy its performance standards is, in fact, "available." With respect to the nuclear power plants that supply 20% of this nation's electricity, that availability presumption rests solely upon telephone conversations with two sales representatives who stand to profit from the Rule, and contradicts the Record evidence provided by state regulators and actual operational experience. Further, the disproportionate impacts on the nuclear sector that result from this improper presumption go wholly unaddressed by EPA and, under the circumstances reflected in the Record, are irrational. As such, the Rule cannot stand. Infra at pp. 35-47.

Lastly, the Rule is not economically practicable as federal law requires. EPA's own cost-benefit assessment, designed to answer the fundamental question of whether the Rule is economically practicable (and, not incidentally, sound environmental policy), reveals an shortfall in benefits to the nation as a whole of over $300 million annually. EPA's efforts to justify that shortfall are wholly inadequate – premised on an outcome-deterministic "true up" analysis without any

evidentiary foundation and grounded in a flawed technical presumption roundly rejected by EPA's own peer reviewers. Infra at pp. 47-52.

To evade this damaging Record, EPA hazards that, as a result of the Rule, fish populations compromised not by power plants, but by overfishing, may experience some decreased vulnerability to what EPA describes as a population's "compensatory reserve." See 69 Fed.Reg. 41576, 41589-90 (July 9, 2004). EPA's misguided effort to redress the unquestioned detrimental impact of overfishing through collateral regulation of a different industry not only lacks any basis in the Act, but also flatly contradicts Congress' stated purpose with respect to §316:

> [A]ll of us are sincerely interested in stopping pollution of our Nation's waters. But the [EPA] Administrator has shown an unfortunate tendency sometimes in the past to require ridiculous expenditures of hundreds of millions of dollars with no benefit to any persons, or even to the fish. The purpose of the language in sections 304, 306, and 316 is to require the Administrator to utilize better judgment in the future.

118 CONG.REC. 33765-66 (1972) (statement of Mr. Clark).

Congress' expectation that EPA would discover its judgment has not come to fruition. EPA instead has forsaken Congress' priority of eliminating pollutant discharges with a Rule that is among the most costly in the Act's history (precisely the result Congress sought to avoid), erroneously regulates the intakes of existing power plants, and will

inappropriately alter, and may compromise, America's electric supply, and with it this Nation's ability to function and prosper.

The eminent administrative jurist Louis L. Jaffe observed the truism that "[d]iscretion is a science or understanding to discern between shadows and substance, between equity and colourable glosses and pretences, and not to do according to ... private affections ... ." Louis L. Jaffe & Edith G. Henderson, Judicial Review and the Rule of Law: Historical Origins, 72 L.Q.Rev. 345, 353 (1956) (quoting Coke). In the final analysis, EPA's proposal to indirectly manage the so-called compensatory reserve of those fish populations challenged by overfishing, which comes at a social cost of $300 million a year with no discernible benefit to fish populations, is a shadow game.

STATEMENT OF FACTS

I. Statutory Background

The indisputable focus of the Act is to limit or eliminate discharges of pollutants into the nation's waterways. In the late 1960s, pollutants discharged into American waterways emerged as a "critical water protection issue." See April 4, 1994 Preliminary Regulatory Development, Section 316(b) of the Clean Water Act, Background Paper Number 1: Legislative, Regulatory and Legal History of Section 316(b) and Information on Federal and State Implementation of Cooling Water Intake Structure Technology Requirements, prepared for EPA by Scientific Applications International Corp. ("EPA's §316(b) Legislative History"), p.2-1. In 1972, Congress responded with an express "Congressional

declaration of goals and policy" of eliminating the discharge of pollutants into the nation's waters by 1985, see 33 U.S.C. §1251(a)(1) ("[I]t is *the* national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 ... .") (emphasis supplied), and directed EPA to establish national discharge limitations to accomplish that objective, see 33 U.S.C. §1311, subject to the overriding caveat that all such measures be reasonable. See 117 CONG.REC. 38801 (1971) ("reasonable cost is the basic test ... for eliminating discharges") (statement of Sen. Muskie).

To achieve the Act's objective of eliminating discharges, Congress established the National Pollutant Discharge Elimination System ("NPDES") – a permit program with a name synonymous with the national goal of eliminating all discharges of pollutants. See 33 U.S.C. §1342. NPDES permits are expressly limited exclusively to discharges. See, e.g., 33 U.S.C. §1342(a) ("... the Administrator may, after opportunity for public hearing, issue *a permit for the discharge* of any pollutant ... upon condition that *such discharge* will meet ... .") (emphasis supplied). With respect to those discharges, NPDES permits represent the basic mechanism by which EPA, or authorized states, may implement, and every five years reconsider, the specific application of uniform national discharge (or effluent) limitations that EPA establishes pursuant to §301 of the Act, 33 U.S.C. §1311, and – per Congress' directive – continually revisits. See 33 U.S.C. §1311(d) (requiring EPA review of effluent limitations every five years) and §1342(a)(3),(b)(1)(B) (providing for five-year NPDES permit terms). Thus, the five-year term of NPDES permits directly correlates to EPA's obligation to every five years reconsider the uniform national discharge limitations (that form the basis for those permit limits).

Congress could have controlled the discharge of heat solely as it does other pollutants by using the "alphabet soup" of technology-based effluent limitations contained in §301. Clean Water Act Handbook, p. 19 (ed. M. Ryan, 2003). Instead, however, Congress created a unique regulatory regime in §316 of the Act, titled "Thermal Discharges," responsive to the central role of power plants to the American economy and the practical reality that heat dissipates in the environment, among other factors. 33 U.S.C. §1326; 118 CONG.REC. 33747-48 (1972) (outlining unique circumstances of thermal discharges). Section 316 does not require or rely on uniform discharge limitations. Rather, §316(a) expressly authorizes thermal discharges above EPA-promulgated uniform national limitations if those discharges assure a balanced indigenous population of fish, shellfish and wildlife. 33 U.S.C. §1326(a); 118 CONG.REC. 33698 (1972). Thus, any thermal discharger, e.g., any open-cycle power plant, already must assure that aquatic ecosystems are protected.[2]

Section 316(b), a single sentence embedded in that Thermal Discharges provision, requires 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). According to EPA, §316(b) "incorporated the Senate's basic approach," in which "cooling water intake structures would have only been regulated as an *indirect result* of the Senate

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2. Section 316 was the product of extensive congressional consideration of thermal pollution – one of the most controversial of the issues covered in the passage of the Act. See EPA §316(b) Legislative History, p.2-1, n.2. Thus, there can be little doubt that Congress' attention to §316 was substantial, and the delicate balance it struck in §316 deliberate.

Bill's regulation of *technologies used to control thermal discharges*." EPA's §316(b) Legislative History, p.2-5 (emphasis supplied); Karl R. Rábago, What Comes Out Must Go In: Cooling Water Intakes and the Clean Water Act, 16 HARV. ENVT'L L. REV. 429, 453 (1992) (using verbatim statement).

The Rule originated in a judicially approved settlement of a citizen suit, which "set[] forth a timetable by which EPA will either issue regulations regarding cooling water intake structures or determine no such regulations are necessary." Cronin v. Browner, 898 F. Supp. 1052, 1055 (S.D.N.Y. 1995) (referencing Consent Decree); see also Consent Decree, ¶2(b) ("the Administrator shall take final action with respect to ['regulations implementing section 316(b) of the Clean Water Act'] no later than August 13, 2001.").[3]

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3. In 1977, EPA's short-lived regulations implementing §316(b) were struck down on procedural grounds. See Appalachian Power Co. v. EPA, 566 F.2d 451, 457 (4th Cir. 1977); 44 Fed.Reg. 32956 (June 7, 1979) (withdrawing regulations). EPA's prolonged inaction in the subsequent three decades is testimony to what EPA acknowledges is the scant evidence that existing power plants have adversely impacted fish populations. 69 Fed.Reg. 41589. Relying on its statutory authority, EPA or an authorized state nonetheless made a §316(b) determination for the vast majority of power plants constructed after the Act's passage, using what EPA characterizes as its "best professional judgment." See 67 Fed.Reg. 17122, 17124 (April 9, 2002); EPA's §316(b) Legislative History, p.5-18 ("[T]he CWA §316(b) data ... indicate that the majority of generating units documented (approximately 80 percent) have had existing intake structures approved under CWA §316(b)," and the remainder reflect proposed facilities where decisions had not yet been made or were otherwise delayed.).

