Center for Progressive Regulation

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Cooling Water Intake Structure (Existing Facilities: Phase II)
Proposed Rule Comment Clerk – W-00-32
Water Docket, Mail Code 4101
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue N.W.
Washington D.C. 20460

Re: Comments on Proposed Rule, RIN 2040-AD62

Clean Water Act §316(b) – National Pollutant Discharge Elimination System – Proposed Regulations for Cooling Water Intake Structures at Phase II Existing Facilities, EPA ICR no. 2060.01

Dear Sir/Madam:

These comments are submitted by the Center for Progressive Regulation (CPR or the Center), a newly created organization of academics specializing in the legal, economic, and scientific issues that surround health, safety, and environmental regulation. CPR's mission is to advance the public's understanding of the issues addressed by the country's health, safety, and environmental laws and to make the nation's response to health, safety, and environmental threats as effective as possible.

The Center is committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment. One component of the Center's mission is to circulate academic papers, studies, and other analyses that promote public policy based on the multiple social values that motivated the enactment of our nation's health, safety, and environmental laws. The Center seeks to inform the public about scholarship that envisions government as an arena where members of society choose and preserve their collective values. We reject the idea that government's only function is to increase the economic efficiency of private markets.

The Center also seeks to provoke debate on how the government's authority and resources may best be used to preserve collective values and to hold accountable those who ignore or trivialize them. The Center seeks to inform the public about ideas to expand and

strengthen public decision-making by facilitating the participation of groups representing the public interest that must struggle with limited information and access to technical expertise.

Our basic concern with EPA's current proposal is this: EPA's proposal threatens to turn a technology-based regime into a cost-benefit regime, without any support for this transformation in the statutory language, structure, or history. Further, the motivation for this sea change in statutory interpretation appears to have come from an agency, the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB), which is not charged with implementing and interpreting the Clean Water Act and which is, it appears, engaged in a pattern of holding closed-door meetings with industry representatives on pending rules, followed by "recommendations" to EPA to weaken the rules under consideration. OIRA's influence on this and other rulemakings, and in particular its closed-door sessions with private parties, have caused misinterpretations of the Clean Water Act and, more generally, violate both the spirit and the letter of the Administrative Procedure Act. Thus, in these comments, we raise two basic objections to EPA's proposed rule on existing cooling water intake structures (CWISs):

1) Statutory interpretation: EPA's reliance on formal cost-benefit analysis, including the agency's proposed differentiation of standards according to the quality of the receiving waters affected, is a misinterpretation of the Clean Water Act. Changes to EPA's proposal made after review by OIRA suggest that EPA's new reliance on formal cost-benefit analysis in setting technology-based standards under the Clean Water Act is a result of OIRA's influence. It thus appears that EPA is ceding its interpretive authority under the Clean Water Act to OIRA, which violates Congress's intent that EPA be responsible for implementation of the Clean Water Act.

2) Administrative process. While OIRA was reviewing EPA's initial proposal for CWIS's, and insisting on numerous and extensive changes in EPA's proposal that greatly relaxed the requirements of EPA's initial proposal, top OIRA officials met with numerous representatives of the energy businesses affected by this proceeding. Yet neither EPA nor OIRA has made available all of the documents that passed between EPA and OIRA concerning EPA's proposal. Moreover, EPA's preamble does not explain whether and how EPA's initial proposal was changed as a consequence of OIRA review and/or OIRA's contacts with industry representatives. As things stand now, the existing public record invites the unfortunate conclusion that the changes made to EPA's proposal between the time when EPA submitted the proposal for OIRA review and when the agency offered a significantly changed proposal for public comment were influenced by ex parte contacts between high-level OIRA officials and industry representatives, contacts undocumented and unexplained in EPA's preamble.

We believe that these errors of statutory interpretation and the appearance (and perhaps reality) of secret industry influence on EPA's proposal will make this rulemaking proceeding exceedingly vulnerable to judicial invalidation. We also believe, as scholars of environmental law and the administrative process, that the substance and process of this rulemaking reflect an exceedingly problematic turn of events both for environmental regulation and, more generally, for open and impartial administrative proceedings. *See* Sidney A. Shapiro, *Two Cheers for* HBO:

The Problem of the Nonpublic Record, 54 Admin. L. Rev. 853 (2002). We strongly urge EPA to respond to the comments below by changing the proposal in the ways we suggest and by making public the documents and any other records that shed light on the reasons why the rule was changed so substantially at OIRA's behest.

