Major D'oh: OIRA's Influence over the EPA's Regulatory Decision Making in Riverkeeper, Inc. v. EPA

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I. INTRODUCTION

Russ Cargill [Head of the EPA]: “When you made me head of EPA you were applauded for appointing one of the most successful men in America to the least successful Agency in Government. And why did I take the job? Cause I’m a rich man who wanted to give back. Not the money. But something. So here’s our chance to kick some ass for mother earth.”

President A. Schwarzenegger: “I’m listening.”

Mr. Cargill: “I’ve narrowed the choices down to five unthinkable options. Each will cause untold misery—” (interrupted)

President: “I pick number 3!!!”

Mr. Cargill: “You don’t even want to read them first?”

President: “I was elected to lead, not to read. NUMBER 3!!”

Recent political debacles involving poor executive decisions have left Americans increasingly skeptical about federal officials’ decision-making abilities. All farce aside, the irritating truth remains: the current executive branch’s decision-making process has
often revealed itself as nothing more than a display of capital conservation and presidential muscle-flexing.

A recent example of questionable decision making arose in Riverkeeper, Inc. v. EPA (Riverkeeper II), a case involving EPA regulations under the Clean Water Act (CWA or Act). The CWA was enacted in 1977 and reflected a growing public concern about the United States' waterways. The Environmental Protection Agency (EPA) is the sole authority responsible for administering the Act. Since its inception, courts have questioned the EPA's ability to promulgate effective regulations under the Act.

The Second Circuit's recent decision in Riverkeeper II addressed a challenge from environmental, state, and industry petitioners regarding several EPA provisions set forth under § 316(b) of the CWA. The Second Circuit remanded a majority of the provisions for revision, finding that they were not in compliance with the plain text of the statute, lacked sufficient analytical support from the administrative record, and impermissibly used cost-benefit analysis. Several critics have suggested that both the lack of analytical support and the improper use of cost-benefit analysis are direct corollaries of closed door meetings, during which the Office of Internal Regulatory Affairs (OIRA) impermissibly interfered with the EPA's regulatory duties.

This Note focuses on the Second Circuit's decision in Riverkeeper II. Part II of this Note recounts the facts of Riverkeeper II, including the arguments presented and the Second Circuit's hold-
II. Facts

As the court opined quite bluntly, "[t]his is a case about fish." Power plants and industrial organizations withdraw water from rivers, lakes and other waterways of the United States to cool their energy-producing facilities. This procedure extracts billions of gallons of water per day, thereby impinging (trapping large organisms against grills or screens) and entraining (sucking smaller organisms into the cooling device) billions of aquatic organisms per year.

Riverkeeper, Inc., which is comprised of environmental groups, states, and industry associations, petitioned for review of an EPA rule promulgated pursuant to the CWA. This rule (the Rule) regulates cooling-water intake structures at existing and developing power plants. Under the Rule, cooling water intake

11. For a further discussion of the facts of Riverkeeper II, see infra notes 16-29 and accompanying text.
12. For background information of Riverkeeper II, see infra notes 30-98 and accompanying text.
13. For a narrative analysis of Riverkeeper II, see infra notes 99-145 and accompanying text.
14. For a critical analysis of Riverkeeper II, see infra notes 146-63 and accompanying text.
15. For a further discussion of the potential impact of Riverkeeper II, see infra notes 164-71 and accompanying text.
17. See id. (introducing process by which power plants and industrial operations withdraw water for cooling facilities).
18. See id. (establishing environmental effects that cooling water technologies have on aquatic organisms).
19. See id. at 90 (discussing consolidated petitions for review, which address final EPA promulgated rule regarding large, existing power plants' withdrawal of water).
20. See 40 C.F.R. § 125.91-99 (suspended effective July 9, 2007) (establishing requirements and definitions applicable to cooling water intake structures for Phase II existing facilities).
21. See id. (establishing rule made pursuant to CWA).
structures must adopt the “best technology available” (BTA) to minimize adverse environmental impact.\textsuperscript{22}

The state and environmental petitioners in \textit{Riverkeeper II} challenged the Rule on the following grounds: (1) the EPA generally exceeded its authority in rejecting closed-cycle cooling and substituting a suite of technologies as the BTA, and more specifically, the Agency’s rejections do not deserve deference because they were improperly made at the direction of OIRA; (2) the EPA exceeded its authority by allowing a ranged standard of acceptable compliance instead of setting a numeric standard; (3) restoration measures are not a proper means of compliance under the CWA; (4) the EPA impermissibly construed the statute to allow cost-cost and cost-benefit analysis; (5) the provisions concerning compliance via mere establishment of a “Technology Installation and Operation Plan” (TIOP) is unauthorized and violated notice and comment requirements; and (6) the EPA has misclassified new constructions as existing facilities, contrary to the definitions previously established, without providing adequate periods for notice and comment.\textsuperscript{23}

