No. 12-1422
Oral Argument Scheduled for May 15, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,

Petitioners,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondent.

AMNESTY INTERNATIONAL USA; AMNESTY INTERNATIONAL LTD.,

Intervenors for Respondent.

On Petition for Review of a Final Rule of the
United States Securities and Exchange Commission

BRIEF OF BETTER MARKETS, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT U.S. SECURITIES AND EXCHANGE COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 26.1 and 28(a)(1), Better Markets states as follows:

(A) Parties, Intervenors, and *Amici*

All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioners and the Brief for Respondent. Better Markets is also aware of the intention of Global Witness to file an *amicus* brief in support of Respondent. In addition, Better Markets understands that certain members of Congress intend to file an *amicus* brief in support of Respondent.

Better Markets is a non-profit organization founded to promote the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including comment on rules proposed by the financial regulators, public advocacy, litigation, congressional testimony, and independent research.

Better Markets has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

(B) Rulings Under Review

References to the rule at issue appear in the Brief for Petitioners.

(C) Related Cases

Counsel is aware of no related cases currently pending in any other court.

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq*.
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)
DRC	Democratic Republic of the Congo
Exchange Act	Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq*.
Petitioners	Petitioners National Association of Manufacturers, Chamber of Commerce of the United States of America, and Business Roundtable
Pet. Br.	Brief for Petitioners page citation
Respondent	U.S. Securities and Exchange Commission
Res. Br.	Brief for Respondent page citation
Rule	Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012)
SEC	U.S. Securities and Exchange Commission

STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in the Brief for the Petitioners, and as to 15 U.S.C. § 78c(f) and 15 U.S.C. § 78w(a)(2), in the *amicus* Industry Coalition's Brief: 33 U.S.C. § 701a; 33 U.S.C. § 1312(b)(1)-(2); 33 U.S.C. § 1314(b)(1)(B); 33 U.S.C. § 1314(b)(4)(B) (1976 ed., Supp. III); 42 U.S.C. § 300g-1(b)(3); 42 U.S.C. § 6295(c)-(d) (1976 ed., Supp. II); 42 U.S.C. § 7491(g)(1); 42 U.S.C. § 7545(c)(2)(B) (1976 ed., Supp. III); 43 U.S.C. § 1347(b) (1976 ed., Supp. III). These statutes are reproduced in the Addendum.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Better Markets is a non-profit organization that promotes the public interest in the financial markets through a variety of activities.[1] One way it furthers its mission is by defending rules of the SEC and other financial regulators against interested parties seeking to overwhelm those agencies with unwarranted, inappropriate, and burdensome economic analysis obligations, including what is often labeled "cost-benefit analysis." Those purported obligations, however, have no statutory or other legal basis.

Better Markets has an interest in this case because Petitioners argue that the SEC failed to conduct what they refer to as an adequate "cost-benefit analysis" when it promulgated the Rule. This argument seeks to expand the SEC's very limited duty under the securities laws far beyond what Congress intended. It threatens not only the Rule at issue, which Congress deemed necessary to ameliorate violence and socio-political conflict in the DRC, but also a more far-reaching harm: Unless rejected, Petitioners' onerous standard—found nowhere in the securities laws—will severely undermine the SEC's ability to implement and defend a wide range of regulatory reforms as Congress intended. Those reforms,

[1] Better Markets states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person—other than Better Markets, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief. FED. R. APP. P. 29(c)(5).

passed by Congress in the Dodd-Frank Act and elsewhere, are essential for protecting the public, our financial markets, and ultimately our economy from another financial crisis.

SUMMARY OF ARGUMENT

The securities laws do not require the SEC to conduct cost-benefit analysis when promulgating rules. The relevant statutory provisions contain no references whatsoever to cost-benefit analysis, make no mention of "costs" or "benefits," and include no language stating or suggesting that the SEC must quantify or compare the costs and benefits of a rule as a condition to implementing Congress's directives.

