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## Statutory Interpretation in the Era of OIRA

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# STATUTORY INTERPRETATION IN THE ERA OF OIRA

*Lisa Heinzerling\**

In recent years, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) has asserted a remarkable degree of authority over administrative agencies' rulemaking processes. One of the ways in which OIRA has exercised power over agencies has been to foist upon them its own views about the requirements of the statutes under which they operate. The most notable trend in this area has been OIRA's insistence on converting technology-based environmental laws into cost-benefit laws. In OIRA's hands, for example, the Clean Water Act<sup>1</sup> ("the Act") is being transformed from a technology-based regime into a cost-benefit regime.

I will argue that this transformation is illegal. Given the plain language of the statute, it would be illegal even if the Environmental Protection Agency (EPA)—the agency charged with implementing the Act—had chosen this course. But EPA did not choose this course; OIRA did. OIRA's role in transforming EPA's understanding of the Act robs EPA's interpretation of any deference it might have been given under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>2</sup> if EPA itself had chosen the interpretation.

I use the Clean Water Act, and in particular a rule governing cooling water towers for power plants, as my case study. But the analysis applies whenever OIRA foists upon an administrative agency an interpretation of a statute that the agency has Congressional authority to administer. When OIRA's interpretation, not the agency's, prevails, the agency's reluctant embrace of OIRA's views does not deserve the deference *Chevron* might otherwise afford.

Part I of this Article provides background on OIRA, the Clean Water Act, and EPA's rulemaking on cooling water towers. Part II

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\* Professor of Law, Georgetown University Law Center. This Article draws upon an amicus brief I wrote (on a pro bono basis) for OMB Watch in the case challenging the Clean Water Act rule discussed in detail here. I am grateful to Robert Rosing and David Tarr for their excellent research assistance.

1. 33 U.S.C.A. §§ 1251-1387 (West 2006).

2. 467 U.S. 837, 844 (1984).

discusses why EPA's interpretation of the Clean Water Act in the proceeding on cooling water towers was in error and why, given OIRA's deep involvement, EPA's interpretation does not deserve *Chevron* deference.

## I. BACKGROUND

### A. The Office of Information and Regulatory Affairs

OIRA is situated within the OMB. Created by the Paperwork Reduction Act of 1980,<sup>3</sup> OIRA has the authority to monitor and reduce the paperwork burden of the federal government and private entities.<sup>4</sup> OIRA also oversees the Unfunded Mandate Reform Act, which creates special procedural rules for Congress's consideration of legislation having certain specified effects on obligations of states and local governments;<sup>5</sup> the Information Quality Act, which aims at ensuring the reliability of information disseminated by the federal agencies;<sup>6</sup> and the Small Business Regulatory Enforcement Fairness Act, which requires agencies to consider the effects of their actions on the nation's small businesses.<sup>7</sup> Under the Regulatory Right-to-Know Act, OIRA is also required to publish an annual report on the costs and benefits of federal regulation.<sup>8</sup>

Yet, in terms of influence, none of OIRA's statutory obligations has surpassed the authority given to it under two different Executive Orders. The first, Executive Order 12,291,<sup>9</sup> which was issued by President Reagan in 1981, required OIRA to oversee compliance with the Executive Order's new requirement that agency regulations costing \$100 million or more be subject to a cost-benefit analysis.<sup>10</sup> The second, President Clinton's Executive Order 12,866, superseded Executive Order 12,291 in 1993.<sup>11</sup> Executive Order 12,866 is similar in many respects to the Order it displaced; it, too, requires cost-benefit analysis for major agency regulations and gives OIRA oversight authority regarding agencies' cost-bene-

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3. 44 U.S.C.A. § 3503 (West 2006). Section 3503 establishes OIRA. *Id.*

4. § 3504 (enumerating the Director of OIRA's responsibilities).

5. 2 U.S.C.A. § 1501 (West 2006).

6. Information Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

7. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 201, 110 Stat. 847 (codified at 5 U.S.C. §§ 801-808).

8. Regulatory Right-to-Know Act of 1999, Pub. L. No. 106-554, § 624, 114 Stat. 2763.

9. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

10. *Id.*

11. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

fit analyses.<sup>12</sup> Moreover, Executive Order 12,866, like Executive Order 12,291, specifically states that it does not displace any statutory requirements the agencies otherwise face.<sup>13</sup>

In its memorandum concluding that Executive Order 12,291 did not unconstitutionally interfere with other agencies' prerogatives, the Department of Justice's Office of Legal Counsel emphasized that the Executive Order did not undo agencies' obligations under existing law, including congressional enactments:

[I]t is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress. . . .

. . . This Office has often taken the position that the President may consult with those having statutory decision-making responsibilities, and may require them to consider statutorily relevant matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority. . . .

. . . The Order [E.O. 12,291] does not empower the Director [of OMB] . . . to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions. . . . [The Director's] power of consultation would not . . . include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. . . .<sup>14</sup>

Likewise, OIRA's first Administrator, James C. Miller III, testified before Congress that:

President Reagan's Executive order imposes requirements on the agencies only "to the extent permitted by law" and only to the extent that its terms would not "conflict with deadlines imposed by statute or by judicial order." The limited application of [Executive Order 12,291] is a crucial point, one that insures [its] legality and the legality of actions pursuant to [it].<sup>15</sup>

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12. *Id.* at 51,737; Exec. Order No. 12,291, 46 Fed. Reg. at 13,193.

13. Exec. Order No. 12,866, 58 Fed. Reg. at 51,735; Exec. Order No. 12,291, 46 Fed. Reg. at 13,198.

14. *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 97th Cong. 154-58 (1981) (memorandum of David Stockman, Director, Office of Management and Budget).

15. *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 97th Cong. 46 (1981) (statement of James C. Miller III, Administrator, Office of Management and Budget).