The industry petitioners in \textit{Riverkeeper II}, on the other hand, challenged the Rule on the following grounds: (1) the CWA section in question does not apply to existing facilities; (2) the record insufficiently supports the EPA’s definition of adverse environmental impact; (3) the record insufficiently supports the EPA’s zero entrainment survival assumption; (4) the EPA did not account for the unfair effects of the Rule on nuclear plants; (5) the Rule gave inadequate notice of the provision regarding independent suppliers of cooling-water; and (6) the EPA gave improper notice regarding the definition of Great Lakes.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{22} See \textit{Riverkeeper II}, 475 F.3d at 90 (discussing rule made pursuant to CWA).
\item \textsuperscript{23} See id. at 96 (identifying state and environmental petitioners’ arguments).
\item \textsuperscript{24} See id. (presenting arguments of industry petitioners, Entergy Corporation, the Utility water Act Group and PSEG Fossil LLC and PSEG Nuclear LLC). This Note mainly will focus on the environmental and state petitioners’ arguments. The industrial petitioners’ arguments amounted to minimal substantive discussion. The court rejected Entergy’s argument that the EPA lacked authority to apply § 316(b) to existing facilities and deferred to the EPA’s reasonable interpretation pursuant to \textit{Chevron U.S.A., Inc. v. Natural Res. Def. Council}. Chevron v. Natural Res. Def. Council, Inc. 467 U.S. 837, 842-43 (1984); see also \textit{Riverkeeper II}, 475 F.3d at 123. The court found \textit{Riverkeeper I} controlling and denied PSEG’s definition of “Adverse Environmental Impact” argument, finding the argument substantially similar to those previously raised and rejected in \textit{Riverkeeper I}. \textit{See Riverkeeper I}, 475 F.3d at 124. The court rejected the industrial petitioners’ argument regarding the EPA’s zero entrainment survival assumption and deferred to the EPA’s judgment. See id. at 127. The court rejected Entergy’s contention that the Phase II rule is arbitrary and capricious because it places disproportionate impact on nuclear plants. See id. at 128. The court held the EPA failed to give proper notice with
\end{itemize}
In response to the environmental and industrial petitioners’ claims, the Second Circuit found that cost-benefit analysis could not be the single deciding factor in choosing the BTA.\textsuperscript{25} The Second Circuit remanded the site-specific, cost-cost variance, and TIOP provision due to an inadequate period for notice and comment.\textsuperscript{26}

The Second Circuit also remanded the provisions that set performance standards as ranges without demanding best efforts in reducing environmental impact, allowed compliance through restoration measures, and authorized site-specific, cost-benefit variances.\textsuperscript{27} On remand, the Second Circuit directed the EPA to use the definition supplied under Phase I for existing facilities, or if amending the definition, to allow a proper period for notice and comment.\textsuperscript{28} Finally, the Second Circuit dismissed the challenge to the definition of Great Lakes for lack of jurisdiction.\textsuperscript{29}

\section*{III. Background}

\subsection*{A. The EPA and CWA}

The EPA was created in 1970, by a presidential reorganization order.\textsuperscript{30} As an independent agency, the EPA’s main purpose was to

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\item \textit{See id. at 129}; \textit{see also} \textit{Nat'l Black Media Coal. v. Fed. Commc'n Comm'n}, 791 F.2d 1016, 1022 (2d Cir. 1986) (stating final rule need not exactly replicate proposed rule in Notice, \textit{but must be logical outgrowth of proposed rule}). Finally, the court dismissed UWAG’s definition of “Great Lakes” argument for lack of jurisdiction. \textit{See Riverkeeper II}, 475 F.3d at 130.
\item \textit{See Riverkeeper II}, 475 F.3d at 130 (remanding EPA’s determination of best technology available for clarification). Cost can be used as a factor in choosing the best technology available, however, it can only be used in a limited way. \textit{Id.} at 99.
\item \textit{See id.} at 130-31 (remanding cost-cost and TIOP provisions because failed to give proper notice).
\item \textit{See id.} at 131 (remanding provisions that court found impermissibly constructed under statute).
\item \textit{See id.} at 131 (holding period is necessary for notice and comment). We remand as based on impermissible constructions of the statute those provisions that (1) set performance standards as ranges without requiring facilities to achieve the greatest reduction of adverse impacts they can; (2) allow compliance through restoration measures; and (3) authorize a site-specific cost-benefit variance as impermissible under the statute. \textit{See id.}
\item \textit{See id.} at 131 (dismissing “Great Lakes” definition challenge). There was no evidence present that the EPA had issued a formal and binding definition of “Great Lakes.” \textit{Id.} at 130. Relying on the Seventh Circuit’s holding in \textit{Am. Paper Inst., Inc. v. U.S. Envtl. Prot. Agency}, the court held that absent “a formal and binding rule or some other final agency action, judicial review is not available at this time.” \textit{Riverkeeper II}, 475 F.3d at 130; \textit{see also} \textit{Am. Paper Inst., Inc. v. U.S. Envtl. Prot. Agency}, 882 F.2d 287, 289 (7th Cir. 1989).
\item \textit{See Jerry S. Riggs, Note, Arc Ecology v. U.S. Dept’ of the Air Force Anchors Away: The Potential for Non-Extraterritorial Statutory Application to Contaminate the Environ-
lead an attack on environmental pollution. During the 1980s, the EPA moved from a sedentary role of liaison between Congress and the public to a more aggressive role as a rule creator and enforcer.

Increasing public concern about water quality and pollution led to the enactment of the Federal Water Pollution Control Act Amendments (FWCPA). In 1977, the FWPCA became known as the Clean Water Act (CWA or Act). The CWA structured the regulation of pollutant discharges and authorized the EPA to implement various pollution control standards.

B. §§ 316(b), 301 and 306 of the CWA

The Clean Water Act utilizes technology-based regulation to clean up national waterways and control pollution. Under CWA § 316(b), the EPA sets technological standards for cooling-water devices, which take in water to cool power plant facilities. Section 316(b) reads:

Any standard established pursuant to section 1311 of this title [CWA section 301] or section 1316 of the title [CWA section 306] and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.
Section 316(b) establishes that cooling-water intake structures must adopt the "best technology available for minimizing adverse environmental impact" (BTA). Provisions cross-referenced in § 316(b) direct the EPA to issue rules regulating pollution discharge from new and existing point sources. A "point source" is defined as "any discernible, confined and discrete conveyance...from which pollutants are or may be discharged."

Cross-referenced § 301 requires the EPA to set effluent limits (wastewater limits) for existing sources based on "the best practicable control technology currently available" (BPT). By 1989, existing source effluent limitations were supposed to be based on the more stringent "best available technology economically achievable" (BAT) standard. Cross-referenced § 306 requires the EPA to establish "standards of performance" to control pollutant discharge.