II. Summary of Relevant Record Evidence

The Rule begins with an omission, and ends with the concession that the Rule is unsound environmental policy. As detailed in the Brief of PSE&G, the Rule omits any definition of §316(b)'s triggering term "adverse environmental impact." 69 Fed.Reg. 41683 (to be codified at 40 C.F.R. §125.93 and containing no such definition). Instead, EPA substitutes an oblique discussion of what it suggests may be perhaps "nontrivial" effects of intake structures on ecosystems already compromised by commercial fishing. See 69 Fed.Reg. 41589-90 ("EPA is concerned that even if there is little evidence that cooling water intakes alone reduce a population's compensatory reserve, the multitude of stressors experienced by a species can potentially adversely affect its ability to recover."; "EPA shares the concerns expressed by expert fisheries scientists that historical overfishing has increased the sensitivity of aquatic ecosystems to subsequent disturbance, making them more vulnerable to other stressors, including cooling water intake structures."). These potential impacts, unconvincingly advanced, are the sole slim justification for the Rule.[4]

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4. In a prior action, this Court apparently was led to believe that power plant entrainment "destabiliz[es]" fish populations. Riverkeeper, Inc. v. EPA, 358 F.3d 174, 181 (2d Cir. 2004). Equating entrainment to population impacts is a distortion similar to equating the disposal of winged maple seeds in the springtime gardener's cleanup to the loss of entire forests. Indeed, EPA failed to identify population impacts in the Rule attributable to power plants (despite decades of operation), and – with respect to the Hudson River – the evidence is clearly otherwise. See, e.g., Testimony of Robert F. Kennedy, Jr., Before U.S. Senate Environment and Public Works Committee In Recognition of the 30th Anniversary of the Clean Water

(Cont'd)

In response to these perhaps "nontrivial" impacts, the Rule establishes two "standards of performance" for existing power plants: a reduction in impingement mortality of 80 to 95%, and a reduction in entrainment by 60 to 90%. 69 Fed.Reg. 41590. According to EPA, these performance standards are based on a handful of EPA-selected technologies that obstruct water flow into intake structures. 69 Fed.Reg. 41598-99. EPA presumes these pre-selected technologies, which serve as the "primary basis" for the Rule, are commercially available for the steam-electric generating industry "as a whole." 69 Fed.Reg. 41599. Indeed, in the final Rule, EPA actually assigned to every facility purportedly subject to the Rule EPA's selected technology for that facility. 69 Fed.Reg. 41646, 41669 (App. A).

EPA also performed a cost/benefit analysis to support its assertion that the Rule requires only "economically practicable and cost-effective" technologies, in accordance with its statutory obligation and sound environmental policy.

(Cont'd)

Act (October 8, 2002), transcript available at http://epw.senate.gov/107th/Kennedy_100802.htm ("[The Hudson River] is the only large river in the North Atlantic that retains strong spawning stocks of its entire collection of historical migratory species."); February 2003 Atlantic States Marine Fisheries Council Fishery Management Report No. 41 (Atlantic striped bass coastal migratory stock "abundance increased steadily between 1982 and 1997," and "was declared recovered in 1995 and has since expanded to record levels of abundance."). EPA's stated concern about endangered species, is simply unnecessary, since such considerations are governed by a wholly separate federal law, the Endangered Species Act, 16 U.S.C. §1531-44. In any event, fisheries management is not EPA's mission under §316(b) of the Act, but rather the business of the aptly named U.S. Fish & Wildlife Service, among other regulators.

See 118 CONG.REC. 33762 (1972) ("best technology available" is "intended to be interpreted to mean the best technology available commercially at an *economically practicable* cost") (emphasis supplied); 69 Fed.Reg. 41583 (facilities to install only those technologies which are "technically available, *economically practicable, and cost-effective.*") (emphasis supplied); 69 Fed.Reg. 41604 ("EPA has long recognized that there should be some reasonable relationship between the cost of cooling water intake structure control technology and the environmental benefits associated with its use."). EPA determined that the *annual* cost of the Rule is $389 million, while the annual benefit to commercial and recreational fishermen is $83 million. See 69 Fed.Reg. 41664. As detailed in Section I of the Brief of the Utility Water Act Group, et al. ("UWAG"), in calculating benefits, EPA relied on a critical technical assumption (that all organisms entrained die as a result of entrainment), 69 Fed.Reg. 41656, despite the contrary Record support and the unanimous conclusion of EPA's own peer reviewers that such an assumption is not supported by an analysis of data from dozens of entrainment studies. See, e.g., Mark B. Bain, Ph.D., External Peer Review of Chapter A7: Entrainment Survival of the Case Study Analysis for Section 316(b) Phase II Existing Facilities Rule Document. Even without this plain error, the Rule reflects a massive social deficit that EPA addressed not through meaningful analysis, but with an expedient assumption wholly without inquiry (and therefore Record support) that American households willingly would assume these costs. 69 Fed.Reg. 41664.

SUMMARY OF ARGUMENT

Entergy's summary of argument is set forth in its Statement of the Case, and not repeated here.

ARGUMENT

I. EPA Lacks Authority to Apply §316(b) to Existing Facilities.

To decide this case, the Court need not look beyond the plain and unambiguous language of §316(b), which provides in its entirety:

> Any standard established pursuant to section [301] or section [306] 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) (emphasis supplied).

The plain language of the Act, its stated purpose and structure, as well as contemporaneous Congressional statements, demonstrate that §316(b) is a pre-construction mandate, and does not confer on EPA authority to repeatedly reconsider – post-construction – its authorizations of intake structures in NPDES permits. This Court must give effect to that unambiguously expressed Congressional intent, notwithstanding EPA's contrary interpretation, see New York Pub. Interest Research Group v. Whitman, 321 F.3d 316, 324 (2d Cir. 2003) ("We will not defer to an agency's interpretation that contravenes Congress' unambiguously

expressed intent."), or justification, see FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner inconsistent with the administrative structure that Congress enacted into law.'") (quoting ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988)).

Even if the statute were not unambiguous, EPA's interpretation of §316(b) as applicable to existing facilities is simply unreasonable and "goes beyond the meaning that the statute can bear." MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 229 (1994) (superseded in part by statute). As such, the Rule cannot be permitted to stand.

A. Section 316(b) Unambiguously Applies Only to New Facilities.

The initial question for this Court is whether Congress intended §316(b) to apply to existing facilities. See Chevron, 467 U.S. at 842-43. "A statute is unambiguous when, employing traditional tools of statutory construction, the court can find the proper interpretation of the relevant provision." Skubel v. Fuoroli, 113 F.3d 330, 335 (2d Cir. 1997) (quotations and citations omitted). The traditional tools of statutory construction include review of the statutory language within the proper statutory context. Brown & Williamson, 529 U.S. at 132-33 (extensive citations omitted).[5]

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5. Entergy did not contest that §316(b) applies to new facilities in a pre-construction review process in its comments to EPA or by participating in the industry challenge previously before this Court. Entergy is mindful that, in footnoted dicta in that decision, this Court suggested that the application of §316(b) to existing facilities may be reasonable. Riverkeeper, 358 F.3d at 187, n.13. It does not,

(Cont'd)

1. *The Plain Language of §316(b) Limits Its Application to New Facilities.*

Here, the first tool of statutory construction – the plain language of the provision itself – makes clear that EPA has overstepped its bounds in applying §316(b) to existing facilities. In interpreting the plain language, words are to be "interpreted as taking their ordinary, contemporary, common meaning," Harris v. Sullivan, 968 F.2d 263, 265 (2d Cir. 1992) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)), and may not summarily be labeled ambiguous, MCI, 512 U.S. at 227 (rejecting uncommon dictionary definition).

Section 316(b)'s operative phrase – "location[6], design[7],

(Cont'd)

however, interpret this Court to have prejudged an outcome not before it, based on arguments it had not heard and therefore could not have considered.

6. See, e.g., Black's Law Dictionary, (6th ed. 1990) ("Location" means "site or place where something is or may be located."); Oxford English Dictionary (2d ed. 1989) ("Location" means "the action of placing ...") (first relevant definition); American Heritage Dictionary (3d ed. 1992) ("Location" means "the act or process of locating."). These definitions clearly contemplate a single location without suggestion of seriatim relocation of an initially located structure, and – in conjunction with the other terms within the operative phrase at issue – implicate the prospective portion of the definition that appears in the vast majority of dictionaries considered.

7. See, e.g., Black's Law Dictionary (6th ed. 1990) ("Design" means "the plan or scheme conceived in mind and intended for *subsequent execution*.") (emphasis supplied); Random House Dictionary of the English Language (2d ed. 1987) ("Design" means "an outline, sketch, or plan, as of the form and structure of a work

(Cont'd)

construction[8] and capacity[9]" – consists of four component words that are joined by the conjunction "and," and therefore must be simultaneously considered. See, e.g., Black's Law Dictionary (6th ed. 1990) ("And" means "a conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first"). The ordinary, contemporary, common meaning of the integrated phrase thus is limited to prospective equipment, *i.e.*, those intake structures not yet constructed, designed, located, or sized to

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(Cont'd)

of art, an edifice, or a machine *to be executed or constructed.*") (emphasis supplied); Oxford English Dictionary (2d ed. 1989) ("Design" means "a plan or scheme conceived in the mind and intended for *subsequent execution*; the preliminary conception of an idea that is to be carried into effect by action; a project.") (emphasis supplied).

8. See, e.g., Black's Law Dictionary (6th ed. 1990) ("Construction" means *"the creation of something new, as distinguished from the repair or improvement of something already existing*" and "construct" means "to build; erect; put together; make ready for use.") (emphasis supplied). This definition is consistent with the definition of "construction" in §306 of the Act as "any placement, assembly, or installation of facilities or equipment ... at the premises *where such equipment will be used*, including preparation work at such premises." 33 U.S.C. §1316(a)(5) (emphasis supplied). "Similar language in two different sections of the same law should be given a similar interpretation." Perales v. Sullivan, 948 F.2d 1348, 1355 (2d Cir. 1991) (citation omitted).