From the beginning, therefore, it has been clear that, in reviewing the regulatory initiatives of its sister agencies, OIRA may not interfere with the agencies' compliance with statutory directives.

In the past several years, OIRA has become increasingly involved in agency rulemaking proceedings. In September 2001, John Graham, OIRA's Administrator, sent a memorandum to the heads of all federal agencies, signaling his intent to use OIRA's oversight authority under Executive Order 12,866 in a variety of new ways.<sup>16</sup> Graham noted that he would disapprove regulations that did not jibe with the cost-benefit framework of Executive Order 12,866.<sup>17</sup> OIRA has made good on this promise. In a 2003 report, the Government Accountability Office (GAO) concluded that OIRA "can have a significant—if not determinative—effect on a broad array of federal regulations . . . ." <sup>18</sup> According to GAO, between June 2001 and July 2002, "the primary effect of OIRA's suggestions was to delay or eliminate certain regulatory provisions that were included in the draft rules as submitted to OIRA" for six of the fourteen EPA rules specifically changed.<sup>19</sup> Moreover, GAO found that twenty-four of the twenty-five rules it examined in its report were weakened during the OIRA review process.<sup>20</sup> The unidirectional nature of OIRA's role in regulatory affairs led one scholar to call cost-benefit analysis in OIRA's hands a "one-way ratchet, able to stand still to be sure, but only capable of moving in one direction when it does function as a tool having some substantive effect, that of making regulation less stringent."<sup>21</sup> Indeed, when agencies have offered proposals that involve *deregulation* rather than increased regulation, OIRA has not required a cost-benefit analysis.<sup>22</sup>

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16. Memorandum from John D. Graham, Administrator, Office of Info. & Reg. Affairs (Sept. 20, 2001), *available at* [http://www.whitehouse.gov/omb/info/reg/oira\\_review-process.html](http://www.whitehouse.gov/omb/info/reg/oira_review-process.html).

17. *Id.* ("[T]he Administrator may decide to send a letter to the agency that returns the rule for reconsideration.").

18. U.S. GEN. ACCOUNTING OFFICE, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 3 (2003), *available at* <http://www.gao.gov/new.items/d03929.pdf>.

19. *Id.* at 76.

20. David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. (forthcoming 2006).

21. *Id.*

22. Lisa Heinzerling & Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENVTL. L. REP. 10,485, 10,488 (2004) ("Thus, when the Bush Administration relaxed requirements for power plants and other facilities under the new source review (NSR) program, it declined to conduct an economic analysis of the consequences of its actions.").

## B. Technology-Based Regulation and Cost-Benefit Analysis

The Clean Water Act,<sup>23</sup> passed in 1972 and amended in 1977, is the leading U.S. law protecting the nation's surface waters from pollution and other threats to their physical, biological, and chemical integrity. Several other federal statutes preceded the Clean Water Act; those statutes, in the words of the Senate Committee on Public Works, were "inadequate in every vital aspect."<sup>24</sup> The Clean Water Act departed from previous legislation in several important ways. For present purposes, the most important innovation was the transition from water-quality based standards to technology-based standards for controlling water pollution.<sup>25</sup>

The Clean Water Act relies on technology-based regulation as the strategy of first resort for cleaning up the nation's waters. Technology-based regulation is regulation that attempts to protect the environment through the use of some version of the best available technology for controlling pollution.<sup>26</sup> The main advantage of technology-based regulation, compared to water-quality based regulation, is that one need not resolve all of the contentious scientific issues surrounding exactly what levels of pollution are bad for the waters before one proceeds to regulate.<sup>27</sup> To be sure, depending on the specific formulation of the "best available technology" requirement in place, the level of pollution reduction can be relevant to the technology-based inquiry. But under the Clean Water Act, the inquiry into the effluent reduction level achieved by various technologies has historically been very limited. In *Weyerhaeuser Co. v. Costle*,<sup>28</sup> for example, the D.C. Circuit held that the consideration of "effluent reduction benefits" called for by the Clean Water Act<sup>29</sup> did not require EPA to conduct a fine-grained cost-benefit analysis of technology requirements before imposing such requirements on the relevant industry.<sup>30</sup>

Ever since Congress passed the Clean Water Act, industry groups regulated by the Act have tried to convert the Act's technology-based standards into cost-benefit standards. Early on, the

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23. 33 U.S.C.A. §§ 1251-1387 (West 2006).

24. S. REP. NO. 92-414, at 7 (1971), as reprinted in S. COMM. ON PUB. WORKS, 93RD CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1425 (Comm. Print 1973).

25. See *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004).

26. See, e.g., *id.* at 185 (citing to section 306 of the Clean Water Act).

27. *Id.* at 184.

28. 590 F.2d 1011 (D.C. Cir. 1978).

29. 33 U.S.C.A. § 1314(b) (West 2006).

30. *Weyerhaeuser*, 590 F.2d at 1048.

*Weyerhaeuser* litigation sought to require cost-benefit analysis in setting technology-based standards for the pulp and paper industry.<sup>31</sup> Other cases involved—and rejected—similar arguments.<sup>32</sup> In the mid-1990s, Congress flirted with statutory amendments that would have required cost-benefit analysis of any rule costing more than \$25 million; the amendments did not pass.<sup>33</sup> At about the same time, Congress also considered legislation implementing Newt Gingrich's "Contract with America," which would have required cost-benefit analysis for major health, safety, and environmental rules.<sup>34</sup> This legislation, too, failed to pass.

Thus, from the earliest days of the Clean Water Act, EPA, the courts, and Congress have agreed that the Act's technology-based requirements are not to be based on cost-benefit analysis. Efforts to import cost-benefit analysis into the Act's basic structure have failed. Yet, some of the Act's technology-based provisions require consideration of both the economic costs and the "effluent reduction benefits" of regulations.<sup>35</sup> What is the difference between these two regulatory approaches?

