No. 07-____

IN THE

Supreme Court of the United States

ENTERGY CORPORATION,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

CHUCK D. BARLOW
ENTERGY SERVICES, INC.
308 E. Pearl Street
Jackson, MS 39201
(601) 969-2542

ELISE N. ZOLI
Counsel of Record
KEVIN P. MARTIN
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for the Petitioner

November 2, 2007

Questions Presented

This case involves regulation under the Clean Water Act ("CWA") of the intake structures used by power plants to take in cooling water. After 30 years of regulating *new* facilities, the Environmental Protection Agency ("EPA") promulgated a regulation requiring *existing* cooling water intake structures to be retrofitted to comply with EPA's latest determination of the "best technology available for minimizing adverse environmental impact," measured in terms of the potential effects on early life stages of fish. The Second Circuit, deferring to EPA, held that EPA has authority to retrofit existing facilities. Siding with environmental petitioners and against EPA, the court also held that EPA's weighing of costs and benefits is limited to a narrow "cost-effectiveness" test. The questions presented, all of which implicate splits in circuit court authority, are:

1. Whether the CWA provides EPA authority to impose new requirements under Section 316(b) of the Act, 33 U.S.C. § 1326(b), with respect to existing cooling water intake structures?

2. Whether a court should accord *Chevron* deference to an agency's interpretation of its own statutory jurisdiction?

3. Whether Sections 301 and 316(b) of the CWA, 33 U.S.C. §§ 1301, 1326(b), limit EPA's weighing of costs and benefits only to the Second Circuit's "cost effectiveness" test?

Parties to the Proceeding

Petitioner Entergy Corp. ("Entergy") was a petitioner in the court of appeals. Utility Water Act Group, PSEG Fossil LLC, and PSEG Nuclear LLC, expected to be separate petitioners in this Court, were also petitioners in the court of appeals.

Respondents are the United States Environmental Protection Agency, a respondent in the court of appeals, and the following petitioners in the court of appeals: Riverkeeper, Inc.; Natural Resources Defense Council; Waterkeeper Alliance; Soundkeeper, Inc.; Scenic Hudson, Inc.; Save the Bay-People for Narragansett Bay; Friends of Casco Bay; American Littoral Society; Delaware Riverkeeper Network; Hackensack Riverkeeper, Inc.; New York/New Jersey Baykeeper; Santa Monica Baykeeper; San Diego Baykeeper; California Coastkeeper; Columbia Riverkeeper; Conservation Law Foundation; Surfrider Foundation; Appalachian Power Company; and Illinois Energy Association; and the States of Connecticut, Delaware, Massachusetts, New Jersey, New York, and Rhode Island.

Corporate Disclosure Statement

Entergy, a Delaware corporation, is a publicly traded company, and no publicly-held company has a 10% or greater ownership interest in Entergy.

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CASES:

Petitioner Entergy respectfully seeks a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Opinion Below

The opinion of the court of appeals (App. 1a–94a) is reported at 475 F.3d 83 (2d Cir. 2007).

Jurisdiction

The court of appeals entered its judgment on January 25, 2007. An order denying petitions for rehearing *en banc* was entered on July 5, 2007. An order extending the time for filing a petition for certiorari to November 2, 2007 was granted on September 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

This case generally involves the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and in particular concerns Section 316(b), 33 U.S.C. § 1326(b). Relevant statutory provisions are set forth in the appendix.

Statement of the Case

This case presents three questions of importance beyond the confines of the present dispute, with respect to which the opinion of the Second Circuit below is in conflict with decisions of several other courts of appeal. Unless reviewed and reversed, the Second Circuit's decision will overthrow decades of settled regulatory practice under the Clean Water Act (the "CWA" or the "Act"). It will also impose upon the nation's electric-generating sector a regime of potentially continuous retrofitting of power plants, costing—by EPA's reckoning—billions of dollars each

year, even where such retrofitting cannot be shown, in the case of a particular plant, to provide any environmental benefits.

The case concerns the infrastructure used by power plants, including nuclear plants, to bring surface water into their facilities. Such water is necessary to offset the heat created by power generation, thereby permitting the safe operation of such plants. The means by which cooling water is drawn into, and circulated through, a plant is a fundamental factor in plant design, and the amount of cooling water a power plant can utilize necessarily affects the amount of power a plant can generate.[1]

While cooling water is necessary for plant operation, the intake structure through which water is drawn may pose a risk of mortality to early life stages of fish through "entrainment" (passage of juvenile fish or larvae through the intake structure) and "impingement" (contact by fish with the screens or exterior of the intake structure).

To address these potential impacts from the intake of cooling water, Congress, in Section 316(b) of the CWA, authorized EPA (and delegated state authorities) to regulate the "location, design, construction, and capacity of cooling water intake structures," to ensure that such structures "reflect the best technology available for minimizing adverse environmental impact," or "BTA." 33 U.S.C. § 1326(b).

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[1] Broadly speaking, some electric-generating facilities draw in water, circulate it once through the plant, and then release it back into the environment ("once-through cooling"); other plants draw water and then consume it through cooling towers ("closed-cycle cooling").

In its decision below, the Second Circuit interpreted Section 316(b) and other provisions of the CWA in a manner inconsistent with the plain meaning of the Act and in conflict with other circuit courts on numerous issues. First, the court interpreted Section 316(b) to create a regime under which regulators must select as BTA the technology that is most effective—even by a single fish larvae—at reducing impingement and entrainment, unless the cost of that technology either cannot be reasonably borne by the electric generating sector as a whole, or a substitute technology, capable of achieving at least one identical result, is available at a "markedly lower" cost. Other than in this limited manner, EPA is entirely forbidden from inquiring whether the environmental benefits of the selected BTA are outweighed by its costs. In so holding, the Second Circuit also interpreted a separate provision of the CWA applicable to all industry, Section 301, as similarly restraining EPA's authority to weigh costs and benefits in regulating the discharge of pollutants.