9. See, e.g., in the absence of a Black's Law Dictionary entry, Oxford English Dictionary (2d ed. 1989) ("ability to receive or contain"); American Heritage Dictionary (3d ed. 1982) ("The *maximum* amount that can be contained; a trunk filled to capacity."). No dictionary suggests the dynamic or variable capacity the Rule contemplates.

a particular capacity, and does not make ordinary, contemporary, common sense when applied to existing intake structures, *i.e.*, those that already have been designed, located, constructed, and sized with a capacity consistent with overall facility design. The phrase is neither "inherently difficult to define" nor "intimately tied to knowledge of the industry." Am. Mining Cong. v. EPA, 824 F.2d 1177, 1184 (D. C. Cir. 1987) (citations omitted).

Indeed, the plain language of §316(b) reflects the fundamental relationship between the "location, design, construction, and capacity" of intake structures and power plants as a whole. Since the capacity of the intake structure is directly related to the generation capacity of the facility, as a practical matter the characteristics of the intake structure must be determined when the facility is first constructed. 69 Fed.Reg. 41651-54 (discussing relationship between intake regulation and power market impacts). To require these fundamental aspects of power plant construction to be revisited during every five-year NPDES permit term simply ignores this reality, and opens the door to EPA's wholesale redesign, relocation and reconstruction of American power plants – a skill set the Agency does not possess, and was never intended by Congress to exercise.

In lieu of this plain reading, EPA proposes a bold revisionist adventure: Ignore the operative phrase "location, design, construction and capacity" as if Congress had omitted it: *i.e.*, "any standard pursuant to section [301] or section [306] and applicable to a point source shall require that [ ] cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. §1326(b). While "blue-penciling" the phrase

"location, design, construction and capacity" may advance EPA's goal of extending the provision to existing facilities, it achieves that end through an indisputably impermissible means – the elimination of essential statutory language – which this Court cannot sanction. Indiana Michigan Power Co. v. Dep't of Energy, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (rejecting blue-penciling effort as failing first step of Chevron); see also Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 485 (2001) (determining, in the context of the Clean Air Act, that "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.").

Not surprisingly, the use of these same terms – location, design, construction, and size (e.g., capacity) of a project or its components – in a vast array of other federal statutes and regulations confirms that Congress and regulatory agencies routinely, if not invariably, employ them in the pre-construction context.[10] Such pervasive and common

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10. See, e.g., 16 U.S.C. §430z-2 ("*design and location* of ... memorials must be approved by the Secretary, ... *before* construction is undertaken"); 33 U.S.C. §2104(b) ("*design* and *location* for construction of the artificial reef and the types and quantities of materials that *may be used in constructing* such artificial reef"); 49 U.S.C. §60103 (regarding LNG facilities, "...*design, location*, installation, *construction*, initial inspection, or initial testing standard prescribed [after effective date] does not apply to an existing...facility...." but may apply to replacement component); 10 C.F.R. §435.302(r) (performance standards for *new* federal residential buildings, defining project to mean a "group of ... buildings *to be built* at a specific geographic *location* that are included ... in specifications issued or used ... for *design* or *construction* of the buildings"); 23 C.F.R. §630.205(b)

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sense use of these operative terms, and the consistency with which they are employed relative to prospective facilities,

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(*pre-construction* procedures require that "plans and specifications shall describe the *location* and *design* features and the *construction* requirements in sufficient detail to facilitate the construction ... and the *estimation of construction costs*"); 24 C.F.R. §891.818(a)(8) (application for *new* construction must address "*design* and *construction* requirements of the Fair Housing Act" and demonstrate that project will comply with regulations prohibiting "the selection of a site or *location*" with exclusionary effect); 25 C.F.R. §900.119 ("*Before* spending any funds for a planning, *design*, *construction*, or renovation project," consultation with Indian tribe required "to follow tribal preferences ... concerning: *size*, *location*, type and other characteristics of the project"); 28 C.F.R. §42.407(b) ("Where the requested assistance is for construction, a *pre-approval* review should determine whether the *location* and *design* of the project will provide service on a nondiscriminatory basis ...."); 34 C.F.R. §395.31(b) ("no such department ... shall undertake to substantially alter or renovate such building, unless it is determined that the *design* for such *construction*, substantial alteration, or renovation includes a satisfactory site or sites for the *location* and operation of a vending facility by a blind vendor"); 36 C.F.R. §251.14(a)(5) ("*Construction* and maintenance plans, *designs*, and *location* shall be approved in writing by Forest Service *before construction* is started."); 36 C.F.R. §327.30, App. A ("Plans and specifications of the proposed facility shall be submitted and approved *prior to the start of construction*"; application should include "engineering details, structural *design*, anchorage method, and *construction* materials; [and] the type, *size*, *location* and ownership of the facility"); 40 C.F.R. §51.161(c)(2) (requiring owner or operator of a facility "*to be constructed* or modified" to submit information on "the *location, design, construction* and operation of such facility"); see also 33 U.S.C. §1316(a)(5) ("construction" means "any placement, assembly, or installation of facilities or equipment ... at the premises where such equipment *will be used*, including preparation work at such premises.") (emphasis supplied in all).

confirms that they are not susceptible of an alternative interpretation that would extend EPA's jurisdiction to apply §316(b) beyond its pre-construction confines. Skubel, 113 F.3d at 335; see also Brown & Williamson, 529 U.S. at 132-33 (rejecting FDA jurisdictional overreach). Certainly, there is nothing within §316(b) that signals Congress' intention to deviate from its consistent usage.

The characterization of §316(b) as a pre-construction requirement also is consistent with Congress' use of the phrase "adverse environmental impact" in contemporaneously promulgated legislation. See, e.g., National Environmental Policy Act ("NEPA"), 42 U.S.C. §4332(2)(C), (requiring consideration of "the environmental impact" or "any adverse environmental effects" of "major federal action"); 40 C.F.R. §1508.8 (defining "effects" and "impacts" as synonymous); 40 C.F.R. §1508.18(b)(4) (defining "major federal action" to include approvals related to proposed projects). Thus, the gravaman of §316(b) – that prospective intake structures should be located, designed, constructed and sized in a manner that minimizes adverse environmental impacts – echoes the express language of NEPA and its unequivocal pre-construction application with respect to proposed projects.

Lastly, the characterization of §316(b) as a pre-construction requirement reflects EPA's interpretation of §316(b) on passage of the Act. See Memorandum of Understanding ("MOU") between EPA and the Nuclear Regulatory Commission ("NRC"), 40 Fed.Reg. 60115 (December 31, 1975). The MOU commits EPA to make a binding §316(b) determination during the pre-construction NEPA review: "EPA will exercise its best efforts to ...

complete cooling water intake structure evaluations pursuant to section 316(b) as far as possible in advance of the planned date of issuance by NRC of the final environmental impact statement [under NEPA] for the construction permit or operating license for each nuclear power reactor." 40 Fed.Reg. 60119. Using the very language of §316(b), the MOU rationalizes that, because "the informational needs" of EPA (under the Act) and NRC (with respect to NEPA) "may be similar in the area of impacts on water quality and biota," the MOU will "assure to the maximum extent possible that subsequent considerations regarding impacts on water quality and biota will not result in the need for significant changes in plant *design* or in the costs and benefits of the operation of the facility subsequent to the completion of NRC's environmental review" as a result of EPA's separate, but nonetheless pre-construction, permitting process. Id. (emphasis supplied).[11] Nowhere in the MOU does EPA reserve its right to reconsider §316(b) beyond the pre-construction context, and its use of the term "changes" in plant "design" suggests both that the term "design" in the Act relates to prospective power plants, and that EPA did not consider itself to retain a continuing right of review beyond its initial §316 approval.

2. *The Structure of the Act Limits the Application of §316(b) to New Facilities.*

The "ordinary and obvious meaning" of a statutory phrase is not to be "lightly discounted." INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (citations omitted).

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11. In the MOU, EPA improperly proposed to include §316(b) determinations in §402 NPDES permits, although neither it nor states have done so in the vast majority of permits. See Rábago, 16 HARV. ENVT'L L. REV. at 471.

Indeed, the Supreme Court has suggested that the plain language may be the end of the analysis. See Chevron, 467 U.S. at 842-43; see also United States v. Kinzler, 55 F.3d 70, 72 (2d Cir. 1995) (citations omitted). Consequently, it is only in the extraordinary circumstance where the plain meaning is clearly contradicted by the structure of the statute that the otherwise plain meaning of statutory language will be tempered. Am. Mining, 824 F.2d at 1185; see also Brown & Williamson, 529 U.S. 120, 132 (recognizing importance of statutory context). No such extraordinary circumstance exists here, because the plain language limitation of §316(b) to new facilities is consistent with the Act's basic permitting scheme, its enforcement system, and the very provision that envelopes §316(b). It is only the Rule which – despite EPA's creative "Legal Authority, Purpose and Background of Today's Regulation," 69 Fed.Reg. 41581-83 – cannot be reconciled with the Act's structure.