Cost-benefit analysis is different from technology-based regulation in three principal ways. First, cost-benefit analysis is indifferent to whether, at the end of the day, any regulation whatsoever is imposed on the actors subject to the relevant law. If the costs of regulation are too high in relation to the benefits, then the cost-benefit analyst will recommend rejecting the regulation.<sup>36</sup> Technology-based regulation, on the other hand, takes it as a given that entities subject to the law will be subject to some form of pollution control requirements when all is said and done; the only question is how stringent those requirements will be.<sup>37</sup> Cost-benefit analysis is

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31. *Id.* at 1036.

32. *See, e.g.,* *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 936 n.9 (5th Cir. 1998); *B.P. Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 799-800 (6th Cir. 1995) (citing *CPC Int'l, Inc. v. Train*, 540 F.2d 1329, 1341-42 (8th Cir. 1976)).

33. H.R. 961, 104th Cong. § 324(a)(1)(B) (as referred in the Senate, May 19, 1995, version 4). The bill died in committee.

34. H.R. 9, 104th Cong. §§ 401-61 (as referred in the Senate, Mar. 10, 1995, version 5).

35. *See* 33 U.S.C.A. §§ 1285(j)(2)(D), 1311(b)(2)(A), 1314(b)(1)(B), 1316(b)(1)(B) (West 2006).

36. The rule on cooling water intake structures, for example, allows a conclusion that no new regulatory requirements are appropriate if a site-specific cost-benefit analysis shows that costs are significantly greater than benefits. *See* 40 C.F.R. § 125.94(a)(5)(ii) (2006).

37. Two narrow exceptions to this principle exist for situations in which pollution control improvements are physically impossible or would force widespread plant shut-downs. *See* David M. Driesen, *Distributing the Costs of Environmental, Health, and*

agnostic on the question of whether regulation should proceed; technology-based regulation is not.

A second major difference between cost-benefit analysis and technology-based regulation is that cost-benefit analysis requires quantification and monetization of the factors relevant to a decision, whereas technology-based regulation does not.<sup>38</sup> Unlike cost-benefit analysis, technology-based regulation does not depend on obtaining numbers for extremely specific aspects of a given regulatory program (such as exactly which fish species are killed by a particular cooling water intake structure, and in what numbers, and at what ages).<sup>39</sup> Nor does it require the translation of such numbers into dollar figures. This step—"monetizing" regulatory benefits—is at once the most controversial and most distinctive feature of cost-benefit analysis.<sup>40</sup>

A third feature of cost-benefit analysis that distinguishes it from technology-based regulation is more obscure, but very important. Modern cost-benefit analysts insist upon "discounting" both the future costs and future benefits of the regulation.<sup>41</sup> This is a normal procedure for future financial costs. Discounting allows the analyst to determine, based on estimates of prevailing rates of return on financial investments, what money in the future will be worth compared to money today. But cost-benefit analysts apply the same technique to non-monetary future goods (such as, in the cooling-water context, fish and wildlife protected in the future through control technologies). The basic idea is that future events are not as important as present events.<sup>42</sup> Thus, in the present setting, the fish of the future are worth appreciably less than today's fish. Technology-based regulation includes nothing remotely resembling the technique of discounting.

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*Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 9 (2005).

38. See, e.g., Lisa Heinzerling, *The Accidental Environmentalist: Judge Posner on Catastrophic Thinking*, 94 GEO. L.J. 833, 836-37 (2006) (reviewing RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004)).

39. See, e.g., National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 67 Fed. Reg. 17,122, 17,122-140 (proposed Apr. 9, 2002) (to be codified at 40 C.F.R. pts. 9, 122-25).

40. See FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 61-90 (2004).

41. See, e.g., OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, at 33-34 (2003), available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf> (requiring agencies conducting cost-benefit analyses to discount future costs and benefits at seven and three percent per year respectively).

42. *Id.* at 32.



In these ways—agnosticism about whether regulation occurs, and quantification, monetization, and discounting of costs and benefits—cost-benefit analysis is very different from the technology-based regulation of the Clean Water Act.

### C. OIRA, Cost-Benefit Analysis, and the Phase II Rulemaking

OIRA has reviewed and directed the revision of numerous Clean Water Act rules in recent years. Here, I focus on EPA's rule on cooling water intake structures at existing power plants, known to aficionados as the "Phase II" rule because a rule on intake structures at *new* facilities (the "Phase I" rule) came first.<sup>43</sup> For cooling purposes, power plants and other industrial facilities draw in staggering amounts of water from adjacent water bodies.<sup>44</sup> Equally staggering numbers of fish are killed when they are either trapped ("impinged") at the inlet to these cooling water intake structures or drawn into the machinery of the structures themselves ("entrained").<sup>45</sup> The Phase II rule is based on section 316(b) of the Clean Water Act, which aims to limit the large-scale fish kills that result from drawing huge amounts of cooling water into power plants.<sup>46</sup> The rule has a long and complicated history. I highlight just two general points here.

First, numerous important changes to EPA's initial proposal and to its proposed final rule were made during OIRA's review and at OIRA's behest. For example, when the rule first went to OIRA for review (before being formally proposed), it required the largest and most harmful plants to employ "closed-cycle recirculating cooling," the most effective technology for avoiding the fish kills just described.<sup>47</sup> OIRA ultimately removed this requirement during its review.<sup>48</sup> OIRA also inserted a "compliance alternative," allowing

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43. National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576 (July 9, 2004) (to be codified at 40 C.F.R. pts. 9, 122-25).

44. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 181 (2d Cir. 2004).

45. *Id.*

46. 33 U.S.C.A. § 1326(b) (West 2006).