Second, the court deferred to EPA's interpretation of Section 316(b) as permitting regulators to revisit their preconstruction approvals of power plants' cooling water intake structures. Under this holding such facilities are in perpetual risk of being required to retrofit fundamental plant infrastructure constructed in reliance on initial regulatory approvals. In validating this portion of its opinion and reconciling it with the remainder of the Act, the Second Circuit interpreted the CWA's pollutant "discharge" permitting provision to permit regulation of the "intake" of ambient water. In combination with the Second Circuit's restrictive reading of what constitutes BTA, the holding below creates a regime

under which the nation's existing electric supply may be forced to shut down during lengthy retrofits—costing hundreds of millions or even billions of dollars for nuclear facilities—with no assurance that EPA will not force another round of retrofits if the agency concludes it would guaranty the survival of a single additional fish egg or larvae.

The Second Circuit's decision is wrong as a matter of law, rests on a flawed understanding of this Court's pre-*Chevron* precedent,[2] and conflicts with the decisions of other courts of appeal on several issues, including: Whether regulators have authority under Section 402 of the CWA to regulate cooling water intake structures and the intake of water; whether a court should defer to an agency's interpretation of its own statutory authority; and the meaning of BTA under Section 316(b) and the term "best available technology" ("BAT") under Section 301. For the reasons given herein, this Court should grant the writ of certiorari to review and reverse the decision below.

A. Statutory Background

This case centers around the interpretation of Section 316 of the CWA, "Thermal Discharges," and in particular Section 316(b), "Cooling Water Intake Structures."

Section 316, uniquely within the CWA, targets power plants and aquatic ecosystems, for the most part *limiting* EPA's authority to impose restrictions on the former for the benefit of the latter. Section 316(a) requires EPA to relax otherwise applicable

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[2] See *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837 (1984).

thermal discharge requirements if the discharger demonstrates that a proposed relaxed requirement "will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife." Section 316(c), meanwhile, prohibits regulators from imposing new thermal discharge requirements on previously modified facilities for the shorter of either 10 years or until the cost of the modification is amortized or depreciated. 33 U.S.C. § 1326(a), (c).

Between these two subsections concerning the "protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife" is sandwiched the single sentence of Section 316(b), which provides, in full:

> Any standard established pursuant to section 301 or section 306 of this Act 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). The CWA says nothing about how EPA is to consider costs in selecting BTA under Section 316(b).

The sections of the Act cross-referenced by the Section 316(b)—Sections 301 and 306—do not address the intake of water. Instead, both govern the discharge of pollutants. Section 301 requires EPA to establish pollutant-specific effluent limitations that "shall be applied to *all* point sources of discharge of pollutants," whether existing or new. See 33 U.S.C. § 1311(e). Section 306 required EPA to begin a rolling process of issuing "standards of

performance" exclusively for new point sources of pollution on a category by category basis, with the standards of performance applied to new facilities "the construction of which is commenced after the publication of proposed regulations * * * which will be applicable to such source." See 33 U.S.C. § 1316.

Sections 301 and 306 contribute to the CWA's alphabet soup of technological standards. Section 301 initially called for "the application of the best practicable control technology currently available" ("BPT"), but required, by March 31, 1989, the implementation of a "best available technology economically achievable" standard ("BAT"). 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A). Section 306, meanwhile, requires standards of performance to be set under a "best available demonstrated control technology" standard, or "BADCT." 33 U.S.C. § 1316(a)(1).

Both Sections 301 and 306 expressly incorporate Section 304, in which Congress provided *some* guidance on how regulators may consider the cost and benefits of compliance in selecting one or another technology. Section 304 of the Act provides that, in selecting BPT under Section 301, EPA should consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved by such application," while in selecting the more stringent BAT, the agency must still consider "the cost of achieving such effluent reduction * * * and such other factors as the Administrator deems appropriate." 33 U.S.C. §§ 1314(b)(1)(B), (b)(2)(B). Section 306 states that, in selecting BADCT, EPA is required to consider "the cost of achieving * * * effluent reduction, and any

non-water quality environmental impact and energy requirements." 33 U.S.C. § 1316(b)(1)(B).

Under Section 401 of the CWA, proposed facilities requiring a federal license must obtain a *pre*construction certificate that "shall set forth any effluent limitations *and other limitations*" specific to the facility, including, where appropriate, facility-specific requirements under Section 316(b). See 33 U.S.C. § 1341 (emphasis added). Section 402 of the Act further provides that operating facilities must obtain, subject to renewal every five years, a National Pollutant Discharge Elimination System ("NPDES") permit with respect to the "discharge of any pollutant," which may contain different discharge limitations than found in the preconstruction Section 401 permit. See 33 U.S.C. § 1342(a)(1). Unlike Section 401, however, Section 402 refers only and specifically to "discharges," *not* to "other limitations."

B. Environmental Protection Agency Rulemaking

EPA's initial attempt at implementing Section 316(b) was abandoned following procedural missteps. See *Appalachian Power Co.* v. *EPA*, 566 F.2d 451, 457 (4th Cir. 1977); 44 Fed. Reg. 32956 (June 7, 1979). EPA did not go gently back to the drawing board. Rather, for nearly thirty years, EPA addressed potential impacts on fish attributable to new power plants by making preconstruction BTA determinations on a site-specific basis. Power plants then were constructed with the approved cooling water intake structures, which determined the design of, and that were integrated with, the hearts of the plants.

The rulemaking at issue here has its origin in a consent decree between EPA and environmental groups requiring the issuance of regulations implementing Section 316(b). The rulemaking was conducted in three phases. In Phase I, EPA set forth standards for cooling water intake structures at new steam-electric generating facilities, and in Phase III, EPA promulgated regulations for new industrial facilities, as well as certain existing industrial and steam-electric generating facilities below a threshold size of cooling water use (among other factors).

At issue in this case is the Phase II rulemaking, which concerns existing electric-generating facilities above the threshold size. See 69 Fed. Reg. 41576 (July 9, 2004), codified at 40 C.F.R. Part 125, Subpart J (the "Rule") (App. 122a–593a). The Rule is targeted exclusively at the reduction in assumed mortality of aquatic organisms through entrainment and impingement, under the assumption that offsetting assumed mortality from those causes may assist aquatic populations taxed by over-fishing. See *id.* at 41590 (App. 188a).