1. EPA's proposal transforms technology-based regulation into cost-benefit regulation, with no support in the statute for doing so.

Section 316(b) is not a cost-benefit provision. It does not even mention economic costs, in contrast to other technology-based provisions of the Clean Water Act, which explicitly allow EPA to consider costs. *See, e.g.*, 33 U.S.C. §§ 1314(b)(1)(B), 1314(b)(2)(B), 1314(b)(3), 1316(b)(1)(B). The contrast between the explicit mention of costs in other statutory provisions and the absence of such language in section 316(b) is striking evidence that cost-benefit analysis is not permitted under section 316(b). See *Whitman v. American Trucking Associates,* 531 U.S. 457, 468 (2001) (faced with similar interpretive question under Clean Air Act, Justice Scalia rejected the argument that costs should be considered, remarking on the importance of the issue and observing that Congress does not "hide elephants in mouseholes"). Moreover, even the consideration of costs that has been undertaken under other provisions of the statute is not as rigid and hyper-quantified as the cost-benefit balancing EPA proposes to undertake here. For example, EPA's longstanding practice under other provisions of the Clean Water Act has not, in contrast to the approach undertaken here, featured relaxation of regulatory requirements based on a comparison of monetized costs to monetized benefits.

In lacking any reference to consideration of costs, section 316(b) contrasts strikingly not only with other provisions of the Clean Water Act, but with provisions of other statutes that do contemplate formal cost-benefit analysis. The Safe Drinking Water Act, for example, specifically directs EPA to undertake cost-benefit analysis and to consider willingness-to-pay in undertaking that analysis. *See* 42 U.S.C. § 300g-1(b)(3)(C)(iii). No such language appears in section 316(b). It is more than a little awkward, therefore, that EPA cites to the Safe Drinking Water Act as a possible source for the cost-benefit standard under the Clean Water Act – as if they were somehow the same statute! *See* National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 67 Fed. Reg. 17122, 17166 (April 9, 2002). They are not.

Moreover, EPA itself recognizes the significant administrative burdens that will be imposed on state and federal permitting agencies as a result of individualized cost-benefit assessments for CWIS regulation. Indeed, these burdens were one reason why EPA did not choose site-specific cost-benefit as a lead option in its original proposal. *See* OMB Review Draft for the Proposed Section 316(b) Rule for Large Cooling Water Intake Structures at Existing Power Generating Facilities, USEPA Docket W-00-32, DCN# 4-4005, at 93 (December 28, 2001). At the behest of OIRA, however, EPA elevated site-specific cost-benefit analysis to a lead option. EPA should explain the basis for this change of heart. Mere reference to OIRA's desires, of course, will not be an adequate statement of EPA's basis and purpose for this rule, as OIRA is not the agency charged with implementing and interpreting the Clean Water Act. *Motor*

Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 56 (1983) (an "agency must examine the relevant data and articulate a 'rational connection between the facts found and the choice made'").

EPA also errs, as part of its new emphasis on cost-benefit balancing, in proposing to vary regulatory requirements according to the nature and quality of the water bodies affected by individual CWISs. Section 316(b) requires that effluent standards demand the "best technology available for minimizing adverse environmental impact." Once a technology is identified as available and as the best for minimizing adverse environmental impact, EPA should not relax regulations under section 316(b) based on the nature of the water bodies affected. Such an approach runs counter to EPA's longstanding approach to the technology-based requirements of the Clean Water Act. See, e.g., *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1035 (D.C. Cir. 1978) (rejecting site-specific variances from best available technology standards). EPA's new approach also runs counter to the history and purpose of the Act itself, which was significantly amended in 1972 precisely because the previous water-quality-based approach had been, in Senate Muskie's words, "inadequate in every vital respect." A Legislative History of the Water Pollution Control Act of 1972, vol. 2, at 1253 (1973). Finally, and perhaps most tellingly, EPA's focus on site-specific water quality under section 316(b) is undermined by the subsection immediately preceding section 316(b) – section 316(a) – which provides explicitly for the kind of site-specific analysis EPA has endorsed here. The lack of such site-specific emphasis in section 316(a) evinces congressional intent that section 316(a) not turn on site-specific determinations.