47. OFFICE OF MGMT. & BUDGET, EPA-HQ-OW-2002-0049, REVIEW DRAFT FOR THE PROPOSED SECTION 316(B) RULE FOR LARGE COOLING WATER INTAKE STRUCTURES AT EXISTING POWER GENERATING FACILITIES, DCN 4-4005, at 72 (Dec. 28, 2001) (on file with author) [hereinafter OMB REVIEW DRAFT] (proposing to require closed-cycle cooling at fifty-nine plants).

48. *Compare id.*, with National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 67 Fed. Reg. 17,122, 17,158 (proposed Apr. 9, 2002) (to be codified at 40 C.F.R. pts. 9, 122-25) (rejecting requirement of closed-cycle cooling at these facilities based on comparison of monetized, incremental costs and benefits).

a facility to escape new regulatory requirements based on a site-specific cost-benefit analysis showing that the costs of regulation were not worth the benefits.<sup>49</sup>

Second, the cost-benefit analysis insisted upon by OIRA featured the characteristics of cost-benefit analysis described above—agnosticism about whether any regulatory requirements will ultimately be imposed, and quantification, monetization, and discounting of the costs and benefits of regulation.<sup>50</sup> On agnosticism, the site-specific cost-benefit compliance alternative allows a facility to avoid regulation altogether if the costs of control technology are “significantly greater” than the benefits.<sup>51</sup>

As for monetization, EPA struggled to attach a dollar figure to the benefits of this regulation. In the end, EPA could monetize only the benefits of saving the fish that, with the protections of this rule in place, will survive the hazards of cooling water intake structures, only later to be caught by commercial or recreational fishers.<sup>52</sup> EPA was unable to attach any separate dollar figure whatsoever to the benefits of 98.2 percent of the aquatic organisms saved by this rule.<sup>53</sup> EPA could not identify the dollar value of the “nonuse” benefits provided by these organisms (such as ecological values).<sup>54</sup> The final rule lists the benefits that EPA was unable to monetize.<sup>55</sup>

EPA used the discounting technique in two ways. First, EPA assumed (without elaboration) that compliance costs would likely be incurred approximately one year before the relevant control tech-

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49. Compare OMB REVIEW DRAFT, *supra* note 47, at 93-95 (declining to propose a compliance alternative based on site-specific cost-benefit analysis, due to administrative costs and regulatory uncertainties created by such an alternative), with OFFICE OF MGMT. & BUDGET, EPA-HQ-OW-2002-0049, SECTION 316(B) PHASE II PROPOSED RULE SUMMARY OF MAJOR CHANGES DURING INTERAGENCY REVIEW, DCN 4-4019 2 (May 23, 2002) (on file with author) (noting that this cost-benefit variance was added at OIRA’s behest).

50. See *supra* notes 36-42 and accompanying text.

51. See 40 C.F.R. § 125.94(a)(5)(ii) (2006) (site-specific cost-benefit determination “may conclude that design and construction technologies, operational measures, and/or restoration measures in addition to those already in place are not justified because the costs would be significantly greater than the benefits” at a particular facility).

52. See National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, *supra* note 43, at 41,660-61.

53. *Id.* at 41,661 (“The Agency’s direct use valuation does not account for the benefits from the remaining 98.2% of the age 1 equivalent aquatic organisms estimated to be protected nationally under today’s rule.”).

54. *Id.*

55. See *id.* at 41,662.

nology would be operational and thus begin saving fish.<sup>56</sup> EPA discounted the monetary value of the fish saved over this one year between the imposition of costs and the realization of benefits.<sup>57</sup> Second, EPA observed that the fish saved by the relevant control technologies would not have been caught by commercial or recreational fishers until they had reached some appropriate level of maturity.<sup>58</sup> EPA thought the benefits of the Phase II rule would not accrue until the date on which the fish saved by the rule would otherwise have been caught.<sup>59</sup> For this reason, EPA discounted the fish-saving benefits of the rule for one or more years, depending on “the time of [the] ultimate harvest” of the relevant fish.<sup>60</sup> Discounting in this manner reduced the estimated benefits of saving fish through this rule by as much as thirty-four percent.<sup>61</sup>

## II. INTERPRETIVE ERRORS

In its Phase II rulemaking, EPA erred by converting a technology-based regulatory regime into a cost-benefit regime. Two important aspects of the final rule rest on EPA’s unlawful interpretation of the statute: the rejection of a provision requiring closed-cycle cooling structures at the largest and most environmentally damaging facilities,<sup>62</sup> and the embrace of a “compliance alternative” based on site-specific cost-benefit analysis.<sup>63</sup> EPA’s substitution of a cost-benefit regime for a technology-based regime conflicts with the plain meaning of the Clean Water Act and thus is due no deference.<sup>64</sup> Even if the Act were ambiguous on the relevant issues, EPA’s interpretation of the statute would not deserve deference.<sup>65</sup> By caving in to the statutory interpretation foisted on it by OIRA,<sup>66</sup> EPA earned the lesser measure of deference recog-

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56. *Id.* at 41,658.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. OFFICE OF MGMT. & BUDGET, EPA-HQ-OW-2002-0049, MEMO TO PHASE II DOCKET, DISCOUNTING RECREATIONAL AND COMMERCIAL FISHING BENEFITS, DCN 5-2390 3 (Apr. 15, 2003) (on file with author).

62. *See supra* note 47 and accompanying text; *infra* notes 68-71 and accompanying text.

63. *See supra* note 49 and accompanying text; *infra* note 72 and accompanying text.

64. *See infra* Part II.A.

65. *See infra* Part II.B.