First, EPA cannot extend the Rule to include reconsideration of existing approved intake structures, absent a permitting vehicle that confers such a right. In the Rule, EPA points to the sole available permitting system that offers seriatim reconsideration – §402 NPDES permits. See 69 Fed.Reg. 41582; compare 33 U.S.C. §§1342 (seriatim reconsideration) and 1344 (one-time pre-construction approval). However, EPA's choice cannot be reconciled with the Act and Congress' clear intent, since NPDES permits are expressly and exclusively limited to "discharges" which are not the subject of §316(b). 33 U.S.C. §1342(a)(1) ("... the Administrator may, after opportunity for public hearing, issue a *permit for the discharge of any pollutant* ... .") (emphasis supplied); 33 U.S.C. §1362(12) ("The term 'discharge of pollutant' and the term 'discharge of pollutants' each means

(A) any addition of any pollutant to navigable waters from any point source ... ."); 117 CONG.REC. 38798 (1971) (statement of Sen. Muskie) ("The permit system, as restated by this legislation, prohibits the discharge of pollutants into the navigable waters."); id. ("The permit system establishes a direct link between the Federal Government and each source of discharge into the navigable waters."); Natural Res. Def. Council v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988) ("[EPA] is powerless to impose [NPDES] permit conditions unrelated to the discharge itself."); but see U.S. Steel Corp. v. Train, 556 F.2d 822, 850 (7th Cir. 1977) (§402(a)(1) "implicitly" requires EPA to insure compliance with §316(b)), abandoned on other grounds, W. Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).[12] EPA offers no legally cognizable reconciliation for

12. The abandoned Train decision is in error. Section 402 contains no reference to §316(b). See 33 U.S.C. §1342(a)(1) (referencing those provisions that §402 implements, without mention of §316(b)). Section 301 contains no reference to §316(b), relates solely to discharges, and includes reference to non-NPDES §404 (pre-construction) permits. 33 U.S.C. §1311(a). Thus, mere reference to §301 does not support that Court's conclusion that §402(a)(i) "implicitly requires" §316(b) be implemented in NPDES permits. Section 306 likewise contains no reference to §316(b) and relates solely to discharges from new facilities. 33 U.S.C. §1316. Again, therefore, mere reference to §306 does not support that Court's conclusion that §402(a)(i) "implicitly requires" §316(b) to be implemented in NPDES permits, particularly at existing facilities. Nor may EPA circumvent this jurisdictional hurdle by classifying §316(b) as an "other limitation," since any such "other limitation" must relate solely to discharges to meet the express limits of §402. 33 U.S.C. §1342(a). The Fourth Circuit's finding that §316(b) is an "other limitation" purely for jurisdictional purposes does alter this conclusion, since that court in no way allowed any such "other" limitation to be implemented in NPDES permits. Va. Elect. and Power Co. v. Costle, 566 F.2d 446, 450 (4th Cir. 1977).

this jurisdictional hurdle. Rather, in a veiled concession to its lack of authority, the Agency argues without credible support that §316(b) is "closely linked" to "several of the core elements of the NPDES permit program." 69 Fed.Reg. 41582[13]; see also id. (section 316(b) does not address discharges into water); Va. Elec., 566 F.2d at 449. ("It is obvious that [§ 316(b) requirements] are not [effluent limitations]."). No legal principle eviscerates an unequivocal statutory limitation on an agency's jurisdiction based on a "close link." Nor could it, without undermining jurisdictional limits Congress created in §402. Rather, the lack of availability of NPDES permits to implement §316(b) indicates Congress did not intend §316(b) determinations to be made beyond the initial approval authorizing construction of a facility (and necessarily its intake structures).

EPA's consistent action over three decades confirms that it has not, in the circumstances where it was most relevant, asserted that §316(b) is a §402 NPDES-permit requirement – that is, in its approval of state requests to administer the federal NPDES program in lieu of EPA. Forty-five states are authorized by EPA to implement the Act's NPDES permitting program in lieu of EPA. See http://cfpub.epa.gov/

13. EPA's sole explanation for the purported "close link" is that "while effluent limitations apply to the discharge of pollutants by NPDES-permitted point sources to waters of the United States, section 316(b) applies to facilities subject to NPDES requirements that withdraw water from waters of the United States for cooling ... ." 69 Fed.Reg. 41582. That both statutory provisions implicate "waters of the United States" is hardly enough to permit an inference that Congress – without saying so – intended EPA to use §402 NPDES permits limited to discharges as a means for implementing §316(b)'s intake requirements.

npdes/statestats.cfm (last updated April 13, 2003, last visited on June 30, 2005). To obtain this authorization, each state had to submit for EPA approval a full and complete description of the program each would establish to meet the Act's requirements. See 40 C.F.R. §123.21(a)(2) (covering basic NPDES permitting requirements and what a state must do to obtain authorization to administer NPDES program); 40 C.F.R. Pt. 123 (state program requirements). However, EPA concluded that less than a handful of authorized states proposed (or have) any requirements relating to §316(b). See EPA's §316(b) Legislative History, p.5-8 ("few NPDES States have specifically addressed cooling water intake technology specifically by statute or regulation"), and F-1. If in each of these forty-five approvals EPA believed that §316(b) was a NPDES requirement, EPA could not have approved the state requests for authorization without adequate state §316(b) analogs. Yet, EPA consistently did approve state authorization requests without §316(b) analogs, confirming that EPA did not consider §316(b) to be a necessary federal requirement under §402. As tellingly, of the three states EPA concluded had developed §316(b)-type laws (that did other than merely incorporate by reference the regulatory placeholder for §316(b) or that section), all have limited application of §316(b) to new facilities. Id. p.5-9. This confirms each of these states' understanding of federal law as applying only to prospective facilities, and – by its approval of each of those programs – EPA's concurrence with that limitation. 33 U.S.C. §1342(a),(b) (state NPDES requirements can be no less stringent than federal law). In short, EPA's own action not only belies the inclusion of §316(b) within NPDES permits as the Rule proposes, but is an unexplained change in policy contrary to law. See, e.g., Am. Mining, 824 F.2d at 1182 ("[u]nder settled doctrine,

'an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.'") (extensive citation omitted); Grace Petroleum Corp. v. FERC, 815 F.2d 589, 591 (10th Cir. 1987) ("an agency must provide a reasoned explanation for any failure to adhere to its own precedents").[14]

Moreover, had Congress intended seriatim review of intake structures, it would have made §316(b) enforceable by EPA or the proper subject of a citizen suit. In fact, however, §316(b) is not enforceable by the Agency or in citizen suits. See 33 U.S.C. §1365(a)(1) (citizen suits limited to effluent limitations); 33 U.S.C. §1362(11) (definition); 33 U.S.C. §1319(a) (no right of enforcement of §316(b)); Hudson Riverkeeper Fund, Inc. v. Orange & Rockland Utilities, Inc., 835 F. Supp. 160, 166 (S.D.N.Y. 1993) ("There is no authority for a citizen suit beyond the enforcement of existing effluent standards or limitations established administratively under the Act," which the court concluded did not include the state analog to §316(b).).[15] The absence

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14. To this day, EPA's NPDES permit application forms seek only discharge-related information. See http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=8&view=Permit%20Applications%20and%20Forms&program_id=1&sort=name. Thus, EPA's own implementing procedures for the NPDES program also contradict its position in the Rule.

15. EPA's reliance on §402 is necessary, because it has identified no other means to enforce §316(b). See EPA's response to Comment ID 316bEFR.337.001 ("EPA disagrees that there is an absence of enforcement mechanisms applicable to section 316(b) requirements ... this Rule properly requires implementation of CWA section 316(b)

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of ongoing enforcement authority (*i.e.*, during facility operations) confirms that Congress never intended the provision to apply beyond the initial approval authorizing construction and operation of the facility. See 42 U.S.C. §4332(2)(C) (core NEPA requirement); 33 U.S.C. §1371(c)(1) (requiring NEPA assessment for every NPDES permit for new, but not existing, facilities), and §1344(a) (permits for dredging and filling in navigable waters).[16] Every facility subject to a federal licensing process – every nuclear facility – underwent a pre-construction environmental assessment and also obtained the one-time pre-construction permit for its intake structure that the Act requires. Because the license or authorization to construct is invariably contingent on compliance with its terms – that is, that the intake structure be located, designed, constructed and sized as approved – no independent enforcement mechanism need apply if §316(b) is a pre-construction requirement. Thus, it is only when EPA attempts to extend §316(b) to existing facilities that the Act's enforcement scheme is confounded, a telling indication that EPA is overreaching.

Further, the Rule – grounded in a single sentence embedded within the Act's comparatively extensive Thermal

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standards through CWA section 402 permits. As such, all CWA enforcement authority applicable to NPDES permit requirements, including the authority to enforce to requirements of the CWA are available to enforce section 316(b) requirements.").

16. Section 404's implementing regulations reflect the strong nexus between §404 and §316(b), since no §404 permit may be granted, "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of [intake construction] on the aquatic ecosystem." 40 C.F.R. §230.10(d).