In another reflection of its misunderstanding of section 316(b), EPA proposes very different requirements for existing facilities than it has required for new facilities in its Phase I rules. Section 316(b) does not, however, distinguish between new and existing facilities; its requirements apply equally to all facilities. Other sections of the Clean Water Act, in contrast, draw a clear distinction between new and existing facilities. Compare, e,g., 33 U.S.C. § 1311 (referring to existing sources) with 33 U.S.C. § 1316 (referring to new sources). The lack of such a distinction in section 316(b) is telling evidence that the same requirements should apply to both kinds of facilities. EPA thus errs in drawing such a large distinction between new and existing facilities for purposes of this proposed rule.

To be sure, section 316(b) does refer to provisions of the Clean Water Act (sections 301 and 306) that distinguish between new and existing facilities. However, nothing in section 316(b) says that the requirements of section 316(b) are the same as those under sections 301 and 306. Moreover, if this were the case, then EPA's use of site-specific, formal cost-benefit analysis, and its emphasis on the condition of the affected waters in setting regulatory requirements, would be even more suspect, as these regulatory approaches have not historically been adopted under sections 301 and 306.

EPA makes a half-hearted attempt to justify its distinction between new and existing facilities, arguing that more flexibility is needed for existing sources and that energy impacts would be unacceptable if the same requirements were to apply to both kinds of sources. 67 Fed. Reg. at 17140-41, 17146. The best evidence against these claims are EPA's own words, in the

original proposal it sent to OIRA for review in December 2001. There, EPA found that 59 existing sources, at least, could be subject to much more stringent standards than it now proposes imposing, despite the supposedly reduced flexibility of such existing facilities. *See* OMB Review Draft for the Proposed Section 316(b) Rule for Large Cooling Water Intake Structures at Existing Power Generating Facilities, USEPA Docket W-00-32, DCN# 4-4005, at 77-78 (December 28, 2001). In the current proposal, which followed OIRA's review and OIRA's closed-door meetings with industry representatives, EPA has softened the requirements for these facilities. However, EPA does not elaborate upon its reasons for having done so. Even under its own, mistaken view of the proper interpretation of the Clean Water Act – according to which cost-benefit analysis is the criterion for regulatory choice – EPA does not adequately explain why the costs of requiring closed-cycle cooling at any or even all facilities covered by this proceeding are not worth the benefits. EPA vaguely suggests that the costs are "unacceptable." The agency also recognizes, however, that the benefits of closed-cycle cooling would reach at least almost $1.5 billion, 67 Fed. Reg. at 17168, without even accounting for the numerous and multifarious unquantified benefits conferred by regulation of CWISs. See 67 Fed. Reg. at 17190-93. EPA cannot simply declare that the costs are unacceptable; it must explain why it believes them to be so.

We strongly support Congress' choice of technology-based standards to implement the Clean Water Act. Although this approach has been criticized by those who favor a cost-benefit approach, the academic literature has long recognized the important advantages of this approach to environmental protection as compared to the cost-benefit approach that OIRA has attempted to smuggle into EPA's decisionmaking. *See, e.g.*, Sidney A. Shapiro & Thomas O. McGarity: *The Rationale for Technology-Based Regulation*, 1991 Duke L.J. 729; Thomas O. McGarity, *Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation*, 46 Law & Comp. Probs. 159 (Summer 1983).

EPA's transformation of technology-based regulation into cost-benefit regulation, along with its inadequate explanation of its regulatory choices under the new cost-benefit regime, is made all the more troubling, as we next explain, by the obvious and undue influence of OIRA, and perhaps even industry representatives, in leading to EPA's regulatory change of heart.

2. EPA and OIRA should make available any and all documents pertaining to OIRA's review of EPA's initial proposal for this rule, and EPA should explain why it changed its proposal so significantly at OIRA's behest. EPA should also explain whether and how private industry representatives with whom OIRA officials met during OIRA's review of this rule affected OIRA's and/or EPA's perspective on this rule.