EPA crafted the Rule to require "technology that is technically available, economically practicable, and cost-effective while at the same time authorizing a range of technologies that achieve comparable reductions in adverse environmental impact." 69 Fed. Reg. at 41583 (App. 157a–158a). To evaluate the costs and benefits of the Rule, EPA developed facility-specific estimates of the costs, along with estimated benefits to, *e.g.*, commercial and recreational fishermen. See *id.* at 41648–55, 41655–64 (App. 439a–515a). These analyses were supported by voluminous technical documents setting forth EPA's methodologies and estimated

costs and benefits of the Rule. See *id.* at 41577 (App. 127a).

In formulating the Rule, EPA rejected as BTA a requirement that all existing facilities replace their cooling systems (not just their intake structures) with closed-cycle cooling, *i.e.*, cooling towers. Cf. *supra*, 2 & n. 1. EPA reasoned, *inter alia*, that: (a) closed-cycle cooling, with a total social cost conservatively estimated at about $3.5 billion annually, "is not the most cost-effective approach for many existing facilities"; (b) decreased energy production associated with retrofits would necessitate the construction of 20 new power plants; (c) a cooling-tower mandate would increase fossil fuel consumption, with resulting air-quality impacts from those new plants; (d) inadequate data existed on cooling-system conversions at existing facilities; and (e) non-water quality impacts, such as water loss, icing, fogging and noise, would be associated with closed-cycle cooling. 69 Fed. Reg. at 41605–06 (App. 255a–60a).

Instead of selecting a single technology as BTA for use in all facilities, EPA designated a suite of technologies, including, *inter alia*, fine- and wide-mesh screens, aquatic filter barrier systems, barrier nets, and fish return systems. 69 Fed. Reg. at 41599 (App. 228a). The Rule requires the use of technology to reduce entrainment by 60 to 90% from a defined baseline condition, and impingement mortality by 80 to 95% from the same baseline. See 40 C.F.R. § 125.94(b)(1), (2). EPA also provided a variance from these requirements for facilities where the costs of achieving the performance standards are significantly greater than, *inter alia*, the fisheries benefits of compliance. See *id.*, § 125.94.

C. The Second Circuit's Decision

EPA's rule was challenged in petitions filed under 33 U.S.C. § 1369(b) by environmental, State, and industry petitioners, with the challenges consolidated before the Second Circuit.

1. In its petition, Entergy argued that Congress did not intend Section 316(b) to apply to existing facilities. In particular, Entergy contended that the integrated phrase "location, design, construction, and capacity" limit the section's application solely to new facilities, *i.e.*, facilities that have not yet been located, designed, constructed or sized with respect to their intake structures. Entergy further argued that this reading of Section 316(b) is supported by the structure of the CWA: The Act provides no continuing mechanism for imposing new requirements on existing cooling water intake structures, since the NPDES permitting system—through which the other requirements of the CWA are amended for existing facilities—only pertains to the regulation of "discharges" of pollutants.

The Second Circuit found Entergy's plain language argument "superficially appealing," App. 63a, and its argument that Section 316(b) requirements have no place in NPDES discharge permits "a closer question." App. 75a. Nevertheless, brushing aside the absence of any clear authority in the Act for regulating existing cooling water intake structures as a mere "textual hiccup," see *ibid.*, the Second Circuit ultimately rejected Entergy's arguments by deferring to EPA on the scope of its authority. See *id.* 77a. The court adopted EPA's assertion of jurisdiction, based largely on 316(b)'s cross-reference to Section 301 of the Act, which allows EPA to regulate discharges from new and

existing facilities. See *id.* 76a–77a. It also concluded that EPA could impose new Section 316(b) requirements on existing facilities via NPDES permits. See *id.* 75a–76a ("EPA's decision to use the NPDES process to enforce section 316(b) is not unreasonable.").

2. Ruling in favor of the Environmental and State petitioners, the Second Circuit also rejected EPA's designation of a suite of technologies—not closed-cycle cooling—as BTA. The court held that the plain language of Section 316(b), in the context of the CWA, requires EPA to select as BTA the one technology most effective at reducing impingement or entrainment, unless (1) that "benchmark" technology is not affordable to the industry as a whole, or (2) use of another technology is justified under a "cost-effectiveness test." Accusing EPA of inappropriately considering costs and benefits in a different manner (characterized by the court as "cost-benefit analysis"), the court remanded for EPA to apply the court's own standard.

In detailing the mechanics of its novel "cost-effectiveness" test, the Second Circuit initially suggested that the new test permits substitution of a less expensive technology that "achieves essentially the same results as the benchmark" technology. App. 26a. The court, however, then went on to demonstrate its test, confirming that the substitute technology must in fact be capable of achieving, in at least some cases, an identical result as the benchmark technology:

> Assuming the EPA has determined that power plants governed by the Phase II rule can reasonably bear the price of technology that saves between 100–105 fish, the EPA, given a

> choice between a technology that costs $100 to save 99–101 fish and one that costs $150 to save 100–103 fish (with all other considerations, like energy production or efficiency, being equal), could appropriately choose the cheaper technology on cost-effectiveness grounds.
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> * * *
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> [T]he EPA could not choose the cheaper technology on cost considerations under section 316(b) if the EPA had first determined that the power plants could reasonably bear the cost of technology that could save at least 102 fish.

App. 27a–28a.