66. *See supra* notes 47-49 and accompanying text.

nized in recent Supreme Court cases that narrowed the instances in which *Chevron's* broad deference is available.<sup>67</sup>

### A. The Plain Meaning of Section 316(b)

The cooling water tower case turns on the proper interpretation of section 316(b) of the Clean Water Act. As interpreted, section 316(b) will determine the appropriateness of, among other things, EPA's performance standards for cooling water intake structures and its endorsement of a "compliance alternative" based on site-specific cost-benefit analysis. EPA explicitly based its rejection of closed-cycle cooling at the largest and most harmful facilities, and its "compliance alternative" using site-specific cost-benefit analysis, on its view that section 316(b) authorizes cost-benefit balancing. EPA explained that it interpreted the phrase "best technology available" under section 316(b) to require "best technology available commercially at an economically practicable cost."<sup>68</sup> EPA viewed economic practicability as including "a consideration of the relationship of costs to environmental benefits" and requiring "some reasonable relationship between the cost of cooling water intake structure control technology and the environmental benefits associated with its use."<sup>69</sup> EPA then rejected closed-cycle cooling because it was "not determined to be the most cost-effective approach on a national basis."<sup>70</sup> In reaching this conclusion, EPA did nothing more or less than a cost-benefit analysis.<sup>71</sup> Similarly, EPA

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67. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 238 (2001) (holding that judicial responses to administrative actions must continue to distinguish between those that are entitled to *Chevron* deference and those that are entitled to *Skidmore* deference).

68. National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, *supra* note 43, at 41,604.

69. *Id.*

70. *Id.* at 41,607.

71. EPA does not explain why it concluded that closed-cycle cooling was not cost-effective. (This lack of explanation is in itself a problem.) In its final draft for OMB review, in discussing cost-effectiveness, EPA simply stated that "[t]he incremental social costs of [closed-cycle cooling at the largest and most harmful facilities] relative to the proposed option (\$686 million) significantly outweigh the incremental benefits (\$299 million)." See OFFICE OF MGMT. & BUDGET, EPA-HQ-OW-2002-0049, REVIEW DRAFT OF PROPOSED SECTION 316(B) RULE FOR LARGE COOLING WATER INTAKE STRUCTURES AT EXISTING POWER GENERATING FACILITIES 7-30 (Dec. 22, 2003) (on file with author); see also National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, *supra* note 48, at 17,158 (offering same kind of analysis, but with figures of \$413 million for incremental costs and \$146 million for incremental benefits). EPA's analysis here is cost-benefit analysis; the agency simply

also based its cost-benefit “compliance alternative” on its view that section 316(b) authorizes cost-benefit balancing.<sup>72</sup> Thus, the validity of both of these features of the rule depends on the validity of EPA’s interpretation of the Act.

The language of a statute is the starting point for statutory interpretation.<sup>73</sup> In the midst of the Clean Water Act’s jumble of acronyms, section 316(b) offers refreshingly plainspoken terms. Here is the provision in its entirety:

Any standard established pursuant to section 1311 [301] of this title or section 1316 [306] of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.<sup>74</sup>

The key phrase of the provision is the one describing the required technology: “the best technology available for minimizing adverse environmental impact.”<sup>75</sup> *Webster’s Third New International Dictionary* defines “minimize” as “to reduce to the smallest possible number, degree, or extent.”<sup>76</sup> The use of the term “minimize” in environmental statutes has been strictly interpreted by the courts. For example, the D.C. Circuit construed the term “minimized” in the Resource Conservation and Recovery Act<sup>77</sup> to require that EPA reduce the targeted harm to the greatest possible extent.<sup>78</sup> Thus, section 316(b) charges EPA with reducing adverse environmental impacts from cooling water intake structures to the lowest possible degree.

EPA’s conversion of section 316(b) to a cost-benefit regime cannot be squared with this unambiguous statutory language. A cost-benefit regime does not minimize adverse environmental impacts;

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compares the results of two different cost-benefit analyses, for two different regulatory options.

72. National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, *supra* note 43, at 41,603 (“EPA decided to use a comparison of a facilities costs to the benefits of meeting the performance standards at the facility (a “cost-benefit test”) as another basis for obtaining site-specific determination of BTA to minimize adverse environmental impact.”).

73. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

74. 33 U.S.C.A. § 1326(b) (West 2006).

75. *Id.*

76. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1438 (1986).

77. 42 U.S.C.A. § 6924(m)(1) (West 2006).

78. *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 361 (D.C. Cir. 1989) (“To ‘minimize’ something is, to quote the Oxford English Dictionary, to ‘reduce [it] to the smallest possible amount, extent, or degree.’”).

a cost-benefit regime balances costs against benefits in deciding what level of environmental impact is acceptable.<sup>79</sup> A regime like section 316(b), which aims to minimize environmental impacts, explicitly favors environmental protection. Cost-benefit analysis does not do this. Indeed, given the difficulty of developing meaningful numbers for the benefits of environmental protection,<sup>80</sup> cost-benefit analysis actually tips the scales *against* environmental protection. This is not the regime created by the language of minimization in section 316(b).

Section 316(b)'s cross-reference to sections 301 and 306 of the Clean Water Act fortifies this conclusion. The Second Circuit has said that this cross-reference:

is an invitation to look to section 306 for guidance in discerning what factors Congress intended the EPA to consider in determining the 'best technology available.' . . . Because section 316(b) refers to sections 301 and 306 but provides a different standard . . . we think it is permissible for the EPA to look to those sections for guidance but to decide that not every statutory directive contained therein is applicable to the Rule.<sup>81</sup>

As the court makes clear, section 316(b) describes a different standard—the minimization of adverse environmental effects—than the standards contemplated by sections 301 and 306.<sup>82</sup> In looking at sections 301 and 306 as guideposts to the meaning of “best technology available” under 316(b), the special standard enunciated in section 316(b) for cooling water intake structures must be preserved.<sup>83</sup>

Sections 301 and 306 establish an array of technology-based standards. Among these are the “best available technology economically achievable,”<sup>84</sup> the “best practicable control technology currently available,”<sup>85</sup> the “best conventional pollutant control technology,”<sup>86</sup> and the “best available demonstrated control technology.”<sup>87</sup> Linguistically, the technology-based standards cited in sections 301 and 306 that are closest to the “best technology available” of section 316(b) are the standards for new sources under sec-

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79. See *supra* notes 36-42 and accompanying text.