Discharge provision – must be harmonized not only with the Act, but with that specific embracing provision. See EPA's §316(b) Legislative History, pp. 2-5-2-6 (the final §316(b), "... incorporated the Senate's basic approach ...," in which "cooling water intake structures would have only been regulated as an *indirect result* of the Senate Bill's regulation of technologies used to control thermal discharges.") (emphasis supplied). Section 316 rejects the blind application of technology where fisheries "population[s]" are assured, 33 U.S.C. §1326(a), in direct response to EPA's "unfortunate tendency sometimes in the past to require ridiculous expenditures of hundreds of millions of dollars with no benefit to any persons, or even fish." 118 CONG.REC. 33765-66 (1972) (statement of Mr. Clark). The Rule – which compels the expenditure of hundreds of millions of dollars of technology each year without even the specter of impacts to fish populations – cannot be reconciled with §316. See PSE&G Brief, Section II (regarding absence of adverse environmental impacts). While administrative law may, in fact, have "largely 'growed' like Topsy," Felix Frankfurter, Foreword, 41 COLUM. L. REV. 585, 586 (1941), its growth must be within the limits Congress intended and should not produce the untenable result that the same statutory section sets two different and conflicting fisheries standards for the same facility.[17] An open-cycle power plant can do no less

17. Neglecting the importance of §316(a), commentators improperly suggested that EPA employ §316(b) to eliminate thermal discharges. See Rábago, 16 HARV. ENVT'L L. REV. at 461 ("[h]ad EPA's §316(a) regulations been upheld, the issues today concerning cooling water intake structures would have been vastly less significant.") but see id. at 482 (proposing that EPA illegally employ §316(b) to eliminate discharges). EPA's assessment of purported entrainment impacts in the Rule which reflects the improper consideration of

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than assure a balanced indigenous fish population as a matter of federal law. See 33 U.S.C. §1326(a). The right to discharge heat where a power plant establishes that aquatic populations are protected is clear and unequivocal. Id. If EPA creates a more stringent standard than §316(a) requires, it effectively invalidates the rights afforded facilities under §316(a). Indeed, the Rule effectively rewrites the §316(a) standard – an obviously illegal result.

In short, to extend §316(b) to existing intake structures, this Court must interpret §316(b) in a manner irreconcilable with the Act's plain language and its statutory context by allowing it to be implemented in NPDES permits and to be enforceable in a manner Congress clearly did not contemplate or desire, and which effectively compromises a right Congress expressly conferred on thermal dischargers.

B. The Legislative History of §316(b) Does Not Support Its Application to Existing Facilities.

As the Supreme Court has observed, "when confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 n.29 (1978). However, if considered, this "secondary indicia of intent," Am. Mining, 824 F.2d at 1182, lends greater support to the conclusion that EPA's extension of §316(b) to

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thermal impacts for many species, see 69 Fed.Reg. 41684 (to be codified at 40 C.F.R. §125.93) (intake structure ends at intake pumps, thereby excluding thermal impacts); 69 Fed.Reg. 41586 (discussing purported entrainment impacts primarily in terms of thermal impacts), suggests EPA did adopt this improper goal.

existing facilities was beyond Congressional contemplation, than it does to the Rule.

The history of the 1972 Act is one of extensive debate and unprecedented consensus in Congress' single-minded mission to eliminate discharges of pollutants to navigable waters. See, e.g., 117 CONG.REC. 38797-888 (1971), 118 CONG. REC. 10201-68, 10611-73, 32747-812, 33692-718 (1972), particularly 38804-05 (1971) ("[T]he objective of this act ... is to eliminate all discharges of pollution into navigable waters from point sources, to the extent practicable, by 1985.") (statement of Sen. Randolph). As Sen. Montoya stated, "clean water means the elimination of the discharge of pollutants. That is the national standard adopted by this bill." 117 CONG.REC. 38808; see also id. at 38820. ("The bill ... says, in effect: Do not put any pollutant in the water.") (statement of Sen. Cooper); id. at 38829 ("We have said in this bill to American industry: 'For 1985 we want to end all discharges into all of our waterways.' The target is clear.") (statement of Sen. Muskie); id. at 38801 ("These ideas are basic to the pending legislation. The committee believes the discharge of pollutants into lakes, rivers, and seas is a waste of substances already in limited supply. The committee believes the discharge of pollutants causes hazards to health and threatens the very existence of man. It is upon this statement, Mr. President, that I rest this Committee's case.") (statement of Sen. Muskie). Thus, the Act provides no foundation for the regulation of intake structures of the magnitude and impact of the Rule.

Senator Muskie, the proponent and primary author of the Act, directly addressed power plants: "In the case of power generating facilities, *it is the discharges* ... that the committee is concerned with, *not the technology*." Id. at

38855 (emphasis supplied). This legislative history has not been relegated to a stray volume of the Congressional Record, but is enshrined in Congress' "declaration of goals and policy" for the Act. See 33 U.S.C. §1251(a)(1).[18] Thus, the legislative history indicates that, within the context of §316, Congress' focus remained resolutely upon thermal discharges, and therefore that it did not intend regulation of intake structures of the magnitude and impacts of the Rule.

The remainder of Senator Muskie's testimony also suggests that, to the extent the debate about §316(b) centered on cooling towers, Congress did not extend §316(b) to existing power plants. In particular, Senator Charles Mathias asked Senator Muskie whether, in light of EPA's attempts to require "*new* steam electric power plants" to build cooling towers, every power facility "*to be built* anywhere in the United States *in the future* would have to have a cooling tower." 117 CONG.REC. 38855 (1971) (emphasis supplied). Senator Mathias's question reflects his understanding that the requirement in question was limited to new facilities, *i.e.*, those "*new*" facilities "*to be built*" sometime "*in the future.*" Id. (emphasis supplied). Senator Mathias simply would not have asked the question as he did, if he believed

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18. To support the Rule, EPA cites to the disembodied statement of objective in §101(a), 33 U.S.C. §1251(a), that the objective of the Act is to "restore and maintain the ... biological integrity of the Nation's waters," but omits to mention that Congress expressly provided in that very provision how EPA was "to achieve this objective" – by eliminating discharges, without any mention of intake structures or water intake. Id. Moreover, a broad legislative goal should not trump the specific statutory provision reflecting the Congressional compromises on how a widely supported goal will be implemented. Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986).

that the statute applied equally to existing facilities. Likewise, had Senator Mathias's question revealed a fundamental misconception of the scope of §316, Senator Muskie would have corrected Senator Mathias' misconception, clarifying the broader application of §316(b) to existing facilities. No such correction occurred.

In short, the plain language and context of §316(b) unambiguously indicate that the provision was not intended by Congress to apply to existing facilities. To the extent considered, the legislative history supports that limitation. Under Chevron and its progeny, then, the Rule is an unauthorized expression of rulemaking power by EPA. Chevron, 467 U.S. at 843; see also Natural Res. Def. Council, 859 F.2d at 168-70 (striking EPA regulations that asserted a power to impose permit conditions unrelated to effluents as being beyond EPA's statutory authority under the Act and NEPA).

C. The Rule Is Invalid As an Unreasonable Construction of the Act.

Even where a statute does not unambiguously reveal Congressional intent, a court must nonetheless invalidate any rulemaking which is not a "permissible construction of the statute." Chevron, 467 U.S. at 843. "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning the statute can bear ... ." MCI 512 U.S. at 229 (further explaining Chevron analysis); see also Brown & Williamson, 529 U.S. at 159 (discretion inappropriate regarding matters of agency authority); Am. Mining, 824 F.2d at 1183 n.5 (D.C. Cir. 1987) ("courts need not defer to agency opinions on 'pure questions' of interpretation,") (citation omitted). A reasonable construction

requires more than just that the agency can "conceive a basis for administrative action." Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 626 (1986) (internal quotation omitted). Instead, an agency must articulate a "logical basis" for its decisions with a "rational connection" between facts and its choices. Detsel v. Sullivan, 895 F.2d 58, 63 (2d Cir. 1990). EPA can present no such "logical basis" or "rational connection" for its conclusion that §316(b)'s requirements were intended to apply to existing facilities.

Based on several arguments detailed *supra*, there is no reasonable construction of the Act that allows §316(b) to extend to existing facilities, particularly in NPDES permits. As EPA concedes, the NPDES permit program allows EPA to review – every five years – what comes *out* of electricity-generating facilities. See 69 Fed.Reg. 41582 ("NPDES permits restrict the types and amounts of pollutants, including heat, that may *be discharged* from various industrial, commercial, and other sources of wastewater."). Surely, if Congress contemplated that such a program should also be used to regularly review what goes *into* electricity-generating facilities, Congress would have said so much more explicitly. Congress does not, as the Supreme Court has aptly observed, "hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001) (citations omitted).

Indeed, since setting forth the applicable analytical framework in Chevron, the Supreme Court has a number of times refused to manufacture implicit conferrals of regulatory authority: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." Id.; see also MCI, 512 U.S. at 231 (1994) ("highly unlikely" that Congress would leave the determination "of whether an industry will be entirely, or

even substantially," regulated to agency discretion, and "even more unlikely" that it would achieve that through "a subtle device"); Brown & Williamson, 529 U.S. at 160 (Congress does not delegate decisions of economic and political significance in "so cryptic a fashion").

This Court previously characterized §316(b) as "something of an afterthought." Riverkeeper, 358 F.3d at 187, n.12. Just as Congress does not hide elephants in mouseholes, neither does it provide sweeping authority to promulgate regulations costing hundreds of millions of dollars each year by "an afterthought." Accordingly, EPA's construction of the Act – that §316(b) applies to existing facilities because §402's NPDES permit program allows EPA to regulate discharges from existing facilities – is simply not permissible.