In interpreting Section 316(b) to permit only this cost-effectiveness test, the Second Circuit conceded that "Section 316(b) does not itself set forth or cross-reference another statutory provision enumerating the specific factors that EPA must consider in determining BTA." See App. 20a; see also *id.*, 23a (same). The court, however, reached its holding in reliance on two principal factors. First, the Second Circuit invoked this Court's pre-*Chevron* decision in *Am. Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 510 (1981), on which the court relied for the proposition that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." App. 25a. The court also relied upon the purported "linguistically similar" wording of Section 316(b)'s BTA standard compared with Section 301's BAT standard, concluding that because—in the Second Circuit's understanding—cost-benefit

analysis is forbidden under the BAT standard, it must be forbidden for BTA as well. See *id.*, 23a

Bypassing what it acknowledged as EPA's general authority to issue variances, the court also intuited a plain meaning in the Act barring EPA from instituting the Rule's site-specific variance program based on a weighing of costs and benefits. In rejecting this particular provision, the court rationalized that the plain language of Section 316(b) does not permit consideration of "the degraded quality of waterways in selecting a site-specific BTA," *i.e.*, the fact that no fish live in a particular body of water is irrelevant to whether BTA must be implemented at a facility drawing water from that source. See App. 58a.

Reasons for Granting the Petition

This case presents three important questions for this Court's review, each of which implicates a split in authority among the courts of appeal, and each of which has implications beyond the case at hand.

First is the question whether EPA has authority, under Section 316(b), to compel the retrofitting of existing cooling water intake structures, a process that would be disruptive of the nation's electric supply and that could cost billions of dollars annually. The Second Circuit, pointing to the NPDES program, found that the agency does have such authority, and in doing so placed itself squarely into conflict with both the DC and Fourth Circuits. Those courts of appeal previously had held, respectively, that the NPDES permitting system applies only to "effluent," *i.e.*, discharge limitations, and that Section 316(b) regulations are not discharge limitations. If not reviewed and reversed, the Second

Circuit's decision will extend EPA authority to a panoply of activities not authorized, or even contemplated, by Congress.

Second, the court of appeals explicitly deferred to EPA on the scope of the agency's own authority. This deference implicates a robust split among multiple circuits on the question whether agency assertions of jurisdiction are entitled to deference, with three other courts of appeal holding, as did the Second Circuit, that such deference is warranted, and at least two courts of appeal holding that it is not.

The third question presented by this case is whether EPA's discretion to weigh costs and benefits in selecting BTA under Section 316(b) is limited to the Second Circuit's rigidly defined, and wholly manufactured, "cost effectiveness" test. The court's refusal to allow EPA to weigh costs and benefits in any other fashion is in direct conflict with the previously authoritative interpretation of Section 316(b) by the First Circuit. Furthermore, the Second Circuit reached its reading of Section 316(b) in part by concluding that EPA's discretion in selecting BAT under Section 301 of the CWA is similarly constrained. That interpretation of Section 301 is squarely in conflict with the Sixth Circuit's reading of the section, inconsistent with other circuit courts' reading of the section, and incongruent with the reading by other courts of similar language in other environmental statutes. The Second Circuit's holding on this question should be reviewed and reversed to preserve the previously settled understanding of EPA's discretion to weigh costs and benefits under both Sections 316(b) and 301 of the Act.

A. The Second Circuit's Holding that EPA Has Authority under Section 402 to Impose Section 316(b) Regulations on Existing Facilities Conflicts with the Decisions of Two Other Circuit Courts of Appeal

The Court should take this case to review the Second Circuit's erroneous conclusion that Section 316(b) allows EPA to require the retrofitting of existing cooling water intake structures. The Second Circuit's reading of Section 316(b) runs counter to Congress's clear intent, is in conflict with decisions from two other courts of appeal, and threatens the stability of the nation's supply of electricity.

1. Nothing in the text of the CWA reasonably can be read to authorize EPA to require the retrofitting of existing cooling water intake structures.

As an initial matter, the plain meaning of Section 316(b) itself limits its application to cooling water intake structures that have yet to be built. This is seen in the Section's reference to "the *location, design, construction, and capacity* of cooling water intake structures." 33 U.S.C. § 1326(b) (emphasis added). The ordinary meaning of this phrase—held together with the conjunction "and"—limits application of Section 316(b) to prospective equipment, *i.e.*, those intake structures not yet constructed, designed, located, and sized to a particular capacity, and does not make sense when applied to existing structures. 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").[3]

There are many ways Congress could have expressed an intent to mandate perpetual retrofitting of major power plant infrastructure. Congress might have omitted the Act's specific reference to the "location, design, construction, and capacity" of cooling water intake structures and instead simply provided that EPA "shall require that cooling water intake structures reflect the best technology available." The Second Circuit, however, cannot attain such a reading of the Act by applying a "blue pencil" to the statute as written. *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 617 (1944).

In concluding that Section 316(b) applies to existing facilities, the Second Circuit relied, in part, on Section 316(b)'s cross-reference to Section 301. Section 301, as the Second Circuit noted, does apply to existing facilities. That, however, is only because Section 301 allows EPA to regulate "*all* point sources of discharge of pollutants" including newly constructed facilities not within a category subject to a more stringent standard of performance under Section 306. See 33 U.S.C. § 1311(e) (emphasis

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[3] Definitions of the other statutory terms are to similar effect. 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 added); 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 added); American Heritage Dictionary (3d ed. 1992) ("Location" means "the act or process of locating.").

added). Given the language of Section 316(b) itself, the most natural reading of Section 316(b)'s cross reference to both Sections 301 and 306 is that Congress intended Section 316(b) requirements to be applied to all new facilities, irrespective of whether a given facility's discharges happen to be regulated primarily under Section 301 or Section 306.

2. That Section 316(b) does not provide EPA authority to require the retrofitting of existing cooling water intake structures is confirmed by the absence of any CWA mechanism for imposing new requirements relating to the intake of water on existing facilities. While the Second Circuit ultimately deferred to EPA's argument that such authority does exist, that conclusion conflicts with earlier decisions from both the D.C. Circuit and the Fourth Circuit.