80. See, e.g., *supra* notes 52-55 and accompanying text.

81. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 186-87 (2d Cir. 2004).

82. *Id.* at 187.

83. *Id.*

84. 33 U.S.C.A. § 1311(b)(2)(A) (West 2006).

85. § 1311(b)(1)(A).

86. § 1311(b)(2)(E).

87. § 1316(a)(1).

tion 306 (“best available demonstrated control technology”)<sup>88</sup> and for existing sources under section 301(b)(2)(A) (“best available technology economically achievable”).<sup>89</sup> If Congress had wanted EPA to set standards for cooling water intake structures based on the “best practicable” control technology, or the “best conventional” control technology, it could easily have done so. It did so in other provisions of the very same statute—provisions cited in section 316(b) itself.<sup>90</sup> Instead, in section 316(b), Congress used language remarkably similar to that used to describe the technology-based requirements under section 306 and 301(b)(2)(A).

The importance of this point goes well beyond semantics, for the specific categorization of control technologies under the Clean Water Act ushers in a cascade of regulatory consequences. Most important for present purposes, the criteria for choosing the required technology change considerably from one technology-based standard to another. In particular, the consideration of costs *in relation to benefits* is explicitly allowed in determining the “best practicable control technology”<sup>91</sup> and the “best conventional pollutant control technology.”<sup>92</sup> The relationship between costs and benefits is *not* one of the factors listed as relevant in choosing the best available technology under sections 306<sup>93</sup> or 301(b)(2)(A) of the Clean Water Act.<sup>94</sup> Thus, neither of the provisions that bear the closest linguistic resemblance to section 316(b) authorize EPA to consider the relationship between costs and benefits in choosing the requisite technology. The explicit mention of cost-benefit comparisons in some provisions of the statute, and the lack of mention of that

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88. *Id.*

89. § 1311(b)(2)(A). This standard applies to existing sources that involve pollutants other than “conventional” pollutants. *See id.* (noting that section 1311 applies to pollutants identified in subsections (C), (D), and (F), which include toxic pollutants and pollutants that are not conventional pollutants). Cooling water intake structures involve neither toxic nor conventional pollutants.

90. § 1311(b)(1)(A) (“best practicable”); § 1311(b)(2)(E) (“best conventional”).

91. § 1314(b)(1)(B) (directing EPA to consider factors including “the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application”).

92. § 1314(b)(4)(B) (directing EPA to consider factors including “the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived”). Even here, and with respect to best practicable control technology, however, EPA has not relied upon the kind of formal, quantified, and monetized cost-benefit analysis that formed the basis of its decisions in this rulemaking proceeding. *See, e.g., Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 *passim* (D.C. Cir. 1978).

93. § 1316(b)(1)(B) (referring only to costs, but not to benefits).

94. § 1314(b)(2)(A).

comparison in other provisions, strongly indicates that Congress did not mean to allow that comparison under the provisions that do not mention it.<sup>95</sup>

Thus, EPA may not, consistent with the unambiguous meaning of section 316(b), convert this provision into a cost-benefit regime. Congress could easily have charged EPA with considering the relationship between costs and benefits in setting standards under section 316(b). Congress could have done this indirectly, by specifying that the standards should require use of the “best practicable” or “best conventional” control technology (which would have brought with it consideration of the cost-benefit relationship), or directly, by using the same kind of language Congress used to describe the factors to be considered in setting certain technology-based standards.<sup>96</sup>

In creating a site-specific “compliance alternative” based on cost-benefit analysis, EPA also ignored explicit statutory language ruling out such an alternative. Congress painstakingly elaborated different rules for variances in different circumstances.<sup>97</sup> In only one kind of case—involving “biochemical oxygen demand and pH from discharges . . . into deep waters of the territorial seas”—was modification of technology-based requirements allowed based on a cost-benefit balancing.<sup>98</sup> The other provisions for variances involve consideration of some combination of the kinds of factors the Second Circuit upheld in reviewing the variance allowed for new sources under section 316(b): a comparison of actual costs to the costs predicted during the rulemaking proceeding, “significant adverse impacts on local air quality,” “significant adverse impacts on local water resources other than impingement and entrainment,” and “significant adverse impacts on local energy markets.”<sup>99</sup> In allowing a variance based on site-specific cost-benefit analysis for the existing sources covered by the Phase II rule, EPA went well be-

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95. See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 458 (2001) (“[T]he cost factor is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would have been expressly mentioned . . . had Congress meant it to be considered.”).

96. Again, the language describing the factors relevant to identifying “best practicable” and “best conventional” control technology explicitly refers to the relationship between costs and benefits. See §§ 1314(b)(1)(B), 1314(b)(4)(B).

97. EPA’s decision to style the cost-benefit option a “compliance alternative” rather than a “variance” does not make the provisions of the Clean Water Act dealing with exceptions to technology-based standards—there styled “variances”—any less relevant.

98. § 1311(m)(1)(B).

99. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 192 (2d Cir. 2004).



yond the narrow variance it allowed for new sources in the Phase I proceeding.<sup>100</sup>

EPA's efforts to get around the clear meaning of section 316(b) are tinged with desperation. EPA notes the linguistic similarity between the "best technology available" of section 316(b) and the "best available demonstrated technology" of section 301.<sup>101</sup> EPA states that it therefore looked to that section (and the closely related section 304) "for guidance in determining the best technology available" under section 316(b).<sup>102</sup> Nevertheless, EPA asserts:

There are significant differences between section 316(b) and sections 301 and 304. . . . In contrast to the effluent limitations provisions, the object of the 'best technology available' is explicitly articulated by reference to the receiving water: To minimize adverse environmental impact in the waters from which cooling water is withdrawn. . . . For this Phase II rulemaking, EPA therefore interprets CWA section 316(b) as authorizing EPA to consider not only technologies but also their effects on and benefits to the water from which the cooling water is withdrawn.<sup>103</sup>

This interpretation must underlie EPA's deployment of the "cost-effectiveness" test in rejecting closed-cycle cooling at the largest and most harmful facilities (since that test is but a refinement of the cost-benefit balancing EPA describes in this passage). It also forms the express basis of EPA's embrace of a "compliance alternative" based on site-specific cost-benefit analysis.<sup>104</sup>

But the interpretation is absurd. First, if EPA had indeed looked for "guidance" in sections 301 and 304 when it was interpreting section 316(b), and done so responsibly, EPA would have found that cost-benefit balancing is foreclosed under section 316(b). Second, to use the specific language of section 316(b) to *enlarge* EPA's authority to conduct cost-benefit balancing is bizarre. As discussed

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100. The cost-benefit "compliance alternative" in this rule also goes beyond the Phase I variance in other ways: the Phase I variance more clearly placed the entire burden of justifying a variance on the applicant; it required that the costs of a technology at a specific site be "wholly disproportionate to"—rather than "significantly greater than"—the costs EPA had assumed in writing the rule; and it did not provide that it was acceptable not to do anything in response to the rule if the costs were high enough in relation to the benefits. *Compare* 40 C.F.R. § 125.85(a)(2)-(3) (2006) (Phase I variance provision), *with* 40 C.F.R. § 125.94(a)(5)(ii) (2006) (Phase II site-specific "compliance alternative" based on cost-benefit analysis).

101. National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, *supra* note 43, at 41,582-83.

102. *Id.*

103. *Id.*

104. *Id.* at 41,603-04.

above, several provisions of the Clean Water Act explicitly authorize the weighing of costs against benefits.<sup>105</sup> As *Weyerhaeuser* makes clear, courts have not even interpreted these provisions as requiring the kind of formal cost-benefit analysis EPA required here.<sup>106</sup> Thus, EPA must somehow argue that a provision requiring it to “minimize adverse environmental impacts” is *less* environmentally protective (because it allows more relaxed regulatory standards under the rubric of formal cost-benefit analysis) than a provision that, like those in section 304, authorizes an informal comparison of economic costs and pollution reduction benefits. Although section 316(b) has an eye on the “effects on . . . the water from which the cooling water is withdrawn,”<sup>107</sup> EPA is directed to *minimize* those effects, not to balance them against economic costs.<sup>108</sup> EPA has read section 316(b) exactly backwards.

In sum, EPA’s transformation of section 316(b) into a cost-benefit provision is inconsistent with the unambiguous meaning of that provision. As next discussed, even if section 316(b) were ambiguous, the interpretation offered in EPA’s rule—at the direction of OIRA—would not deserve deference under *Chevron*.

## B. *Chevron* and OIRA

For reasons just discussed, one cannot argue that section 316(b) is unambiguous in the other direction; that is, that it unambiguously allows cost-benefit analysis to serve as the criterion for choosing technologies under section 316(b), or that it unambiguously permits a compliance alternative based on site-specific cost-benefit analysis. Even EPA appears to have conceded this point. In the preamble to the final rule, the agency states that “neither the statute nor the legislative history *requires* a formal or informal cost-benefit assessment.”<sup>109</sup>

In recent years, the Supreme Court has refined its holding in *Chevron* by deciding that the degree of deference courts should give to agency interpretations of ambiguous statutes depends on a

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105. See *supra* note 35 and accompanying text.

106. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1046-47 (D.C. Cir. 1978).

107. National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, *supra* note 43, at 41,583.

108. See *supra* notes 74-75 and accompanying text.

109. National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, *supra* note 43, at 41,604 (emphasis added).

wide array of factors.<sup>110</sup> The substantial deference afforded under *Chevron*<sup>111</sup> to the agency charged with implementing a statute is, in other words, not automatically applicable whenever an agency offers an interpretation of a statute.<sup>112</sup> Rather, the Court held in *United States v. Mead Corporation*,

[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.<sup>113</sup>

The Court went on to quote Justice Jackson's opinion in *Skidmore v. Swift & Co.*:<sup>114</sup>

The weight [accorded to an administrative judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>115</sup>

The situation here calls for the application of *Mead*, not *Chevron*. First and foremost, *Chevron* deference is due only to the agency responsible for implementing the statute in question, or, in *Chevron*'s words, to the agency "entrusted to administer" the relevant statute.<sup>116</sup> Moreover, as the Supreme Court held in *Martin v. Occupational Safety & Health Review Commission*, when two different executive agencies clash, the agency with the greatest degree of implementing authority under the relevant statute deserves deference to its interpretation.<sup>117</sup> EPA is that agency in the case of the Clean Water Act.<sup>118</sup>

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110. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

111. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

112. *Natural Res. Def. Council, Inc. v. Abraham*, 355 F.3d 179, 200-01 (2d Cir. 2004).

113. 533 U.S. at 228.

114. 323 U.S. 134 (1944).

115. *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

116. *Chevron*, 467 U.S. at 844.

117. 499 U.S. 144, 152-53 (1991); see also *Gonzales v. Oregon*, 126 S. Ct. 904, 914-22 (2006) (declining to give *Chevron* deference to Attorney General's interpretation of the Controlled Substances Act, as Act did not delegate to the Attorney General the authority to make medical judgments).