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39. See id. (establishing "best technology available" standard).

40. See id. (discussing facilities to be regulated).


42. See 33 U.S.C. § 1311(b)(1)(A) (establishing best practicable control technology currently available). Section 1311(b)(1)(A) reads:

[N]ot later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title.

Id.

43. 33 U.S.C. § 1311(b)(2)(A) (describing best technology available). Section 1311(b)(2)(A) reads:

[F]or pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) of this title, such which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title.

Id.
from new sources based on “the best available demonstrated control technology.”

C. Regulations Pursuant to the CWA

In 1977, the Fourth Circuit remanded, on procedural grounds, the EPA’s initial attempt to regulate pursuant to § 316(b). Many years passed without new rules, and environmental groups sued the EPA, winning a consent decree. In adherence to the consent decree, the EPA adopted a three-phase timetable to issue pollution discharge regulations. Phase I governs new facilities, Phase II – the Rule in question - covers larger, existing power plants, while Phase III aims to regulate existing power plants not addressed in Phase II, as well as other industrial facilities.

In December 2001, the EPA issued its first rule for Phase I, to govern cooling-water intake structures for new facilities. The Phase I rule established two tracks of compliance for cooling-water intake structures: Track I sets national intake capacity and velocity standards and facilitates closed-cycle cooling technology; Track II provides that alternative technologies may be used, as long as the facility can demonstrate “that the technologies employed will reduce the level of adverse environmental impact” to a level comparable to the capacity and velocity standards in Track I.

44. See 33 U.S.C. § 1316(a)(1) (noting standard). This standard “reflects the greatest degree of effluent reduction”. Id. For a further discussion of § 1316(a)(1), see supra notes 37–40 and accompanying text.

45. See Appalachian Power Co. v. Train, 566 F.2d 451, 459 (4th Cir. 1977) (remanding EPA’s regulation on procedural grounds). In Appalachian Power, petitions were filed for judicial review of the EPA’s regulation concerning cooling water intake structures. Id. at 454. The fourth circuit held that a determination of the regulation on the merits was not presently available due to procedural errors and would have constituted an advisory opinion prohibited by Article III of the Constitution. Id. at 459. The court remanded to the EPA in part and denied petitioners’ claims in part. Id.


48. See Riverkeeper II, 475 F.3d at 90 (citing Riverkeeper, 2001 WL 1505497, at *1) (stating role of phase rules).


decision involving Riverkeeper, Inc., Riverkeeper, Inc. v. United States EPA (Riverkeeper I), environmental, state and industry groups challenged Phase I of the Rule. The Court found the second restoration option inconsistent with § 316(b), holding the EPA impermissibly exceeded its authority in allowing compliance with Phase I via restoration measures.

D. Phase II

In July 2004, the EPA issued a final Rule regulating cooling-water intake structures at large existing power plants. Phase II covers existing facilities that are point sources and, as their primary activity:

both generate and transmit electric power [or]. . . generate and sell electric power for transmission [or]. . . propose to use cooling water intake structures with a total design intake flow of 50 million gallons per day or more [and]. . . use at least 25 percent of water withdrawn exclusively for cooling purposes.

Phase II has five compliance alternatives: (1) using a closed cycle re-circulating system or reducing maximum through-screen

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Federal Regulations establishes the compliance alternatives under the Phase I Rule. 40 C.F.R. § 125.84. Under § 125.84(a)(1), the owner or operator of a new facility must comply with Track I or Track II, which are respectively detailed in subsections (b)-(e). 40 C.F.R. § 125.84(b)-(e).

51. 358 F.3d 174 (2d Cir. 2004).

52. Id. at 183 (stating petitioner’s claims). The court entertained claims similar to claims in the current case. See id. The environmental petitioners asserted that the EPA Phase I provisions conflicted with the CWA in that: (1) Track II provisions set lower standards than Track I provisions; (2) Variance provisions were precluded under the statute; and (3) dry cooling is the BTA. Id. Industry petitioners had eight claims that challenged the Phase I Rule as being overly flexible, vague, contradictory and unsupported by the statute. Id.

53. See id. at 189 (holding that restoration option was inconsistent with § 1326(b) of the United States Code because restoration had nothing to do with cooling water intake structure’s location, design, construction, or capacity).

54. See National Pollutant Discharge Elimination System - Final Regulations to Establish Requirements for Cooling Water Intake Structures as Phase II Existing Facilities, 69 Fed. Reg. 41,576 (July 9, 2004) (to be codified at 40 C.F.R. pt. 125) (establishing Phase II rule, which covers existing facilities at point sources that primarily generate and transmit or generate and sell electricity).

55. 40 C.F.R. § 125.91 (suspended July 9, 2007). This section is applicable to ‘existing facilities’ that are point sources. See id. The definition of “Existing Facility” and other special definitions are supplied in § 125.93. 40 C.F.R. § 125.93 (suspended July 9, 2007). For a further discussion of point source, see supra note 41 and accompanying text.
design intake velocity to 0.5 feet per second;\(^{56}\) (2) demonstrating that existing facilities meet specified performance standards and/or restoration requirements;\(^{57}\) (3) demonstrating that the applicant has selected, has installed, or will install and operate an approved technology pursuant to performance standards and/or restoration requirements;\(^{58}\) (4) demonstrating that the applicant has installed, or will install, and properly operate and maintain technology in accordance with § 125.99(a) or (b);\(^{59}\) or (5) demonstrating that the applicant has selected, installed and properly operated or will install and properly operate technologies, operational measures and/or restoration measures under a site-specific determination of best technology available.\(^{60}\)

The final Rule provided compliance through a range of acceptable performance standards, as opposed to a single, numeric performance standard.\(^{61}\) Additionally, the Rule allowed for site-specific compliance variances.\(^{62}\) These alternatives allow cost-cost or cost-benefit analysis in complying with performance standards.\(^{63}\) The cost-cost alternative allows facilities to weigh the costs of compliance against the costs considered by the Administrator.\(^{64}\) The cost-benefit alternative allows facilities to weigh the costs against the benefits of compliance.\(^{65}\) In either circumstance, if there is a finding that BTA technology costs greatly exceed the Administrator's

\(^{56}\) See 40 C.F.R. § 125.94 (suspended July 9, 2007) (iterating compliance measures through closed cycle cooling or reduction of intake velocity).