Even a cursory comparison of EPA's original proposal, sent to OIRA in December 2001, and the proposal EPA published in April, reveals that OIRA insisted on numerous and extensive changes in EPA's proposal. EPA should explain why it made these changes. EPA's December 2001 proposal was made by the expert agency, charged with implementing and interpreting the relevant statute, after plenary agency review. Changes made at the behest of OIRA at this point should be explained in the administrative record. This is particularly so in this case, where OIRA met with numerous industry representatives while undertaking its review of this rule.

While EPA's initial proposal was under review at OIRA, high-level OIRA officials met with representatives from the following industry groups: TXU, Cinergy, PSEG, Progress Energy, Edison Electric Institute, TECO Energy Inc., Constellation Energy Group, Allegheny Energy, Minnesota Power, and Mirant Corporation. *See* "Meeting Record Regarding: Meeting with the Administrator of OIRA to Discuss 316(b) Existing Facilities Rule," *available at* http://www.whitehouse.gov/omb/oira/2040/meetings/87.html. All of these are businesses in the energy sector. (We have used the abbreviated designations used by OIRA on its web site; we think it most likely that "TXU" is TXU Energy, "PSEG" is Public Service Enterprise Group, and "EEI" is Edison Electric Institute.)

Several weeks after this meeting, OIRA concluded its review of EPA's proposal. OIRA's review ultimately produced substantial changes in EPA's proposed rule. EPA itself has documented the changes that occurred at OMB's behest. *See* Section 316(b) Phase II Proposed Rule Summary of Major Changes During Interagency Review, USEPA W-00-32 DCN 4-4019, (May 23, 2002) (documenting that over thirty major changes, i.e. the vast majority, were made "at the suggestion or recommendation" of OIRA). EPA has not stated, however, whether any information, opinions, or documents that might have been supplied by the energy industry representatives who enjoyed an ex parte meeting with OIRA officials led to the changes in EPA's proposal. Yet EPA officials were present at the meeting with industry representatives. (See meeting record, *available at* http://www.whitehouse.gov/omb/oira/2040/meetings/87.html (listing EPA employees Stephanie Dangle, Geoff Grubbs, David Gravallese, and Tom Gibson as attendees).) EPA thus should explain what influence, if any, its ex parte contacts with industry representatives had on its current proposal.

In addition, EPA should make public any documents that passed between EPA and OIRA during this review. OIRA so far has refused to make public all such documents, citing a Reagan-era policy on nondisclosure of OIRA-review-related documents. *See* Letter from Donald R. Arbuckle, Deputy Administrator, OIRA, to Reed Super, Senior Attorney, Riverkeeper (June 20, 2002)). EPA should also make public any written or oral communications that passed between private groups and individuals and EPA or OIRA during OIRA's review. *See* Shapiro, *supra*, at 855 ("The legitimacy of rulemaking relies on public knowledge of private contacts with agency and White House officials even if any agency can successfully defend its rule against legal attacks on the basis on publicly available information.")

Without this disclosure, OIRA's early and intense involvement in EPA rulemaking would allow OIRA to undo the procedural strictures of the Administrative Procedure Act: a "private" notice and comment period, open to select members of affected groups, would precede the "public" notice and comment period contemplated by the APA. The D.C. Circuit has warned of such secrecy "frustrating" the APA, since the final rule would not be "based (in part or whole) on any information or data which has not been placed in the docket...." *Sierra Club v. Costle*, 657 F.2d 298, 403 (D.C. Cir. 1981), *quoting* Administrative Procedure Act, 42 U.S.C. §7607(d)(6)(C). The court also expressed the same concern in *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C.Cir.1980) (*partially rev'd on unrelated grounds, United Steelworkers of America v. Dole*, 1990 WL 488981 (D.C. Cir. 1990)), requiring disclosure of any

ex parte communications "that may have influenced the agency decisionmaking." 647 F.2d at 1237-38. Surely these principles cannot be circumvented by the simple expedient of having private industry representatives meet in OIRA's offices rather than in EPA's.

Any questions or comments concerning this submission should be addressed to Lisa Heinzerling, Professor of Law, Georgetown University Law Center (phone: 202-662-9115; email: heinzerl@law.georgetown.edu).

Sincerely,

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