EPA and the Second Circuit purport to find authority for EPA to impose new requirements on existing cooling water intake structures in the NPDES permitting process of Section 402 of the Act, which requires existing facilities to apply to receive a discharge permit every five years. The limited scope of the NPDES program, however, is evident from the plain language of the Act. Section 402 of the Act, which establishes the NPDES program, states in pertinent part that:

> [t]he Administrator may, after opportunity for public hearing, issue a permit for the *discharge of any pollutant, or combination of pollutants*, notwithstanding section 1311(a) of this title, upon condition that *such discharge* will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior

> to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1342(a)(1) (emphases added). No reference to Section 316(b), 33 U.S.C. § 1326(b), is made in Section 402. Further, no reasonable analysis of its language allows a requirement related to the intake of water under Section 316(b) to be transformed into a requirement relating to the "discharge of any pollutant, or combination of pollutants." This is confirmed by the Section 401 preconstruction permitting process's broader reference to "effluent limitations *and other limitations*," including, where appropriate, Section 316(b) limitations. See 33 U.S.C. § 1341(d) (emphasis added); see also *supra* at 6–7. If Congress intended NPDES permits to cover more than limitations pertaining to "discharges," it knew how to say so.

The Second Circuit dismissed the permitting process's limitation to "discharge" requirements as a mere "textual hiccup." See App. 75a. In glossing over the plain language of the Act, however, the Second Circuit placed itself into conflict with two other courts of appeal.

First, in *Va. Elec. & Power Co.* v. *Costle*, 566 F.2d 446 (4th Cir. 1977), the Fourth Circuit considered whether it possessed jurisdiction to hear appeals from an EPA rulemaking promulgating regulations under Section 316(b), an issue which required the court to consider, *inter alia*, whether Section 316(b) regulations are "effluent limitations" or "other

limitations." In concluding that they are not "effluent limitations," the court explained:

> No contention is raised that the § 316(b) regulations are themselves effluent limitations. *It is obvious that they are not*, for the statute defines "effluent limitation" as any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters. * * * *The regulations involved here are concerned with structures used to withdraw water for cooling purposes, not the discharge of pollutants into the water.*

Id. at 449 (emphases added).

Second, in *Natural Res. Def. Council* v. *EPA*, 859 F.2d 156 (D.C. Cir. 1988), the D.C. Circuit considered challenges to EPA's issuance of regulations governing the NPDES permitting process. Industry petitioners challenged EPA's attempt to implement requirements unrelated to "water quality" through NPDES permits. The D.C. Circuit sided with petitioners, rejecting an argument by EPA that the agency can use NPDES permits "to impose permit conditions *unrelated to effluents*," *i.e.*, discharges. *Id.* at 170 (emphasis added).

Thus, the courts of appeal are divided on the question whether Section 316(b) requirements can be implemented through the NPDES permitting process of Section 402. On the one hand, the Fourth Circuit has concluded that Section 316(b) regulations are not effluent limitations, and the DC Circuit has held that only effluent limitations may be imposed through

NPDES permits. On the other hand, the Second and, arguably, Seventh Circuits have held that NPDES permits can be used to impose Section 316(b) intake requirements on existing facilities.[4] Whether EPA has authority to impose non-effluent requirements, including Section 316(b) requirements, under Section 402 is a matter of broad import, implicating the very purpose and scope of the CWA, and should be reviewed and answered by this Court.

3. The Second Circuit's conclusion that EPA has authority to require the retrofitting of existing cooling water infrastructure is not only incorrect as a matter of law, it poses significant risks to the nation's electric supply. Retrofitting the cooling systems of existing facilities is no simple or inexpensive proposition. With respect to nuclear facilities, EPA concluded that retrofitting with cooling towers, if possible at all, would be a long process of several years, with at least ten months during which the facilities that currently power American homes and businesses could produce no electricity, and after which the retrofits would precipitate compromised electric-system reliability, escalating electricity prices and increases in harmful air emissions. See 69 Fed. Reg. at 41605–07 (App. 254a–263a). EPA conceded that annual costs of the Rule, in excess of potential benefits, could exceed $3.5 billion annually. *See id.* at 41605 (App. 256a).

These serious health, safety and economic impacts not only underscore the need for this Court's review, but confirm the flaws in the Second Circuit's

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[4] See *U.S. Steel Corp. v. Train*, 556 F.2d 822, 850 (7th Cir. 1977), abandoned on other grounds, *W. Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

interpretation of the Act. Section 316 embodies Congress's concern that the protection of fish not impose unreasonable costs on the electric-generating sector and, correspondingly, the essential service those facilities provide. Congress specifically added Sections 316(a) and 316(c) to allow power plants to employ alternative, less stringent thermal limits, if those discharges nonetheless protect a balanced indigenous fish community. See *supra* at 4–5. It beggars belief that Congress, so careful to restrain EPA's hand with respect to thermal discharges, contemplated the retrofitting of the intake structures of that same sector over the very same aquatic impacts.

As this Court has cautioned, Congress "does not * * * hide elephants in mouse holes." *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). If Congress intended to impose on the electric-generating sector a perpetual retrofitting regime, it would have done so more clearly than through a provision limiting EPA's authority to regulating the "location, design, construction, and capacity of cooling water intake structures," or through a licensing provision directed to "the discharge of any pollutant." The Court should take this case to resolve the split among the courts of appeal over EPA's authority through the NPDES permitting program to require retrofitting of power plants for anything other than pollutant-discharge requirements, particularly requirements under Section 316(b).

B. The Second Circuit's Deference to EPA on the Existing Facilities Issue Implicates a Split Among the Courts of Appeal Over Deference to Agency Assertions of Jurisdiction

1. As described above, while the Second Circuit disagreed with Petitioner that the plain language of the Act deprives EPA of jurisdiction to require the retrofitting of existing cooling water intake structures, it did find some ambiguity—*i.e.*, the "textual hiccup"—on this point. The court ultimately concluded that it would defer to EPA's assumption of authority over existing structures. App. 72a ("We conclude * * * that, at the very least, the EPA permissibly interpreted the statute to cover existing facilities and that its interpretation is therefore entitled to deference under *Chevron*"). In deferring to EPA's determination of its own jurisdiction over existing facilities, the Second Circuit placed itself in the middle of a well-developed circuit split on the appropriate level of deference to agencies making determinations of the scope of their own jurisdiction.