118. See 33 U.S.C.A. § 1251(d) (West 2006) ("[T]he Administrator of the Environmental Protection Agency . . . shall administer this chapter."); § 1316(b)(1)(B)

The paper trail in the cooling water tower case makes clear that OIRA foisted on EPA an interpretation of the Clean Water Act that EPA itself had not developed.<sup>119</sup> OIRA is not the agency charged with implementing the Clean Water Act. Indeed, the Act does not mention OIRA; it does not give OIRA even the tiniest role in implementing the Act.<sup>120</sup> In this way, therefore, the cooling water tower case is even more straightforward than *Martin*. In *Martin*, the agency that offered a statutory interpretation that conflicted with the interpretation of the agency given primary responsibility for implementing the statute at least had some responsibilities under the statute.<sup>121</sup> OIRA has no responsibilities under the Clean Water Act. EPA should not be given *Chevron* deference for an interpretation that simply bends to the will of a sister agency.<sup>122</sup>

Another feature of the Phase II rulemaking also supports application of the *Mead* rather than *Chevron* standard of review for EPA's interpretative choices. The interpretive choices I have referenced here—such as the adoption of a “net benefits” standard and the embrace of a site-specific cost-benefit test—were made abruptly, in response to pressure from OIRA, rather than with careful deliberation and application of EPA's unique expertise.<sup>123</sup> The care with which an agency makes an interpretive choice is another factor in deciding how much deference to afford that choice.<sup>124</sup>

Thus, not only OIRA's aggressive involvement in EPA's interpretive choices, but also the agency's lack of care in making these choices, counsel in favor of withholding *Chevron* deference to EPA's interpretation in the rule on cooling water towers.

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(“[T]he Administrator shall propose and publish regulations establishing Federal standards of performance for new sources . . .”).

119. See *supra* notes 49-50 and accompanying text; see also OFFICE OF MGMT. & BUDGET, EPA-HQ-OW-2002-0049, FORM FOR COMPLIANCE WITH E.O. 12866 DOCKET REQUIREMENTS, DCN 6-5051 9 (Mar. 10, 2005) (on file with author) (noting that OMB had advocated adding the “clarification that comparison of costs with benefits is an important component of economic practicability”).

120. Cf. 42 U.S.C.A. § 7607(d)(4)(B)(ii) (West 2006) (Clean Air Act expressly refers to OMB regulatory review process in requiring that drafts of proposed rules submitted for this process be placed in the relevant rule's public docket).

121. 499 U.S. at 152-53.

122. Cf. *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 365-66 (D.C. Cir. 1989) (finding that EPA did not adequately explain the interpretation of the statute where it referred to representatives' post-enactment letter setting forth their own interpretation of the statute, as if their interpretation controlled EPA's view of the statute).

123. See *supra* notes 47-49 and accompanying text.

124. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

Basic principles of administrative law support this conclusion. A bedrock principle of administrative law holds that an agency may not offer post hoc rationalizations for its regulatory choices.<sup>125</sup> This principle is, in fact, reflected in the decision of *Mead* itself. There, the Court strongly suggested that an agency may not support an interpretive choice through lawyers' arguments made after the interpretation has been settled.<sup>126</sup> In the rule on cooling water towers, EPA's lawyers were essentially put in the position of appellate lawyers asked to defend an agency's pre-existing interpretive choice. EPA was given its marching orders by OIRA, and then EPA had to supply the legal rationale for the changes instigated by EPA.<sup>127</sup> This is not the way agencies are supposed to go about interpreting the statutes they administer.<sup>128</sup>

Finally, the theoretical reasons for *Chevron* deference do not apply in a situation where an expert agency like EPA takes its interpretive directions from OIRA. The *Chevron* Court itself justified deference to agency interpretations by noting that agencies' have greater expertise and political accountability than courts.<sup>129</sup> The same comparison is true for agencies like EPA and OIRA. OIRA's special expertise lies neither in science nor in control technologies—two basic underpinnings of EPA's regulatory decisions. In addition, when EPA makes a decision based on what OIRA has told it to do, political accountability is lacking; Administrator Johnson, not Administrator Graham (or his successor), will take the heat for what EPA ultimately does. Yet, responsibility properly lies with OIRA, not with EPA.

The lack of accountability is made more pointed still by a peculiar position EPA's lawyers have taken in the case involving cooling water intake structures. EPA's lawyers have argued to the Second Circuit that the documents showing what EPA did in response to

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125. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

126. *Mead*, 533 U.S. at 228 (noting that the Court showed "near indifference" to an agency interpretation that appeared in a litigation brief in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988)); *Mead*, 533 U.S. at 238 n.19.

127. *See supra* Part II.B.

128. *See, e.g., Investment Co. Inst. v. Camp*, 401 U.S. 617, 627-28 (1971) (declining to defer to the Comptroller General's statutory interpretation where he "adopted no expressly articulated position at the administrative level as to the meaning and impact of the [relevant] provisions" and noting that although appellate counsel had offered such a position, "[i]t is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress").

129. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

OIRA's demands are not part of the administrative record and ought not be considered by the court in its review of EPA's decision.<sup>130</sup> In essence, EPA's lawyers propose that the very documents that show why EPA did what it did in this rule are the very documents the court cannot consider in reviewing the rule. Such a position virtually guarantees confusion about who is accountable for the rule's results.

### CONCLUSION

OIRA's increasingly aggressive role in controlling agency action is so far the biggest administrative law story of the new century. One part of the story is OIRA's role in shaping agencies' interpretations of the laws they administer. In the case of the regulation of cooling water intake structures under the Clean Water Act, OIRA fundamentally changed the regulatory framework under which EPA was operating. OIRA's pointed involvement in this rulemaking proceeding, and in others like it, eliminates any argument for interpretive deference under *Chevron*.

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130. Combined Reply in Support of EPA's Motion to Strike Portions of Briefs That Rely Upon Material Outside of the Administrative Record and in Opposition to Petitioners' Cross-Motions to Supplement the Record at 10-17, *Surfrider Found. v. EPA*, No. 04-6692 (2d Cir. January 20, 2006) (on file with the author).