\(^{57}\) See id. (stating compliance through existing measures).

\(^{58}\) See id. (allowing facility compliance with national standards to be based on facility's compliance with Technology Installation and Operation Plan's requirements).

\(^{59}\) See id. (elaborating compliance alternative which cites § 125.99). Section 125.99 outlines technologies, such as submerged cylindrical wedge-wire screen technology and its alternatives, that constitute approved design and construction technologies under § 125.94(a)(4). See 40 C.F.R § 125.99 (suspended July 9, 2007).

\(^{60}\) See Riverkeeper Inc. v. U.S. Envtl. Prot. Agency (Riverkeeper I), 475 F.3d 83, 93-94 (2d Cir. 2007) (discussing proposed compliance alternatives in title 40, § 125.94(a)(5) of Code of Federal Regulations pursuant to Phase II Rule). Restoration measures should yield ecological benefits substantially similar to results under national performance standards. See id. at 94; see also 40 C.F.R § 125.94(a)(5).


\(^{62}\) See Riverkeeper II 475 F.3d at 94 (discussing compliance variances allowed under § 125.94(a)(5) of Code of Federal Regulations).

\(^{63}\) See id. (discussing cost-cost and cost-benefit alternatives).

\(^{64}\) See id. (citing 40 C.F.R. § 125.94(a)(5)(i)).

\(^{65}\) See id. (citing 40 C.F.R. § 125.94(a)(5)(ii)).
costs or benefits, then there is a site-specific determination of BTA as close as practicable to national performance standards.66

The EPA’s initial Rule under the CWA did not allow for cost-cost or cost-benefit analysis and instead required state-of-the-art technology for facilities most damaging to the environment.67 The initial Rule instructed fifty-nine of the largest plants in ecologically sensitive areas to implement a closed-cycle cooling system, which was considered the BTA.68 The Rule was subject to the Office of Information and Regulatory Affairs’ (OIRA) review, and the mandatory BTA requirement was absent after closed-door meetings between the EPA and OIRA.69

E. The President, OMB, OIRA and Agency Relationships

OIRA was created in 1980 under the Paper Reduction Act, which authorizes OIRA to reduce burdens associated with federal government and private entity paperwork.70 Two Executive Orders, President Reagan’s 12,29171 and President Clinton’s 12,866,72 drastically changed the scope of OIRA’s authority. Executive Order 12,291 required OIRA oversight and application of cost-benefit analysis to agency regulations exceeding one hundred million dollars.73 Despite potential grounds for conflict, 12,291 specifically

66. See id. (discussing factors to be weighed under each variance).
68. See id. at 1105 n.47 (requiring fifty nine of the most damaging plants to adopt closed-cycle cooling).
69. See id. (citing 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)).
73. See Exec. Order No. 12,291 § (2)(b), 46 Fed. Reg. 13,193 (Feb. 17, 1981) (stating agency regulations costing more than one hundred million dollars are subject to cost benefit analysis); see also Brief of Environmental and State Petition-
states that it does not displace agencies’ statutory duties. During the Department of Justice’s review of the order, the government contested assertions that 12,291’s enactment unconstitutionally interfered with agencies’ obligations under established law and congressional enactments:

The Order does not employ the Director... 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...

In 1993, Executive Order 12,886 superseded 12,291 but closely mirrored its predecessor, similarly requiring cost-benefit analyses and OIRA oversight. OIRA used 12,886 to become proactively involved in agency rulemaking proceedings. In 2001, the Administrator of OIRA informed the heads of several federal agencies that it would disapprove regulations that did not comply with cost-benefit analysis outlined in 12,866. The Administrator applied this policy with immediacy, and between 2001 and 2002, twenty-four of twenty-five regulatory provisions concerning environmental, health and safety concerns were weakened under OIRA involvement.
President Bush’s Executive Order 13,422 was released on January 18, 2007, and further increased White House control of agency regulation. This newest Order requires each agency to have a regulatory policy office run by political appointee, who will supervise rule development in compliance with cost-benefit framework and presidential priorities.

In a separate action on April 4, 2007, President Bush, via recess appointment, named Susan E. Dudley OIRA Administrator, despite prior opposition to her nomination and lack of committee support for a vote during the 109th Congressional meeting. Susan Dudley’s past record illustrates strong views on governmental regulation and substantial ties to industry executives. She is the first OIRA Administrator not to receive Senate confirmation. Her first notable public action was to release a memo revising executive branch policies on agency risk analysis, which trumped use of cost-benefit analysis in OIRA’s decision making process.

F. Judicial Review of Agency Regulation under *Chevron* and *Mead*

Traditionally, under the Supreme Court’s holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*), sub-rules resulted in weakening regulation in twenty four out of twenty five cases); see also Heinzerling, *supra* note 67, at 5 (citing Driesen article).


