SUPREME COURT OF THE UNITED STATES

Nos. 07–588, 07–589 and 07–597

ENTERGY CORPORATION, PETITIONER
07–588 *v.*
RIVERKEEPER, INC., ET AL.

PSEG FOSSIL LLC, ET AL., PETITIONERS
07–589 *v.*
RIVERKEEPER, INC., ET AL.

UTILITY WATER ACT GROUP, PETITIONER
07–597 *v.*
RIVERKEEPER, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[April 1, 2009]

JUSTICE BREYER, concurring in part and dissenting in part.

I agree with the Court that the relevant statutory language authorizes the Environmental Protection Agency (EPA) to compare costs and benefits. *Ante*, at 7–13. Nonetheless the drafting history and legislative history of related provisions, Pub. L. 92–500, §§301, 304, 86 Stat. 844, 850, as amended, 33 U. S. C. §§1311, 1314, makes clear that those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost-benefit comparisons. And I would apply that text accordingly.

I

Section 301 provides that, not later than 1977, effluent

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

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

The drafting history makes clear that the statute reflects a compromise. In the House version of the legislation, the Agency was to consider "the cost and the economic, social, and environmental impact of achieving such effluent reduction" when determining both "*best practicable*" and "*best available*" technology. H. R. 11896, 92d Cong., 2d Sess., §§304(b)(1)(B), (b)(2)(B) (1972) (as reported from committee). The House Report explained that the "*best available* technology" standard was needed—as opposed to mandating the elimination of discharge of pollutants—because "the difference in the cost of 100 percent elimination of pollutants as compared to the cost of removal of 97–99 percent of the pollutants in an effluent can far exceed any reasonable benefit to be achieved. In most cases, the cost of removal of the last few percentage

points increases expo[n]entially." H. R. Rep. No. 92–911, p. 103 (1972).

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

The final statute reflects a modification of the House's language with respect to "*best practicable*," and an adoption of the Senate's language with respect to "*best available*." S. Conf. Rep. No. 92–1236, pp. 124–125 (1972). The final statute does not *require* the Agency to compare costs to benefits when determining "*best available* technology," but neither does it expressly *forbid* such a comparison.

The strongest evidence in the legislative history supporting the respondents' position—namely, that Congress intended to forbid comparisons of costs and benefits when determining the "*best available* technology"—can be found in a written discussion of the Act's provisions distributed to the Senate by Senator Edmund Muskie, the Act's principal sponsor, when he submitted the Conference Report for the Senate's consideration. 118 Cong. Rec. 33693 (1972). The relevant part of that discussion points out that, as to "*best practicable* technology," the statute requires application of a "balancing test between total cost and effluent reduction benefits." *Id.*, at 33696; see §304(b)(1)(B). But as to "*best available* technology," it states: "While cost should be a factor in the Administrator's judgment, no balancing test will be required." *Ibid.;* see §304(b)(2)(B). And Senator Muskie's discussion later speaks of the agency "evaluat[ing] . . . what needs to be done" to eliminate pollutant discharge and "what is

achievable," both "without regard to cost." *Ibid.*

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

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

Thus Senator Muskie used nuanced language, which one can read as leaving to the Agency a degree of authority to make cost-benefit comparisons in a manner that is

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

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

(emphasis added).

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

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

I say that one *may,* not that one *must,* read Senator Muskie's statement this way. But to read it differently would put the Agency in conflict with the test of reasonableness by threatening to impose massive costs far in excess of any benefit. For 30 years the EPA has read the statute and its history in this way. The EPA has thought that it would not be "reasonable to interpret Section 316(b) as requiring use of technology whose cost is *wholly disproportionate* to the environmental benefit to be gained." *In re Pub. Serv. Co. of N. H. (Seabrook Station, Units 1 and 2)*, 1 E. A. D. 332, 340 (1977), remanded on other grounds, *Seacoast Anti-Pollution League* v. *Costle*, 572 F. 2d 872 (CA1 1978) (emphasis added); see also *In re*

Central Hudson Gas & Elec. Corp., EPA Decision of the General Counsel, NPDES Permits, No. 63, p. 371 (July 29, 1977) (also applying a "wholly disproportionate" test); *In re Pub. Serv. Co. of N. H.*, 1 E. A. D. 455 (1978) (same). "[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration." *Barnhart* v. *Walton*, 535 U. S. 212, 220 (2002). And for the last 30 years, the EPA has given the statute a permissive reading without suggesting that in doing so it was ignoring or thwarting the intent of the Congress that wrote the statute.

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

II

The cases before us, however, present an additional problem. We here consider a rule that permits variances from national standards if a facility demonstrates that its costs would be "significantly greater than the benefits of complying." 40 CFR §125.94(a)(5)(ii) (2008). The words "significantly greater" differ from the words the EPA has traditionally used to describe its standard, namely,

"wholly disproportionate." Perhaps the EPA does not mean to make much of that difference. But if it means the new words to set forth a new and different test, the EPA must adequately explain why it has changed its standard. *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 42–43 (1983); *National Cable & Telecommunications Assn.* v. *Brand X Internet*, 545 U. S. 967, 981 (2005); *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 524, n. 3 (1994) (THOMAS, J., dissenting).

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

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