II. EPA's Failure to Account for the Disproportionate Impacts of the Rule on Nuclear Power Plants Is Arbitrary and Capricious.

While an agency has discretion to design rules of broad application, it must "justify its failure to take account of circumstances that appear to warrant different treatment for different parties." See Petroleum Commc'n Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994). In particular, when faced with evidence in the administrative record running contrary to key assumptions, the agency must present sufficient justification for rejecting that evidence and adhering to its assumption. See Leather Indus. of Am., Inc. v. EPA, 40 F.3d 392, 402-03 (D.C. Cir. 1994) (EPA must justify broad application of rule and underlying assumptions to sludge and heat-dried sludge, when it had information in the record supporting more tailored regulation of heat-dried sludge).

Where an agency fails to provide a sufficient justification, its exercise of rulemaking authority on the basis of its regulatory assumption is irrational and, therefore, arbitrary and capricious. See id. (remanding rule as without a rational basis where "EPA had at hand the information necessary to [account for different circumstances]," but failed to "provide some explanation for ignoring it in favor of blanket, highly conservative assumptions."); see also Appalachian Power Co. v. EPA, 249 F.3d 1032, 1061-63 (D.C. Cir. 2001) (vacating and remanding rule under Clean Air Act where EPA failed to appropriately account for different circumstances affecting a "discrete subclass" of power plants); Appalachian Power Co. v. EPA, 135 F.3d 791, 820 (D.C. Cir. 1998) (vacating and remanding rule under Clean Air Act where EPA failed to justify treatment of retrofitted cell burner as wall-fired boiler); Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 433 (D.C. Cir. 1980) (vacating and remanding rule under Clean Air Act where EPA failed to establish performance standards based upon range of relevant variables that affect emissions from different plants); Appalachian Power Co. v. Train, 545 F.2d 1351, 1366-77 (4th Cir. 1976) (invalidating EPA's summary rejection of a specific nuclear exemption under §316(a)).

EPA committed such error here. The plain language of §316(b) requires that a technology must be "*available* for minimizing adverse environmental impact." 33 U.S.C. §1326(b) (emphasis supplied); 69 Fed.Reg. 41853 ("EPA has established in today's rule national requirements for facilities to install technology that is *technically available*, economically practicable, and cost effective ... .") (emphasis supplied). To appropriately be considered available, a technology must be demonstrably feasible in practice, e.g., through actual experience at a representative number of comparable facilities, and assist a facility in meeting

regulatory requirements. Appalachian Power Co., 135 F.3d at 801 (equating an available technology with existing technologies utilized to meet prescribed air emissions limits or reasonably predicted improvements on existing technology).

EPA based the performance standards in the Rule "on consideration of a range of technologies that EPA has determined to be commercially available for the industries affected as a whole." 69 Fed.Reg. 41598-99. In developing the entrainment performance standard, EPA considered aquatic filter barrier systems, fine mesh wedgewire screens, and fine mesh traveling screens to be the range of commercially available technologies. Id. at 41599. EPA concluded that "[t]hese technologies exist and are in use at various Phase II facilities and, thus, EPA considers them collectively technologically achievable." Id. at 41602. EPA then assumed that "[t]he fact that these technologies are collectively available means that one or more technologies within the suite is available to each Phase II facility." Id. However, the Record is as clear as it is troubling in confirming the lack of evidence supporting EPA's assumption that these technologies are available at nuclear power plants. Moreover, EPA impermissibly ignored the concededly disproportionate impacts of the Rule on the nuclear sector, and the corresponding risk to the American electric system. See Petroleum Commc'n, 22 F.3d at 1172; see also EPA Guidelines for Preparing Economic Analyses (September 2000) ("EPA Guidelines"), pp. 144, 149-50 (EPA must examine the distribution of benefits and costs across "particular segments of the private sector"). For these reasons, the Rule must be remanded.

A. None of the Technologies Considered by EPA in Establishing the Entrainment Performance Standard Is Available to Nuclear Power Plants.

The Record basis for EPA's determination of available technologies is the February 12, 2004 Technical Development Document for the Final Section 316(b) Phase II Existing Facilities Rule ("TDD"), which "describes the set of technologies that may be used to meet the final rule's requirements." 69 Fed.Reg. 41577.[19] The TDD contains no specific discussion of the availability of EPA's selected technologies to nuclear facilities. Rather, despite the unique safety concerns associated with obstructing cooling water flow into nuclear power plants[20], EPA assumed they are

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19. Appendix A, in which EPA assigned to particular facilities the technologies identified in the final TDD, first appeared in the final Rule. See 69 Fed.Reg. 41648 and 41669 (App. A).

20. EPA states that it coordinated with the NRC, 69 Fed.Reg. 41585, and memorialized these coordination efforts in the Record, 67 Fed.Reg. 17127, but cannot produce any Record documentation. See March 1, 2005 communication from Martha Segall, EPA ("There is nothing in the public Record on our interagency consultation with the NRC."). Nonetheless, it is beyond cavil that nuclear facilities, which must possess adequate water supply to ensure safe reactor operation and shutdown, are uniquely impacted by regulations, such as the Rule, obstructing cooling water intakes or limiting water use. See, e.g., 10 C.F.R. Pt. 50, App. A, Criterion 44 – Cooling Water ("A system to transfer heat from structures, systems, and components important to safety, to an ultimate heat sink shall be provided." Ultimate Heat Sink for Nuclear Power Plants, NRC REG. GUIDE 1.27, p.1 (Jan. 1976) ("The [ultimate heat] sink constitutes the source of service or "house" water supply necessary to safely operate, shut down, and cool down a plant."). Any change in water intake, (Cont'd)

available at nuclear plants because "[t]hese technologies exist and are in use at various Phase II facilities" and, therefore, "one or more technologies within the suite is available to each Phase II facility." Id. at 41602. By way of illustration of the fundamental logical flaw in EPA's argument, the mere fact that certain prescription drugs are being used to treat certain patients does not mean one or more of those drugs is safe and "available" for every patient; e.g., a drug appropriately prescribed for a young woman may be deadly for a toddler, a man with a heart condition or an elderly person.

However convenient this "one technology fits all" assumption, the TDD offers no credible evidence to support its application to nuclear power plants. Illustrative of EPA's error is its assumption that so-called Technology 12 is available to several nuclear facilities. 69 Fed. Reg. 41669 (App. A). Technology 12 requires the "addition" of fine mesh (cylindrical wedgewire) screens on existing near-shoreline intake structures to meet the entrainment performance standard. 69 Fed.Reg. 41646.[21] Thus, the availability of either

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particularly any technology that may result in a sudden limitation in water intake, may be proscribed. Id. at 2. (NRC requires a "high level of assurance" that the water sources of the sink will be available, when needed).

21. It is not necessary to review each of the entrainment technologies EPA assigned to nuclear power plants, because every technology selected by EPA to address entrainment at nuclear stations includes the use of "wedgewire" or "fine mesh screens" that underpin Technology 12. Thus, the errors in Technology 12 necessarily infect all of EPA's selected technologies, unless EPA distinguished those technologies, which it did not in the Rule. 69 Fed.Reg. 41646 and 41669 (App. A).

wedgewire or fine mesh screens to nuclear facilities underpins EPA's assumption that these nuclear facilities can deploy these technologies to meet the entrainment performance standard.

In fact, however, neither wedgewire nor fine mesh screens are available to the very nuclear facilities to which EPA assigned Technology 12: Diablo Canyon, Indian Point Unit 2, and Indian Point Unit 3. First, EPA concedes the more general point that it "is not aware of the installation of any fine-mesh wedgewire screens at any power plants with high intake flows ...." TDD p. 4-13. Rather, the purported availability of these devices rests in all respects on sales talk: seven referenced "telephone contact reports," two of which are not in the Record, of discussions between EPA's contractor and sales representatives from two companies that manufacture these screens and, therefore, would directly gain by EPA's conclusion that they are "available" for nuclear facilities, and one follow-up e-mail with one of the sales representatives. Id. at 1-59. The telephone contact reports are merely transcribed oral representations of the sales personnel, one of which suggests that the sales representative had not reviewed the questions in advance, given that he "decided to answer as much as possible" when EPA's contractor reached him through the receptionist. See July 30, 2002 Telephone Contact between Henry Petrovs, U.S. Filter, and John Sunda, SAIC.

Worse yet, while EPA itself concedes that these telephone representations reflect "minimal data," TDD, p. 1-1, it did nothing to remedy the scant, undoubtedly biased information source. No law allows a key regulatory assumption, e.g., the availability of a technology that is a primary basis for a major rulemaking, to be based on a sales pitch by a randomly

selected self-interested vendor. Rather, EPA's proffered evidence fails to meet its burden to provide a rational basis for its decision making. See Nat'l Lime, 627 F.2d at 433 ("an initial burden of promulgating and explaining a non-arbitrary, non-capricious rule rests with the Agency").