82. See *id.* (noting role of department head under order).


84. See *id.* (discussing concerns with Susan Dudley). OMB Watch and Public Citizen released a report that casts Dudley as ideologically opposed to government regulation. *Id.* In support, they cite her emphasis on the free-market’s ability to self-correct and her support of the senior-death discount, which devalues older individual’s lives. *Id.* Dudley also worked with the Mercatus Center in the past couple of years, which is an anti-regulatory think tank. *Id.* They contend that she might use OIRA as a vehicle in satisfying corporate interests. *Id.*

85. See *id.* (discussing Dudley’s recess appointment). This appointment circumvented the Senate’s normal confirmation process and was widely criticized. *Id.*


Substantive judicial review of agency regulations consists of two steps. First, the court must examine the EPA's regulation in light of the statute. If the court concludes that Congress has "unambiguously expressed" its meaning and its intent is clear, the court must give effect to Congress' intent. If the statute is silent or ambiguous with respect to the specific issue, however, the question for the court is whether the "agency's answer is based on a permissible construction of the statute." If the agency followed Congress' intent or permissibly construed the statute, the court will review the regulation and rulemaking record, but the court will give deference to the agency, unless it finds the regulation arbitrary, capricious, or manifestly contrary to the statute.

The deference allowed under *Chevron*, however, is not necessarily applicable to every agency statutory interpretation. In 2001, the Supreme Court departed from its stronger deferential stance in *Chevron*, in deciding *United States v. Mead Corporation (Mead)*. In *Mead*, the Supreme Court noted that the degree of deference given to an agency's interpretation of an ambiguous statute can turn on a wider array of factors, such as "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."
Finally, the court must review the procedural aspects of rule promulgation pursuant to the Administrative Procedure Act (APA). The APA requires published notice of proposed rules in the Federal Register, and a period for interested parties to comment on proposed rules. Noncompliance with these provisions results in remand to the promulgating agency.

IV. NARRATIVE ANALYSIS

A. Use of Cost in Determining “Best Technology Available”

State and environmental petitioners contended that the EPA exceeded its authority in rejecting closed-cycle cooling as the BTA for existing facilities because the EPA’s interpretation utilized impermissible cost analysis, which conflicted with the CWA’s plain meaning. Specifically, environmental petitioners argued that the rejection did not merit deference because the decision was made under improper OIRA influence. Closed-cycle cooling was an integral part of the original Rule proposal and the rejection of closed-cycle cooling allegedly occurred during OIRA’s review process. Environmental petitioners sought to supplement the record with review documents indicating these impermissible changes.

The Second Circuit noted that § 316(b) does not establish determinative factors that the EPA should consider in arriving at the

95. See Riverkeeper II, 475 F.3d at 96 (stating procedural standards of review under APA).
97. See id. at § 553(c) (requiring interested parties an opportunity for comment).
98. See Riverkeeper II, 475 F.3d at 96 (citing Sprint Corp. v. Fed. Commc’n Comm’n, 315 F.3d 369, 371 (D.C. Cir. 2003)). “Because the [agency] failed to provide adequate notice and opportunity to comment, we grant the petition and remand the case to the [agency].” Sprint Corp., 315 F.3d at 371.
99. See Riverkeeper II, 475 F.3d at 96 (stating state and environmental petitioners’ argument against EPA rejection of closed-cycle cooling). The court noted the most significant challenge raised addressed the rejection of closed cycle cooling and adoption of the suite of technologies, based largely on improper cost considerations. See id. at 97.
100. See id. at 105 (claiming EPA’s rejection of closed cycle cooling was made at direction of OMB). Environmental petitioners argued that rejection of closed cycle cooling for the largest facilities was an attempt to maximize net economic benefits. See id. at 101.
101. See id. at 105 (outlining petitioners’ arguments concerning OIRA).
102. See id. (addressing environmental petitioners’ request to supplement record with OMB review documents).
BTA.¹⁰³ These determinative factors, however, can be reasonably deduced from its textual similarity to the previously established standard, “the best available technology economically achievable” (BAT).¹⁰⁴ The shift from the original “best practicable control technology currently available” (BPT)¹⁰⁵ standard, to the more stringent BAT standard, illustrated Congressional intent to adopt a cost-effective, as opposed to a cost-benefit, analytical framework under the CWA.¹⁰⁶ Cost-benefit analysis is not permitted under the BAT standard, and this preclusion makes it reasonable to find that this analysis is similarly barred under § 316(b).¹⁰⁷ Regardless of intent, the Second Circuit found the plain text of § 316(b) to require the best technology available, not the most economic.¹⁰⁸

Citing its analysis in Riverkeeper I, the Second Circuit provided that the Agency can consider cost, but not as a primary consideration.¹⁰⁹ Cost can only be used to determine whether technology can be reasonably borne by the industry, or in application of cost-effectiveness analysis.¹¹⁰ These roles should be narrowly construed

¹⁰³. See id. at 97 (noting § 316(b) does not explicitly set forth factors for consideration of “best technology available”). In consideration of petitioners’ challenge, the court noted the necessity of determining how the EPA can consider cost in selecting BTA. See id.

¹⁰⁴. See Riverkeeper II, 475 F.3d at 98 (discussing linguistic similarity between BAT standard of § 301 of CWA and standard under § 306, which applies to new sources).


¹⁰⁶. See Riverkeeper II, 475 F.3d at 98 (noting cost-benefit analysis inherent in Congress’ promulgation of environmental regulations precludes use of cost-benefit analysis as major factor in choosing appropriate technology). The court noted the difference between the means and ends of each analysis: “[c]ost-benefit analysis, like BPT, compares the costs and benefits of various ends, and chooses the end with the best net benefits. By contrast, cost-effectiveness considerations, like BAT, determine which means will be used to reach a specified level of benefit that has already been established.” See id.

¹⁰⁷. See id. (discussing court’s rejection of cost-benefit analysis under § 316(b)).

¹⁰⁸. See id. at 98-99 (concluding that plain language of § 316(b) indicates definition of best technology available does not allow for cost-benefit analysis). In establishing BTA, Congress did not expressly permit the agency to consider technological cost in light of adverse environmental impact. See id. at 99.

¹⁰⁹. See id. at 99 (stating cost should not be primary factor in adopting technology).

