

# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR  
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July 22, 2013

Ms. Nancy K. Stoner  
Acting Assistant Administrator for the Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave, NW  
Washington, D.C. 20460

Dear Acting Assistant Administrator Stoner:

We write to express our concern regarding the Environmental Protection Agency's (EPA) apparent attempt to deliberately inflate benefits calculations in order to justify the high cost of a rule. EPA is seeking to exaggerate benefits through the use of a "stated preference survey"<sup>1</sup> to calculate the alleged "non-use" benefits of the proposed rule for cooling water intake structures under Section 316(b) of the Clean Water Act (CWA).<sup>2</sup> Use of a stated preference survey is inappropriate. Furthermore, reliance on non-use benefits, as opposed to traditional "use" benefits, to justify a significant regulation is without precedent and should not be permitted. Accordingly, we request that EPA refrain from using this survey as a basis for the final rule and stick to well-established methods to determine the costs and benefits of the regulation.

In April 2011, EPA issued a proposed rule under Section 316(b) of the CWA, which requires that standards governing cooling water intake structures reflect the best technology available (BTA) for minimizing adverse environmental impact.<sup>3</sup> EPA's proposed rule would set new standards for cooling water intake structures at approximately 1,260 existing power generating and manufacturing and industrial facilities.<sup>4</sup> EPA is required by a modified court settlement agreement to publish the final rule by November 4, 2013.<sup>5</sup>

As part of its required regulatory analysis, EPA conducted an original cost-benefit analysis.<sup>6</sup> In this analysis, EPA used conventional methods to determine the use benefits for

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<sup>1</sup> National Pollutant Discharge Elimination System--Proposed Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities; Notice of Data Availability Related to EPA's Stated Preference Survey, 77 Fed. Reg. 113 (proposed June 12, 2012) (to be codified at 40 C.F.R. pts. 122, 123, 124, 125).

<sup>2</sup> National Pollutant Discharge Elimination System—Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 76 (proposed on April 20, 2011) (to be codified at 40 C.F.R. pts. 122 and 125).

<sup>3</sup> 33 U.S.C. § 1326(b).

<sup>4</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA 820-F-11-002, FACT SHEET: PROPOSED REGULATIONS TO ESTABLISH REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES AT EXISTING FACILITIES (2011), [http://water.epa.gov/lawsregs/lawguidance/cwa/316b/upload/factsheet\\_proposed.pdf](http://water.epa.gov/lawsregs/lawguidance/cwa/316b/upload/factsheet_proposed.pdf).

<sup>5</sup> Third Amendment to Settlement Agreement Among the Env'tl. Prot. Agency, the Plaintiffs in Cronin v. Reilly, No. 93 Civ. 0314 (LTS) (S.D.N.Y.), and the Plaintiffs in Riverkeeper v. EPA, No. 06 Civ. 12987 (PKC) (S.D.N.Y.) (June 27, 2013), available at <http://water.epa.gov/lawsregs/lawguidance/cwa/316b/upload/amendment3rd.pdf>.

<sup>6</sup> National Pollutant Discharge Elimination System—Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 76 (proposed on April 20, 2011) (to be codified at 40 C.F.R. pts. 122 and 125).

commercial and recreational fishing.<sup>7</sup> EPA then decided that its first cost-benefit analysis was “incomplete” and attempted to recalculate not only the use benefits, but the non-use benefits as well.<sup>8</sup> In order to do so, EPA conducted a national “stated preference survey” in which individuals, who would gain no direct benefit, were asked how much they were hypothetically willing to pay to prevent distant fish from being harmed.<sup>9</sup> Attempting to monetize non-use benefits in this way, and on this scale, is highly questionable.

As you may know, stated preference surveys are one of the most controversial methods for estimating non-use benefits because they are based on what individuals say they would do as opposed to what they are actually observed doing.<sup>10</sup> There are very few instances in which such a complicated and subjective tool can be used with any degree of reliability.<sup>11</sup> According to leading economists, stated preference surveys should only be used in situations where the resources are unique or limited and the impacts are substantial or irreversible.<sup>12</sup> This is not the case here. The results of this survey cannot be taken as credible estimates of potential benefits of the proposed rule and certainly cannot be used to justify spending hundreds of millions or potentially billions of dollars each year. Accordingly, EPA should not use the results of the stated preference survey as a basis for the final rule.

Additionally, EPA conducted two separate benefits analyses in little more than a year that resulted in dramatically different conclusions.<sup>13</sup> EPA’s original cost-benefit analysis, using conventional methods, determined that the \$466 million annual costs of the preferred option outweighed the \$16.3 million annual benefits by a ratio of 29 to 1.<sup>14</sup> Conversely, the annual benefits from the stated preference survey were \$2.275 billion for the preferred option, with a cost to benefit ratio of 1 to 5.<sup>15</sup> This is a substantial and questionable increase in benefits, all due to EPA’s decision to rely on a controversial method to recalculate benefits. If EPA were to substitute the survey results for the original benefits calculation, the majority of all benefits would be non-use benefits as opposed to the traditionally calculated use benefits associated with commercial and recreational fishing. This would be highly unusual. EPA has never attempted to justify an entire regulation primarily on non-use benefits. Doing so now would set a dangerous precedent that would interject arbitrariness and unpredictability in the regulatory process and allow regulators to justify actions based on public opinion surveys rather than sound science.

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<sup>7</sup> *Id.*

<sup>8</sup> National Pollutant Discharge Elimination System--Proposed Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities; Notice of Data Availability Related to EPA's Stated Preference Survey, 77 Fed. Reg. 113 (proposed June 12, 2012) (to be codified at 40 C.F.R. pts. 122, 123, 124, 125).

<sup>9</sup> *Id.*

<sup>10</sup> See Jerry Hausman, *Contingent Valuation: From Dubious to Hopeless*, 26(4) J. ECON. PERSPECTIVES 43 (2012).

<sup>11</sup> *Id.*

<sup>12</sup> A. MYRICK FREEMAN, *THE MEASUREMENT OF ENVIRONMENTAL AND RESOURCE VALUES: THEORY AND METHODS* 156-57 (Resources for the Future 2003) (1993).

<sup>13</sup> Comments on EPA’s notice of Data Availability for §316(b) Stated Preference Survey: Prepared for: Utility Water Act Group and Edison Electric Institute, NERA ECON. CONSULTING E-8 (July 2012), [http://www.nera.com/nera-files/PUB\\_UWAG\\_0712\\_final.pdf](http://www.nera.com/nera-files/PUB_UWAG_0712_final.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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EPA's previous estimate of use benefits associated with commercial and recreational fishing provides a far more accurate gauge of the potential benefits of the proposed rule than the results of the controversial stated preference survey. Accordingly, EPA should withdraw the survey and not attempt to use the results as a basis for the final rule.

If you have any questions regarding this letter, please feel free to have your staff contact Kristina Moore with the Senate Committee on Environment and Public Works at (202) 224-6176.

Sincerely,



David Vitter  
U.S. Senator



James Inhofe  
U.S. Senator



Mike Crapo  
U.S. Senator



John Boozman  
U.S. Senator

cc: Ken Kopocis  
Senior Advisor for the Office of Water