In contrast to the statements of sales representatives, the Record contains a crush of uncontroverted evidence submitted by state regulators, and power plant owners steeped in site-specific technology assessments of the sort at issue here, on the *unavailability* of Technology 12 to nuclear facilities where EPA proposes to require these screening devices. The California regulator charged with implementing §316(b) at Diablo Canyon explicitly concluded that fine mesh screens "are not a demonstrated 'available' technology for [Diablo Canyon]" and that "wedgewire screens ... are not used on large scale systems such as [Diablo Canyon]." NPDES Permit Order RB3-2003-0009 (July 2003), Attachment 4 to Draft NPDES Permit, at 11; see also Comment ID 316bEFR.100.004, State Water Resources Control Board ("Wedgewire screens are more suitable for closed-cycle make-up intakes ... .").[22] The New York regulator charged with implementing §316(b) likewise considered, but rejected, fine mesh and wedgewire screens for use at Indian Point 2 and Indian Point 3. See Draft Environmental Impact Statement ("DEIS") for SPDES Permits for Bowline Point, Indian Point 2&3, and Roseton Steam Electric Generating Stations (Dec. 1999) at VIII-33,

22. The California Regional Water Quality Control Board's Draft NPDES Permit for Diablo Canyon is an official state Record provided directly to EPA and published for public comment, and issued after the close of the comment period for the Rule, but before its final promulgation. Accordingly, we ask this Court to take judicial notice of that draft permit.

35-36 ("Installation of fine-mesh screens would significantly increase debris loading. From an operational standpoint, the increased debris loading associated with fine-mesh screens could reduce plant efficiency and reliability .... Clogging of the perforations and consequent loss of flow is a concern .... Both the reliability and biological effectiveness of these [wedge-wire screening] systems for application at Indian Point Units 2 & 3 was considered uncertain."); June 25, 2003 Final Environmental Impact Statement, p. ii (incorporating the DEIS). The California and New York regulators echo the conclusions of the independent expert retained by the New Jersey regulator that rejected wedgewire and fine mesh screens. See Review of Portions of [NJPDES] Renewal Application for the [PSE&G] Salem Generating Station, prepared by ESSA Technologies Ltd. for NJDEP (June 14, 2000), p. 45 ("Salem's cooling water flow rate is more than five times the rate where [wedge-wire screens] is presently used, and there are real concerns about biofouling and clogging with this technology at Salem. There is also only limited information on its biological effectiveness where it is being used.").

Several nuclear facilities also submitted information indicating that these screening devices are not available. By way of example, Millstone Station determined that both the wedgewire screens and fine-mesh screens are not available at a nuclear facility of its size. See Feasibility Study of Cooling Water System Alternative to Reduce Winter Flounder Larval Entrainment at Millstone Units 1, 2, and 3 (Jan. 1993), p. ES-5 ("This design [wedgewire screens] is not appropriate for the flow rate at [Millstone] and would result in new biofouling and corrosion problems," and "there are also significant concerns over the ability of fine-mesh screens to control debris fouling, which has previously resulted in numerous plant outages at [Millstone].").

Even EPA cannot avoid contradicting its own presumption. For instance, EPA acknowledges that a scenario involving screens was "discarded" at Salem Station for reasons implicating nuclear safety. TDD at 1-15. As tellingly, EPA ultimately concluded that, "*wedgewire screens may be more suitable for closed cycle make-up intakes than once-through systems.*" TDD, Attachment A to Chapter 4, p. A-13 (emphasis supplied); see also TDD at 4-13 ("[fine-mesh screens] could be even more susceptible to clogging ... . [i]t is unclear whether clogging would simply necessitate more intensive maintenance or *preclude their day-to-day use at many sites*," and, in regards to wedgewire screens, "there are no full-scale data available specifically for marine environments where biofouling and clogging are significant concerns.") (emphasis supplied); id. at 1-3 ("If the [passive] screen becomes plugged to the point where backwash fails to maintain the necessary water level in the pump well, the pump flow rate must be reduced. *This reduction may result in a derating or shut down of the associated generating unit.*") (emphasis supplied); id. at 1-54 ("[r]etrofitting existing coarse mesh screens with fine mesh may affect the ability of screens to remove debris quickly enough to function properly.").[23]

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23. While EPA references one nuclear facility as though fine mesh screens had been successfully applied there, the Record reflects the well-documented and serious safety concerns created by the technology that limits, if not prevents, its use as EPA suggests. See Brunswick Steam Electric Plant: 2000 Environmental Monitoring Report (August 2001) at 2-4 ("During periods of high vulnerability resulting from extreme lunar tides or increased sediment and debris loading, the NPDES permit allows for removal of a portion of the fine-mesh screens to prevent plant scrams. High vulnerability conditions existed for most of the year."). If the sole nuclear station

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In light of this abundance of Record evidence undermining EPA's assumption that fine mesh and wedgewire screens are available to the very nuclear facilities EPA proposes to require them, EPA's failure to justify its continued reliance on that assumption is irrational, arbitrary and capricious. See Leather Indus., 40 F.3d at 402-03 (remanding rule as without a rational basis where "EPA had at hand the information necessary to [account for different circumstances]," but failed to "provide some explanation for ignoring it in favor of blanket, highly conservative assumptions."). Moreover, because this improper assumption is central to the major components of the Rule, e.g., the performance standards linked to those technologies, the streamlined compliance option, and EPA's cost-benefit analysis, the Rule must be set aside in its entirety. Appalachian Power Co. v. Train, 545 F.2d at 1364-65.[24]

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on which EPA would rely for the purported availability of the technology experienced dispositive nuclear-safety concerns, the conclusion must be that the technology is unavailable. Ethyl Corp. v. EPA, 541 F.2d 1, 38 (D.C. Cir. 1976) ("Only rarely will a single study or example suffice, since by its nature scientific evidence is cumulative; the more supporting, albeit inconclusive evidence available, the more likely the accuracy of the conclusion.").

24. The Rule is trebly premised on the key assumption of the "availability" to nuclear facilities of EPA's selected technologies. First, EPA's suite of purportedly available technologies provides a streamlined compliance scheme for industry. See 69 Fed.Reg. 41605, 41603 (to be codified at 40 C.F.R. §§125.94(a)(1),(4) and 125.99; 69 Fed.Reg. 41602 (discussing same). Second, EPA's performance standards are correlated to the presumed availability of EPA's pre-approved technologies, as applied to model facilities. 69 Fed.Reg.

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B. The Absence of Available Technologies for Nuclear Facilities Requires These Facilities to Reduce Water Withdrawals to Levels Even EPA Recognizes Are Unjustifiable.

The lack of available technologies reveals that the Rule will require, at least with respect to nuclear facilities, draconian water reductions that necessitate the very technology EPA abandoned as inappropriate – namely the replacement of existing cooling systems (not just intake structures) with cooling towers at existing nuclear power plants. See 67 Fed.Reg. 17186 (alternative water body/ capacity-based option considered by EPA, which employed a cooling tower mandate in certain waterbodies, results in disproportionate closures of nuclear power plants); 69 Fed.Reg. 41606 ("EPA believes that it is significant that so few existing facilities retrofitted [with cooling towers over the past 20 years.] The rarity of this technology as a retrofit further indicates that it is not economically practicable for

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41598-99 ("Overall, the performance standards that reflect best technology available under today's final rule are not based on a single technology, but, rather, *are based on consideration of a range of technologies that EPA has determined to be commercially available for the industries affected as a whole* ... .") (emphasis supplied); 68 Fed.Reg. 13522, 13527 (proposed rule Notice of Data Availability March 19, 2003) ("... [t]he Agency is confident that the suite of available technologies can achieve compliance with the proposed performance standards generally ... ."). Third, EPA's suspect conclusion that the costs of the Rule are justifiable rests on the availability of its pre-approved technologies, including for nuclear stations. See 69 Fed.Reg. 41604 ("The legislative history of section 316(b) indicates that the term 'best technology available' should be interpreted as 'best technology available at an economically practicable cost.'").

the vast majority of existing facilities."). The parade of horribles that even EPA readily concedes follow from retrofitting nuclear facilities with cooling towers is long, and includes serious increases in air emissions, electricity price increases and sagging reliability, see 69 Fed.Reg. 41605-07, and raises the specter of impairing riparian rights and related takings considerations. See 69 Fed.Reg. 41630.[25] These consequences flow directly from EPA's insupportable assumption that screening technologies are available at nuclear facilities, threaten the viability of existing plants and their daily contribution to cost-effective electricity, and promise increased air emissions of criteria air pollutants and Greenhouse Gases to what this Court has called "our precious air resources." New York Pub. Interest Res. Group v. Whitman, 321 F.3d 316, 319 (2d Cir. 2003) (citation omitted); 69 Fed.Reg. 41605-07; see also, e.g., Comments of Entergy Corp. pp. 43-47 (Aug. 6, 2002) and related attachments (outlining serious energy reliability and pricing, as well as air, impacts).[26]

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25. EPA also improperly failed to address the substantially different impacts of the Rule on regulated and unregulated entities. See Appalachian Power Co., 249 F.3d at 1061-62 (identifying a similar flaw in the context of Clean Air Act regulations); EPA response to Comment, ID #316bEFR.029.007 (summarily dismissing the concededly "important" issue on the grounds that future deregulation may eliminate the concern), despite EPA's defining the regulated and unregulated power plants as two different industrial sectors or categories. 67 Fed.Reg. 17134-36.

26. Indeed, EPA wholly failed to evaluate the effect of the Rule on the reliability of the electric system. 69 Fed.Reg. 41651 ("Electric reliability impact analyses could not be performed using the IPM Model" that EPA used for the proposal and the NODA to identify operational and economic impacts.).