¹¹⁰. See id. at 99-100 (establishing permissible ways EPA may consider cost). The EPA’s technology determination should be based on optimally performing Phase II facilities first, after which factors such as cost can be considered in finding less expensive technologies yielding equal results. See id. at 99-100.
and conjunctively used, to find a technology-driven, as opposed to a cost-driven, result.\textsuperscript{111} The Second Circuit found that the record failed to establish the EPA's application of any reasoned analyses in reaching its technology conclusions.\textsuperscript{112} The court found it "impossible to judge whether the performance of these technologies is essentially the same as the performance of closed-cycle cooling, or whether they simply are cheaper per percentage point of reduction in entrainment and impingement mortality."\textsuperscript{113} Accordingly, the Second Circuit remanded the Rule, stating that the EPA needed to justify its conclusion that choosing a suite of technologies as BTA was sufficiently reached.\textsuperscript{114}

This marked a bittersweet victory for the environmental petitioners.\textsuperscript{115} Since the Second Circuit generally granted the petitioners' challenge to the EPA's BTA determination, the Court forewent addressing environmental petitioners' arguments concerning OIRA involvement.\textsuperscript{116}

\section*{B. Performance Standards Expressed as Ranges}

The Second Circuit found that performance standards could be expressed as ranges.\textsuperscript{117} The EPA, however, must require facilities to minimize adverse environmental impact to the best possible

\begin{itemize}
  \item \textsuperscript{111} See \textit{Riverkeeper II}, 475 F.3d at 99 (discussing difference between technology-driven and impermissible cost-driven analysis). Selection of BTA on cost-benefit analysis is impermissibly cost-driven, while selection based partially on cost-effectiveness analysis can remain technology driven. \textit{Id.} at 99; \textit{see also} Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 822 F.2d 104, 123 (D.C. Cir. 1987) (holding CWA's most salient characteristic is that it is technology driven).
  \item \textsuperscript{112} See \textit{Riverkeeper II}, 475 F.3d at 102 (finding unclear whether EPA improperly used cost-benefit analysis). The court noted as important the omission of the word "practicable" under the more stringent BAT standard. \textit{Id.} This omission precludes the use of cost-benefit analysis, yet the EPA interpreted the statute to require "practicability" analysis. \textit{Id.} Further, in adopting the suite of technologies alternative to closed-cycle cooling, the EPA concluded suite of technologies were the most cost effective option in a convoluted three part explanation. \textit{Id.}
  \item \textsuperscript{113} \textit{Id.} at 104 (finding record lacks needed information on EPA decision-making process).
  \item \textsuperscript{114} See \textit{id.} at 105 (remanding to EPA for agency explanation on its conclusions in adopting suite of technologies over closed-cycle cooling). "In a technical area of this sort, it is difficult for judges or interested parties to determine the propriety of the Agency's action without a justification for the action supported by clearly identified substantial evidence whose import is explained." \textit{Id.} at 103-04.
  \item \textsuperscript{115} See \textit{id.} at 105 (rejecting environmental petitioners' claim to strike and/or supplement record).
  \item \textsuperscript{116} See \textit{id.} (denying motions to strike and supplement motions to strike as moot).
  \item \textsuperscript{117} See \textit{Riverkeeper II}, 475 F.3d at 105 (holding nothing barred EPA from expressing standards as ranges).
\end{itemize}
degree. As instituted, the Rule does not require facilities to adopt technologies that yield the greatest possible reduction.

In Riverkeeper I, the court concluded that mathematical inability to measure a particular technology's performance with precision made it reasonable to consider a margin of error within a performance standard. Unlike Riverkeeper I, the performance standard here allowed for a range of technologies and performances based on local conditions.

The Court acknowledged the difficulty of predicting which facilities could meet the upper ranges of performance. This difficulty, however, cannot justify a facility’s compliance when it meets the lower end of the range, if the facility could meet the higher end. Best technology cannot be construed to mean second best. If the EPA is to use performance ranges, it must establish the ranges in accordance with the technology’s best possible level of performance.

118. See id. (stating Rule failed to require facilities' reduction of adverse environmental impacts associated with their cooling water intake structures to best degree possible).

119. See id. (noting performance standards as written do not require facilities' achievement of best possible level of adverse environmental impact minimization). In anticipation of changing BTA on remand, the court provided the EPA guidance in future challenges to regulatory authority. Id. at 108.


121. See Riverkeeper II, 475 F.3d at 107 (noting differences between two performance standards). In Riverkeeper I, the issue was a margin of error associated with measuring the end result of chosen technologies. See id. Here, the performance ranges indicate differences in the actual performance of technologies in achieving results. See id.

122. See Riverkeeper II, 475 F.3d at 107 (noting predictions difficult given various facilities).

123. See id. (discussing effects of compliance standard ranges).


125. See Riverkeeper II, 475 F.3d at 107-08 (establishing necessity of best possible level of impingement and entrainment reduction EPA determines chosen technologies can achieve).
C. Compliance through Restoration Measures

The EPA exceeded its authority in allowing plants to use restoration measures to meet national standards.\(^{126}\) Primarily, the court relied on its prior holding in *Riverkeeper I*, in which it found restoration measures inconsistent with the plain meaning of the text of § 316(b) and the section's legislative history.\(^{127}\) Despite the EPA's contentions that *Riverkeeper I* should not be binding, the court noted that where statutory language is unambiguous, as is the case here, the plain meaning of the text is binding.\(^{128}\)

Even if *Riverkeeper I* was non-binding, the court mused that its prior reasoning as applied to this case would still be persuasive.\(^{129}\) Restoration provisions contradict Congress' clear intent, because restoration measures have nothing to do with the location, design or construction of cooling-water intake structures.\(^{130}\) The EPA's allowance of compliance with § 316(b) via restoration measures was an impermissible interpretation of the statute.\(^{131}\)

D. Site Specific Cost-Cost Compliance Alternative

In the EPA's proposal Rule, compliance costs were provided for model plants based on geographic and operational factors.\(^{132}\) The final Rule, however, designated estimated costs to specified facilities, rather than model facilities.\(^{133}\) Thus the proposed Rule did not provide for required adequate notice of the costs associated with specific facilities named in the final Rule.\(^{134}\) The final Rule should be a "logical outgrowth" of the proposed rule, as agencies

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126. See id. at 108 (establishing that facilities must use full potential to minimize adverse impact).