2. For decades, this Court's precedent had suggested that courts should not grant agencies deference on the subject of agency jurisdiction. In *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 608 (1944), this Court considered the validity of a regulation passed pursuant to the Fair Labor Standards Act. The Act exempted employees "within the area of production (as defined by the Administrator), engaged in * * * canning of agricultural * * * commodities for market" from certain regulation *Id.* (citing 29 U.S.C. § 210(a)(10)). The Administrator issued a regulation defining "area of production" to include those employees (1) engaged

in canning of goods that were obtained by farms in the immediate locality of the place of employment, and (2) who are employed at an establishment with no more than seven employees. *Id.* at 609–10.

The Court struck down the regulation, holding that the Administrator's attempt to regulate some workers engaged in the canning of agricultural commodities (those at establishments employing more than seven employees) exceeded its authority under the Act. *Id.* at 616–19. In refusing to defer to the Administrator's interpretation of "area of production," the Court explained that "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Id.* at 616.

However, in *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822 (1984), decided earlier in October Term 1983 than *Chevron*, the Court rejected the argument that it should not defer to NLRB's determination that certain labor conduct came within the scope of "concerned activities" protected under the National Labor Relations Act. The respondent in that case had argued that no deference should be granted, because such a determination was "essentially a jurisdictional or legal question concerning the coverage of the Act." *Id.* at 830 n. 7. This Court stated, without citing *Addison*, that it had "never * * * held that such an exception exists to the normal standard of review of Board interpretations of the Act." *Ibid.*

The tension between *Addison* and *City Disposal* has not, since *Chevron*, been conclusively resolved by the Court. The issue, however, has been addressed by individual justices, most notably in *Mississippi*

Power & Light Co. v. *Mississippi*, 487 U.S. 354 (1988). In his concurrence in that case, Justice Scalia stated that "it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Id.* at 381. A three-Justice dissent, on the other hand, contended that "we cannot presume that Congress implicitly intended an agency to fill 'gaps' in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power." *Id.* at 387.

3. The lack of definitive guidance from this Court has led the circuit courts to adopt conflicting rules. See *Newton v. FAA*, 457 F.3d 1133, 1137 (10th Cir. 2006) (noting that "the extent to which such deference should be accorded to an agency's interpretation of its own jurisdictional statute has been a matter of dispute"). The Third, Fourth, and Fifth Circuits, like the Second in the instant case, have deferred to an agency determination of its own jurisdiction. See, *e.g.*, *E.E.O.C.* v. *Seafarer's Int'l Union*, 394 F.3d 197, 201 (4th Cir. 2005); *First Gibraltar Bank, FSB* v. *Morales*, 42 F.3d 895, 901 (5th Cir. 1995); *Puerto Rico Mar. Shipping Auth.* v. *Valley Freight Systs., Inc.*, 856 F.2d 546, 552 (3rd Cir. 1988).

Other circuit courts, however, since *Chevron* and also since *Mississippi Power & Light*, have refused to apply deference—Petitioner believes correctly—to an agency's view of its own jurisdiction. This no-deference rule has been repeatedly employed in both the Seventh and Federal Circuits, see, *e.g.*, *Holderfield* v. *Merit Sys. Prot. Bd.*, 326 F.3d 1207, 1208 (Fed. Cir. 2003), *Northern Illinois Steel Supply*

Co. v. *Secretary of Labor*, 294 F.3d 844, 846–47 (7th Cir. 2002), and has also found some support in the D.C. Circuit, see *Business Roundtable* v. *SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990); *ACLU* v. *FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987).

The question whether agencies should be accorded deference with respect to determinations of their own jurisdiction is an important one even beyond the context of this case and is squarely presented by the decision below. The Court should take the case to resolve that issue in a manner consistent with its earlier decision in *Addison* and the approach adopted by the Seventh and Federal, Circuits.

C. The Second Circuit's Holding Limiting EPA to a Narrow "Cost-Effectiveness" Test under Sections 301 and 316(b) Conflicts with the Holdings of Other Courts of Appeal

The Second Circuit erred not only in holding that EPA has authority to require the retrofitting of existing cooling water intake structures, but also in holding that, in selecting BTA, EPA can only employ the cramped "cost-effectiveness" test made up that court. As with the court's decision on EPA's authority, this decision is incorrect as a matter of law, conflicts with earlier holdings of other courts of appeal, and should be reviewed, and reversed, by this Court.

1. The Second Circuit's suggestion that Section 316(b) has a plain meaning requiring that court's cost-effectiveness test is wholly unfounded. Section 316(b) does not expressly or implicitly provide a standard requiring technology that would save 101–

103 fish for $150, unless another technology would save 99–101 fish for $100, unless the industry as a whole could "reasonably bear" a technology saving 102 fish. See *supra* at 11–12. If anything, the Second Circuit's awkward grappling with how to save a single additional fish reveals not a plain meaning in Section 316(b), but the wisdom of deferring to agency expertise on the highly technical question of BTA selection. Indeed, the Second Circuit's failure to defer to EPA on this technical question is even more striking given the court's deference to EPA on the scope of its jurisdiction, an assuredly non-technical question.

In a world of finite resources on which competing demands are placed, consideration of what is "best" necessarily includes a weighing of factors broader than the Second Circuit's "cost effectiveness" test allows. The court's conclusion that BTA is the technology that saves 102 fish, instead of 99–101 fish, so long as it does not bankrupt the industry, disregards the plain fact that electricity is an essential service, not to mention the sensible possibility that the money spent saving that extra fish might someday be needed for other purposes, *e.g.*, ensuring the reliability of the nation's electricity supply. Clearly, the "best" technology is not necessarily that which leaves industry unduly financially burdened. The decision below underscores the judiciary's unsuitability to manage these highly technical and policy-laden trade-offs in any kind of systematic fashion.