EPA's silent gloss over these significant sector differences invalidates the Rule, Leather Indus., 40 F.3d at 402, and is flawed environmental policy, EPA Guidelines at 11 and 149.

III. The Rule Is Not Economically Practicable As Federal Law Requires.

Americans expect sound policy – that is, economic practicability and cost-effectiveness – from their public officials. See, e.g., A. Gore, Accompanying Report of National Performance Review, From Red Tape to Results: Creating a Government that Works Better & Costs Less (1993). In the rulemaking context, sound policy is measured by the net (social) result of regulatory action. See EPA Guidelines at 5 ("Policymakers need information on the benefits, costs and other effects of alternative options for addressing a particular environmental problem in order to make sound policy decisions."). Absent explanation and sometimes even despite that explanation, regulations should not have net social costs. See id. at p. 20 (identifying as the "foundation of benefit-cost analysis" the requirement that a policy or regulation's "net benefits to society be positive"); see also Exec. Order No. 12866(1)(b)(6), 58 Fed.Reg. 51735 (Oct. 4, 1993) (requiring that agencies "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs").

This basic principle that sound policymaking is cost-effective expressly and impliedly underpins §316(b), because the phrase "best technology available" is, as this Court has concluded and EPA concedes, "intended to be interpreted to mean the best technology available commercially at an *economically practicable* cost." 118 CONG.REC. 33762 (1972)

(emphasis supplied); Riverkeeper, 358 F.3d at 187, n.12; Seacoast Anti-Pollution League v. Costle, 597 F.2d 306, 311 (1st Cir. 1979) (approving EPA's administrative decision not to pursue an alternative location for a new intake structure, because in that instance estimated costs were wholly disproportionate to estimate environmental benefits); 69 Fed.Reg. 41583 (facilities to install only those technologies which are "technically available, *economically practicable, and cost-effective.*") (emphasis supplied); id. at 41604 ("EPA has long recognized that there should *be some reasonable relationship* between the cost of cooling water intake structure control technology and the environmental benefits associated with its use.") (emphasis supplied). EPA's nationwide application of §316(b) likewise must meet the economic practicability test, or it evades the Act's mandates. Any such failure to achieve a reasonable assurance of economic practicability is, in these circumstances where the Act requires cost-effectiveness, contrary to law.[27]

In order to determine whether the Rule was economically practicable and cost-effective, EPA in fact undertook to compare the benefits of the Rule to the estimated costs of compliance to industry. See 69 Fed.Reg. 41657. That analysis, and EPA's incorrect conclusion that the Rule was economically practicable, are irretrievably flawed, because EPA relied on a series of assumptions that have no Record support and in some instances, contradict the overwhelming weight of Record evidence. First, as set forth in the UWAG brief, EPA's assumption that each organism entrained at each

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27. Of course, to the extent this Court equates §316(b) to §301 or otherwise looks to those provisions to ascertain EPA's obligations, cost-benefit determinations are mandatory. See, e.g., 33 U.S.C. §1314(b)(1)(B) (mandating cost benefit assessment for relevant §301 effluent limitations).

facility subject to the Rule invariably dies as a result of entrainment, a position roundly criticized as insupportable by EPA's own peer reviewers, results in a severe overstatement of benefits. Second, even without accounting for its overstated benefits, EPA concluded that the annual social cost of the Rule is $300 million and, therefore, that it is not economically practicable, unless EPA assumes, as it did in the Rule, that the American public is willing to shoulder the costs of that shortfall – without any discernible benefit. However, EPA readily concedes that it has not undertaken the necessary assessment to determine whether the American public is willing to pay that princely sum. 69 Fed.Reg. 41664. Accordingly, the Rule is not economically practicable, contrary to the express direction of Congress, and must be vacated.[28]

A. EPA's Zero-Entrainment Survival Assumption Contradicts the Record and EPA's Peer Reviewers.

Section I of the UWAG Brief, which details the technical basis for entrainment survival and the flaws in EPA's assumption of 100% mortality, is not repeated herein. It confirms that EPA has not, and cannot, provide a defensible rationale for choosing zero over any other number reflected in the data and, by doing so, improperly increased the calculation of benefits provided by the Rule. Thus, the net social costs are even greater than the Rule admits, and the Rule even more fundamentally unsound.

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28. The total cost of the Rule ($389 million) exceeds the total costs of all EPA programs for the year beginning October 1, 2002 ($360 million), see Office of Management and Budget, Progress in Regulatory Reform (2004) p.7.

B. EPA's "Break-Even Analysis" Is an Outcome-Determinative Assumption Lacking Record Support.

According to EPA's own estimates, the annual social cost of the Rule is $389 million, and the monetized social benefits of the Rule are $83 million. See 69 Fed.Reg. 41664. In other words, the Rule has a net social cost – a loss to Americans – of $306 million a year. In an attempt to compensate for this exorbitant shortfall, EPA proposes an outcome determinative "break-even analysis" in which, at bottom, EPA assumes that every affected household in the country would be willing to cover this annual $306.5 million loss, despite EPA's own conclusion that "the existing body of empirical research is inadequate to answer this question [of households' willingness to pay the annual $306.5 million]." Id. In fact, EPA's "break-even" analysis, which produces the desired 1:1 ratio of costs and benefits (*i.e.*, a rule that is, by definition, "economically practicable" or "cost-effective"), is not analysis at all, but a foregone conclusion grounded on the assumption that the public is willing to cover nearly 80% of the costs of the Rule.[29]

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29. In an equally startling abdication of responsibility, EPA provided the analysis "*to aid policy makers and the public in forming their own judgment*" about the cost-effectiveness of the Rule. 69 Fed.Reg. 41664 (emphasis supplied). EPA cannot, however, pass the buck so easily, since it is *the final* policymaker for the Rule, and therefore responsible for judging the appropriateness of its cost-benefits analysis. These "policy makers and the public" were not allowed to cast a vote on the promulgation of the Rule. Having proposed the Rule in final form, EPA necessarily concluded that its analysis was defensible or, to the extent EPA did not reach that conclusion, the Rule must be vacated.

Similarly, EPA has not demonstrated, based upon its own criteria, that the so-called non-use benefits (*i.e.*, benefits based upon "human values associated with existence and bequest motives,"), 69 Fed.Reg. 41657, that underpin its assumption about the American public's willingness to pay exist on a nationwide basis. EPA identified specific levels of ecological impact that *may* require consideration of non-use benefits: where impingement and entrainment studies identify substantial harm to (1) a threatened or endangered species; (2) the sustainability of populations of important species of fish, shellfish, and wildlife; or (3) the maintenance of community structure and function in a facility's waterbody or watershed. See 69 Fed.Reg. 41648. Where none of these levels of harm is demonstrated, monetization of non-use benefits "is not necessary." Id. Implicit, then, in EPA's break-even analysis is a conclusion that impingement and entrainment at each facility subject to the Rule is causing one of these three levels of substantial harm. Otherwise, non-use benefits would not be available to fill the Rule's cost-benefit chasm.

However, by EPA's own admission, it does not have sufficient evidence to determine whether cooling water withdrawals presently cause such harm. See, e.g., Id. at 41587 ("Although the extent to which threatened, endangered, and other special status species are taken by cooling water intake structures more generally *is yet to be determined*, EPA is concerned about *potential* impacts to such species.") (emphasis supplied); id. at 41589 ("EPA is concerned that *even if there is little evidence* that cooling water intakes *alone* reduce a population's compensatory reserve [*i.e.*, a population's ability to sustain itself in the presence of large scale disturbances, such as those created by major weather events], the multitude of stressors experienced by a species

can *potentially* adversely affect its ability to recover."). Indeed, EPA acknowledges that overfishing, not impingement and entrainment, is the actual cause of substantial harm to fishery resources. Id. at 41589-90. Accordingly, EPA has no basis in the Record for concluding that non-use benefits should be considered on a national basis.

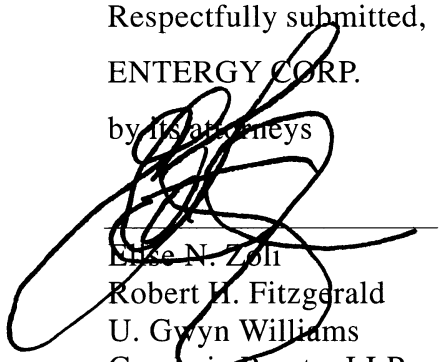
CONCLUSION

Based upon the foregoing, Petitioner Entergy Corp. respectfully requests that this Court declare that §316(b) does not apply to existing facilities, or set aside the Rule in its entirety for the reasons provided herein.

Respectfully submitted,

ENTERGY CORP.

by its attorneys



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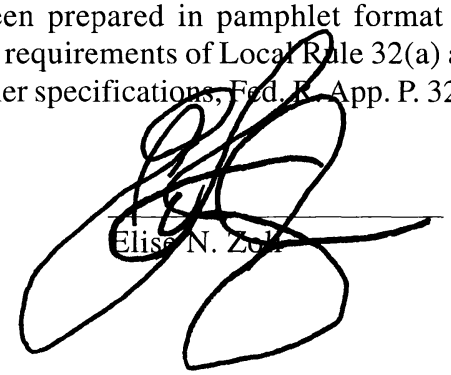

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