127. See id. at 110 (citing holding of *Riverkeeper I* and discussing language of § 316(b)).

128. See id. at 109 (citing *Chevron* test). "We agree with the petitioners that *Riverkeeper I* held that the Agency's decision to permit restoration measures in the Phase I Rule was not 'based on a permissible construction of the statute,' and that this holding applies equally here." Id. (quoting *Chevron*, 467 U.S. 843).

129. See *Riverkeeper II*, 475 F.3d at 109 (finding restoration measures contradict the unambiguous language of § 316(b)).

130. See id. (applying reasoning from *Riverkeeper I*).

131. See id. at 110 (finding restoration measures are not viable compliance alternatives).

132. See id. at 112 (noting EPA's proposed rules weighed factors such as fuel sources, means of electricity generation, intake devices, location, waterbody type, and volume of intake).

133. See id. (reviewing history of Rule and outcome of final Rule).

134. See *Riverkeeper II*, 475 F.3d at 112-13 (stating importance of notice requirement). The Court provided that "[n]otice is said not only to improve the quality of rulemaking through exposure of a proposed rule to comment, but also to provide fairness to interested parties and to enhance judicial review by the de-
are not permitted to "pull a surprise switcheroo." Because interested parties were not allowed an opportunity to comment on the EPA's established costs for specified facilities, this section was remanded on procedural grounds.

E. TIOP Provision Compliance

Similar to the site specific cost-cost variance provided above, the EPA's first Rule regarding a Technology Installation and Operational Plan (TIOP) was markedly different from its final proposed Rule. The first Rule allowed for an extended period to comply with national standards under a TIOP. The final Rule stated that once a TIOP was established, there was an indefinite period to meet performance standards. Due to the failure to provide notice, the Second Circuit remanded this provision of the Rule on procedural grounds.

F. Site Specific Cost-Benefit Compliance Alternative

As previously noted, the use of cost is limited under § 316(b) in determining the BTA. Additionally, the court found the cost-benefit alternative impermissible because it authorized the EPA to weigh the quality of a waterway in determining the best technology available and granting variances. Under this method, a facility would be able to avoid compliance through a showing of dismal development of a record through the commentary process. Id. (citing Nat'l Black Media Coal. v. Fed. Comm'n Comm'n, 791 F.2d 1016, 1022 (2d Cir. 1986)).


136. See id. at 113 (remanding variance for inadequate notice). "The EPA should have afforded notice and an opportunity to challenge the cost estimates for specific facilities and not simply an opportunity to comment on the EPA's methodology and general cost data." Id.

137. See id. at 116 (describing differences in TIOP section of proposed rule).


139. See How will requirements reflecting best technology available for minimizing adverse environmental impact be established for my Phase II existing facility?, 40 C.F.R. § 125.94(d)(2) (2007) (stating facility could be given an indefinite period of compliance with performance standards under a TIOP) (suspended July 9, 2007).

140. See Riverkeeper II, 475 F.3d at 116-17 (remanding Phase II Rule with regards to TIOP section on procedural grounds).

141. For a further discussion of the use of cost, see supra notes 99-111 and accompanying text.

142. See Riverkeeper II, 475 F.3d at 114 (stating consideration of water quality in selecting site-specific BTAs is impermissible).
water quality that did not justify the costs of implementing new technology. In such an environment, the benefit of saving a few aquatic organisms would be outweighed by the costs of updating an existing water-cooling structure.

Parallel to Riverkeeper I, the court maintained its position that such a regulation is impermissible, and remanded this aspect of the Rule.

V. CRITICAL ANALYSIS

The court effortlessly analogized the current case to its prior holdings in Riverkeeper I, but found the EPA's decision-making process void of any supporting analysis in the final Rule's shift away from closed-cycle cooling. The court remanded a majority of the Rule's provisions for change or analytical elaboration. The EPA's last minute shifts regarding these provisions lacked the information necessary for proper judicial review.

There are several indications that these last-minute changes were not the EPA's decision at all but results of illegal interference from OIRA. Specifically, the regulation provisions that allow weighing costs in determination of the BTA are indicative of interference from OIRA. The documents that would prove, or deny, such a relationship were withheld in both Riverkeeper II and Riverkeeper I. Since the Second Circuit granted Petitioners' challenge.

143. See id. at 115 (noting compliance could be met under this rule through showing previously degraded water quality and low levels of wildlife).
144. See id. (demonstrating how particular Phase II Rule provisions would operate if enacted).
145. See id. (noting Congress previously rejected regulation that would weigh water quality as a factor in determining BTA).
146. See id. at 105 (finding EPA's reasoning unclear). In discussing rejection of closed cycle cooling, the court noted: the "EPA may have simply either failed to perform the required analysis or to explain adequately a decision that was within its authority to make. We cannot opine on this subject, because we must consider only those justifications that the EPA offered at the time of the rulemaking." Id.
147. See Riverkeeper II, 475 F.3d at 130-31 (remanding sections of Phase II Rule to EPA).
148. For a further discussion of judicial review in Riverkeeper II, see supra notes 104-09 and accompanying text.
150. See id. at 1105-106 (discussing various changes to initially proposed rule made during OIRA review). For a further discussion of OIRA's policies, see infra note 84 and accompanying text.
151. See Heinzerling, supra note 149, at 1117 (discussing EPA's position that documents concerning meeting between the EPA and OIRA should not be admitted to record).
The Second Circuit gave deference to its analysis in *Riverkeeper I*, which relied heavily on the application of the *Chevron* test.153 The *Chevron* test is proper if the EPA is the sole agency responsible for constructing the Phase II Rule.154 This application, however, is not appropriate if OIRA usurps the EPA's regulatory power in interpreting section 316(b).155 In a circumstance where evidence provides a reasonable belief that OIRA usurped the EPA's regulatory interpretation, giving *Chevron* deference to the EPA would be inappropriate.156 In such a circumstance, it would be reasonable for the court to apply the *Mead* standard in deciding the appropriate weight given to the EPA's interpretation.157