2. Unsurprisingly, the Second Circuit's strained plain-meaning interpretation of Section 316(b) conflicts with the reading given that Section by the only other circuit court to have directly considered

the issue in the past 35 years. In 1979, during the Act's early implementation, the First Circuit considered a challenge by environmental petitioners to EPA's approval of the location and design of a then-proposed cooling water intake structure at the Seabrook nuclear facility in New Hampshire. See *Seacoast Anti-Pollution League* v. *Costle*, 597 F.2d 306 (1st Cir. 1979). In rejecting the challenge, the First Circuit explained:

> The Administrator decided that moving the intake further offshore might further minimize the entrainment of some plankton, but only slightly, and the costs would be "wholly disproportionate to any environmental benefit." * * * Petitioners, wisely, do not argue that the cost may not be considered, and no harm is done by noting that there would be other costs. The legislative history clearly makes cost an acceptable consideration in determining whether the intake design "reflect(s) the best technology available."

Id. at 311 (citation omitted).

What the First Circuit, relatively soon after passage of the Act, considered a "wise" reading of the Act, the Second Circuit, decades later, has deemed a forbidden reading. Clearly one court is not right, and this Court should grant review to resolve the split.

3. The Second Circuit buttressed its reading of Section 316(b) by resorting to Sections 301 and 306. The court concluded that the "best technology available" language in Section 316(b) is "linguistically similar" to the "best available technology" language of Section 301(b)(2)(A), and held that, because a weighing of costs and benefits is

not permitted with respect to BAT, neither is it permitted with respect to BTA. App. 23a.

This analysis based on Section 301 misreads the statutory text. As an initial matter, the Second Circuit's analysis ignores the fact that it is not Section 301(b)(2)(A), but Section 304, that governs consideration of costs and benefits in determining BAT. See *supra* at 6. The interplay of Section 301 and Section 304 demonstrates that the word combination "best," "available," and "technology" does not itself dictate how EPA may consider costs and benefits. If it did, the pertinent language in Section 304 would be mere surplusage, and it is axiomatic that every word in a statute must be read to have some meaning. See *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997).

Moreover, in finding that Section 301 prohibited any weighing of costs and benefits in determining BAT, the Second Circuit based its conclusion principally on the structure and purpose of Section 301 as initially passed in 1972. According to the Second Circuit, the Act envisions a shift from a BPT standard, under which a weighing of costs and benefits is permitted, to a BAT standard, under which such weighing is forbidden. See App. 20a–22a. Congress, however, changed that structure in 1977 precisely to avoid the result the Second Circuit mandates here.

While under the 1972 Act Section 301 treated all effluents alike, the 1977 amendments created a three-tiered regulatory system. First, Congress lowered the control requirement for all "conventional pollutants," namely those that EPA concluded were adequately regulated under the 1972 Act given projected expenditures for additional control

technology, from BAT to "best conventional pollutant control technology." See 33 U.S.C. § 1311(b)(2)(E). Second, the amendments retained the BAT standard for toxic chemicals not implicated here. *Id.* § 1311(b)(2)(C). Finally, and importantly, while Congress retained BAT for the third tier of "nonconventional pollutants," the amendments created a waiver provision based expressly on a consideration of environmental benefit. *Id.* §§ 1311(b)(2)(F); 1311(g).

Viewed in light of the 1977 amendments, it is clear that the Second Circuit's reliance on the supposedly tightening standards of the Act leading up to implementation of the BTA standard does not support the holding below. Under the 1977 Amendments, standards were actually *relaxed* for all but the most dangerous toxic chemicals released into the water, a change enacted for the very purpose of avoiding uneconomic regulation of the sort mandated by the Second Circuit's decision.

4. In addition to misconstruing the actual text of the CWA, the Second Circuit misconstrued precedent from this Court, and in doing so placed itself into conflict with numerous other courts of appeal.

To buttress its holding, the Second Circuit relied upon *dicta* in this Court's decision in *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64 (1980), which the circuit court found "strongly suggests" that a weighing of costs and benefits "is no longer permitted" in determining BAT, and hence (in the Second Circuit's view) BTA. App 23a. The language relied upon by the circuit court is found in the *National Crushed Stone* decision's background section; this Court noted, after describing the factors used by EPA in determining BPT, that "[s]imilar

directions are given the Administrator for determining effluent reductions attainable from the BAT except that in assessing BAT total cost is no longer to be considered in comparison to effluent reduction benefits." 449 U.S. at 71. To reach its holding in the case, however, the Court did not, nor did it need to, reach the question whether the BAT standard forbids any comparison of cost to benefits in selecting BAT.

Because this Court's description of BAT in *National Crushed Stone* was far from a holding, the Second Circuit appears alone in concluding that a comparison of costs and benefits, outside that court's very limited "cost-effectiveness" test, is forbidden for BAT and, by extension, for BTA. Indeed, that court's decision is squarely in conflict with the Sixth Circuit's decision in *BP Exploration & Oil v. EPA*, 66 F.3d 784 (6th Cir. 1995). In BP exploration, the Sixth Circuit stated quite unambiguously:

> the CWA's requirement that EPA choose the best technology does not mean that the chosen technology must be the best pollutant removal. Obviously, BAT * * * must be acceptable on the basis of numerous factors, only one of which is pollution control. NRDC ignores the statutory language, which sets up a 'limited' balancing test. In enacting the CWA, Congress did not mandate any particular structure or weight for the many consideration factors. Rather, it left EPA with discretion to decide how to account for the consideration factors, and how much weight to give each factor. Consequently, NRDC is wrong to contend that EPA is not permitted to balance

> factors such as cost against effluent reduction benefits.

Id. at 796 (internal quotation marks and citations omitted). Similarly, in the pre-*National Crushed Stone* case *Weyerhauser Co.* v. *Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978), the D.C. Circuit concluded that Congress "left EPA with discretion to decide how to account for the consideration factors," such as cost, under Section 301(b)(2)(B), "and how much weight to give each factor." See also *Nat'l Wildlife Fed'n* v. *EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002).

