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palmeag to: John King 12/10/2008 01:52 PM

From: palmeag@nu.com
To: John King/R1/USEPA/US@EPA
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...a Region I permit can require tens of millions of dollars to protect ten thousand fish, but EPA's lawyer argues for a 316(b) cost-benefit analysis before the Supreme Court?

DARYL JOSEFFER, ESQ., Deputy Solicitor General,

Department of Justice, Washington, D.C.; on behalf of the Environmental

Protection Agency, et al., supporting the Petitioners.

ORAL ARGUMENT OF DARYL JOSEFFER

ON BEHALF OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., SUPPORTING THE

PETITIONERS

MR. JOSEFFER: Mr. Chief Justice, and may it please the Court:

For more than 30 years, EPA has construed the Clean Water Act to permit it

to consider the relationship between costs and benefits in setting limits

on water intake. The court of appeals' unprecedented limitation of that

discretion is wrong as a matter of basic Chevron interpretive principles

for at least three reasons.

First, the controlling statutory standard, which looks to the best

technology available for minimizing adverse environmental impacts, is

ambiguous and does not preclude EPA's interpretation, especially in light

of the statute's other "best technology" provisions, two of which expressly require consideration of the relationship between costs and benefits.

Second, there is no indication that Congress determined for itself that the benefits of stricter regulations would in fact outweigh their costs. There is no indication in either the context or the history of the statute that Congress determined for itself that the benefits of stricter regulations would in fact justify their costs. Instead the indication is that Congress left that to the agency.

Congress took a very careful look at the separate issue of the discharge of pollutants and legislated numerous very specific provisions concerning the discharge of pollutants. But when it came to water intake, the Congress gave scant attention to that at all and included only this one very general provision in the act on that subject.