Application of the *Mead* standard would look to circumstantial evidence, such as "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."158 Instead of a facial review of the statute's plain text and the EPA's rulemaking record, EPA decisions could be weighed in light of the validity of its reasoning and other circumstantial factors.159 Such an examination could allow a court flexibility to address this inter-agency dispute.160 Nevertheless, as *Riverkeeper I* and the current case have shown, the EPA's reluctance to share evidentiary analysis supporting its decision-making process has amounted to nothing more than a Phase II Rule volley between the EPA and the Second Circuit.

Even if the EPA were fully cooperative in producing documents supporting its decision to adopt a suite of technologies, it

152. See *Riverkeeper II*, 475 F.3d at 105 (holding moot petitioner's arguments concerning OIRA's role in interagency review).
153. See id. at 95-96 (stating standard of review under *Chevron* analysis).
154. See id. at 96 (stating deference to EPA under *Chevron*).
156. See *Heinzerling*, supra note 149, at 1114 (stating *Mead Corp.* is appropriate standard in giving deference to the EPA).
157. See id. (concluding application of *Mead Corp.* analysis more appropriate than *Chevron* analysis). For a further discussion of application of *Mead Corp.* analysis to agency regulations, see supra note 92 and accompanying text.
159. See id. (discussing factors weighed under *Mead Corp.* analysis).
160. See *Heinzerling*, supra note 149, at 1114-117 (discussing application of *Mead Corp.* standard).
still might be difficult to verify OIRA’s changes. Agencies are required to document changes made while under OIRA review, but documentation is consistently inadequate. Documents noting OIRA changes are not made available online, are not properly indexed to indicate OIRA involvement, and are often are unreported by Agencies.

VI. IMPACT

The holding in Riverkeeper II does not significantly depart from the Court’s prior holding in Riverkeeper I. The effect is subtle, yet compelling. Judicial review of agency regulations has been historically narrow, but this Second Circuit decision is a steadfast statement prohibiting approval of regulations that are improperly supported by the administrative record.

The EPA’s conflict with environmental groups and the judicial branch has changed little over the past thirty years. The interesting question is whether this current conflict is indicative of the EPA’s inability to properly choose and analytically support its regulations, or OIRA’s, and proximately, big business’ deregulation policies.

The Second Circuit’s decision is merely a small piece of a puzzling relationship that affects the majority of governmental agencies. OIRA’s centralized oversight of agency regulation has
grown in frequency and strength, particularly under the Bush administration. The President's most current Executive Order, combined with the recent appointment of Susan Dudley, has several critics fearful of a further increase in OIRA deregulatory actions. This fear derives from a fundamental difference in analytical allegiance of each respective side. While OIRA's involvement in federal regulatory affairs often reveals a one-size-fits-all approach in which cost-benefit analysis is necessarily best, OIRA's opponents realize that the most economic option is not always best, and often undermines congressional intent underlying the CWA.

These concerns are certainly justified, because after all, costs and benefits are inevitably tied to one's own interests. For example, in The Simpsons Movie, the plot is thickened by protagonist Homer's insatiable desire for pastries. On his way to properly dispose of some hazardous waste, he receives a phone call announcing that his favorite pastry establishment is distributing free donuts. Unsurprisingly, Homer chooses to forgo the proper disposal techniques of the material, opting to dump it into severely polluted Lake Springfield in expedience of a donut feast.

Homer's lackluster cost-benefit analysis would have been arguably appropriate under the EPA's proposed cost benefit compliance alternative. Homer could evidence the immediate benefit of attaining pastries, which strongly outweighed the costs associated with proper disposal of the hazardous waste. A factor such as the already degraded water quality of Lake Springfield could bolster Homer's argument, in establishing minimal adverse environmental impact.

Even in the worst of situations, Homer's choices often lead to realization and resolution. Unfortunately for us, however, the rules of animation, television sitcoms, and bad Bill Murray movies do not...

168. See Driesen, supra note 80, at 364 (discussing OMB's involvement under President George W. Bush).
171. See The Simpsons Movie (20th Century Fox 2007) (establishing movie's basic plotline).
172. See id. (recanting phone conversation leading to Homer's disposal of hazardous waste into Lake Springfield).
173. See id. (noting Homer's disposal of hazardous waste into Lake Springfield).
apply to our lives, and life does not reset each time we reach the end of a conflict. The impact of allowing such inane cost-benefit analysis would be environmentally horrifying.

While it is questionable whether OIRA should be heavily involved in agency regulation, one thing is clear: the dealings between the EPA and OIRA lack necessary transparency for effective judicial review. The Second Circuit established, yet again, that it will continue to remand regulations if there are procedural or evidentiary errors. A future application of *Mead*, instead of *Chevron*, might encourage stronger analytical support while still giving deference to constitutional and prudential boundaries of judicial review. For now, however, the EPA’s poor analytical support of proposed regulations and lack of interagency documentation is effectively extending deadlines for major power plants, saving these plants major money, and prolonging a thirty year EPA-Big Business D’oh for dough transaction.

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174. For a further discussion of the lack of transparency inherent in OIRA and EPA dealings, see *supra* notes 112-16 and accompanying text.

175. For a further discussion of remanded provisions, see *supra* notes 25-29 and accompanying text.