Other circuit courts have rejected arguments that a formal cost-benefit analysis is *required* in selecting BAT under Section 301, but none have done so on the basis that under *National Crushed Stone* a weighing of costs and benefits is impermissible—as one would expect, if indeed this Court had so held. See, *e.g.*, *Rybachek v. EPA*, 904 F.2d 1276, 1290–91 (9th Cir. 1990); *Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 264 (5th Cir. 1988); *Reynolds Metal Co.* v. *United States EPA*, 760 F.2d 549, 565 (4th Cir. 1985).

All told, the Second Circuit's decision below not only misconstrued Section 316(b), it also inflicted collateral damage on Section 301. As numerous courts of appeal have recognized, neither section limits EPA to the extremely narrow cost-effectiveness test approved by the Second Circuit.

5. In addition to directly conflicting with the interpretation of Sections 301 and 316(b) by other courts of appeal, the Second Circuit's reading of those sections is also inconsistent with the interpretation given by courts of appeal to similar language in other environmental statutes.

For example, in *Gulf Restoration Network* v. *United States Dept. of Trans.*, 452 F.3d 362 (5th Cir. 2006), the Fifth Circuit considered a licensing provision in the Deepwater Port Act requiring a demonstration that the port "will be constructed and operated using best available technology, so as to prevent or minimize adverse impact on the marine environment," *id.* at 371, quoting 33 U.S.C. § 1503(c), language quite similar to that in Sections 301 and 316(b). There, as here, environmental petitioners complained that the Secretary of Transportation erred in permitting use of a technology providing lesser environmental benefits because it had "lower operating costs"; the Secretary responded that the statutory language was "best read to require construction that reasonably minimizes adverse impact to a reasonable degree given all relevant circumstances," a reading of the statute upheld by the Fifth Circuit. See *id.* at 372.

Likewise, in *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), the D.C. Circuit considered an EPA rule implementing a provision in the Clean Air Act calling for "reasonable progress toward meeting the national visibility goal" of the "prevention of any future, and the remedying of any existing, impairment in visibility." *Id.*, at 3. Under the Act, state authorities were required to consider five factors in deciding what "best available retrofit technology," or "BART," controls to place on a source:

> The costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may

> reasonably be anticipated to result from the use of such technology.

Id., at 5.

EPA's rule, at its core, required the adoption of BART by individual point sources to remedy haze problems in distant areas, even absent a showing that adoption of BART by the particular point source would reduce the haze. The D.C. Circuit rejected this rule as inconsistent with the Act. After noting that "the factors were meant to be considered together by the states," the court negatively observed that "[u]nder EPA's take on the statute, it is therefore entirely possible that a source may be forced to spend millions of dollars for new technology that will have no appreciable effect on the haze in any Class I area." *Id.*, at 6–7.

6. To support its plain-meaning analysis, the Second Circuit also cited this Court's decision in *Donovan* for the proposition that an agency can weigh costs and benefits only where Congress has *explicitly* provided for such an approach. This Court's *Donovan* opinion, however, said no such thing. In *Donovan*, petitioners argued that cost-benefit analysis was *required* under a section of the Occupational Safety and Health Act providing "[t]he Secretary * * * shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." *Donovan*, 452 U.S. at 506–08. While this Court did observe that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute," *id.* at 510, that was in the context of determining whether Congress had

intended to require cost-benefit analysis, not whether Congress intended to leave the issue to agency discretion. What this Court said in *Donovan* concerning discerning congressional intent to *require* cost-benefit analysis is wholly beside the point.

Even if the majority opinion in *Donovan* did stand for the principle drawn from it by the Second Circuit, that principle would be clearly inconsistent with this Court's subsequent analysis in *Chevron* and should be revisited. Under *Chevron*, statutory ambiguity connotes a gap to be filled by the agency, not a court. See *Chevron*, 467 U.S. at 843–44. Thus, the Court should in any event review this case to clarify the relationship between *Chevron* and *Donovan*.

7. Unless reviewed and reversed, the Second Circuit's holding that Section 316(b) forbids a weighing of costs and benefits threatens to impose billions of dollars in costs on the electric-generating sector for no appreciable benefit. Indeed, because the Second Circuit reached this result by misreading the BAT standard applicable to all industries under Section 301, the Second Circuit's decision has the potential to impose significant, unnecessary burdens on the entire economy.

The Second Circuit's conclusion that Congress intended to mandate a "technology forcing" policy for the benefit of fish finds no support in the text of the Act. Indeed, Section 301(g) of the Act requires EPA to permit facilities to operate under the less stringent BPT standard, rather than BAT, as long as doing so will not interfere with "the protection and propagation of a balanced population of shellfish, fish, and wildlife." 33 U.S.C. § 1311(g)(1), (g)(2)(C). Similarly, EPA is required to provide point sources with variances from thermal discharge requirements

under Section 316(a) so long as the relaxed requirement "will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife." 33 U.S.C. § 1326(a).

These provisions, particularly in light of their legislative history, make clear that the CWA does not reflect a Congressional obsession with saving every aquatic organism possible; the Act is not a legislative analog to *Finding Nemo*. Rather, when it comes to aquatic life, Congress repeatedly directed EPA to pursue reasonable policies. EPA's limited weighing of costs and benefits in Section 316(b) is consistent with that theme; the Second Circuit's approach is not. Simply put, the sheer implausibility of the Second Circuit's reading of congressional intent confirms the textual evidence of EPA discretion in deciding how to weigh costs and benefits.

In summary, the Second Circuit interpreted Section 316(b) in a manner that is facially implausible and in direct conflict with the First Circuit's interpretation of that Section. It interpreted Section 301 in a manner conflicting with at least the Sixth Circuit's reading of that section. Review and reversal of the Second Circuit's interpretations of Sections 316(b) (and Section 301) is not only merited as a matter of law, but, given the disruption retrofitting of existing power plants would entail for public safety and the national economy, is also a matter of unquestionable importance.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHUCK D. BARLOW
ENTERGY SERVICES, INC.
308 E. Pearl Street
Jackson, MS 39201
(601) 969-2542

ELISE N. ZOLI
Counsel of Record
KEVIN P. MARTIN
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for Petitioner

November 2, 2007