Instead, the SEC's statutory obligation is simply "to consider" a rule's impact on several specifically listed economic factors. The Supreme Court has held that Congress's use of the word "consider" gives agencies wide discretion in determining the role that any factors should play in the agency's rulemaking process.

The legislative history of the specific provisions at issue reveals that Congress intended the SEC's duty to be limited, rather than requiring an exhaustive analysis of costs and benefits. That history also confirms that Congress intended the SEC to place the protection of investors and the public interest above all economic considerations. Removing any doubt about the true scope of the

SEC's obligation is the plain fact that when Congress wants an agency to conduct cost-benefit analysis in the rulemaking process, it explicitly imposes that obligation in clear terms. Thus, its decision **not** to do so in the securities laws was a deliberate policy choice.

The rationale for Congress's approach is clear: Requiring the SEC to conduct cost-benefit analysis for every rule would severely hamper the agency's ability to implement Congress's statutory directives, and ultimately to protect the public interest. If upheld, the Petitioners' interpretation of the SEC's obligations will fuel additional unfounded attacks against the SEC's rules in court, overwhelm the SEC's rulemaking process, and ultimately prevent the SEC from implementing a wide range of congressional goals—from the Rule at issue to other provisions in the Dodd-Frank Act.

In this case, the SEC fulfilled its limited duty to consider the economic factors set forth in the securities laws. Moreover, there is no other legal or factual basis for expanding the SEC's duty or for finding that the SEC did not comply with its limited statutory obligation. The Petitioners' reliance on several recent decisions from this Court is misplaced. In none of those cases did the parties present or the Court substantively analyze the legal authorities and arguments defining the limited scope of the SEC's statutory duty, and, on that issue, they lack precedential weight. In addition, the APA imposes no economic analysis

obligation on the SEC, and as interpreted by the Supreme Court, it actually prohibits a court from substituting its judgment for that of an agency. To the extent the SEC engaged in a discretionary consideration of certain costs and benefits not required under the Exchange Act, that consideration was reasonable under the APA. And where the SEC chose an approach that might prove more costly than alternatives, in the exercise of its discretion, it reasonably did so for the express purpose of advancing the statutory goals and achieving additional benefits.

In short, Congress has never authorized the SEC to ignore or second-guess its rulemaking mandates, has never required the SEC to conduct cost-benefit analysis, has never insisted that the SEC pursue the least costly manner of implementing congressional policy, and has never authorized the SEC to subordinate its mission of protecting investors and markets to protecting market participants from costs Congress chose to impose. The Petitioners' criticisms of the Rule on grounds of economic analysis have no basis in law or policy and should be rejected.

ARGUMENT

I. The SEC's narrow duty under the Exchange Act is only to "consider" certain specific factors, not to conduct cost-benefit analysis.

A. The securities laws do not contain cost-benefit analysis requirements.

The applicable provisions of the Exchange Act do not contain any language requiring the SEC to conduct cost-benefit analysis. Those statutory provisions contain no references whatsoever to cost-benefit analysis, make no mention of "costs" or "benefits," and include no language stating or suggesting that the SEC must quantify or compare the costs and benefits of a rule as a condition to implementing Congress's directives. Therefore, Petitioners' claim that "the SEC failed to conduct an adequate cost-benefit analysis," *see, e.g.*, Pet. Br. at 45, cannot be valid, since the SEC has no duty to conduct such an analysis.

Exchange Act Section 3(f) merely requires the SEC, after considering "the public interest" and the "protection of investors," "to **consider** . . . whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f) (emphasis added). Section 23(a)(2) only requires the SEC to "**consider** among other matters the impact any such rule or regulation would have on competition," and to refrain from adopting the rule if it "would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the statute]." 15 U.S.C. § 78w(a)(2) (emphasis added).

B. The Supreme Court has held that the obligation to "consider" factors gives an agency wide discretion.

Long before Congress added the applicable statutory provisions to the Exchange Act in 1975 and 1996, the Supreme Court held that when statutorily mandated "considerations" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion." *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950) ("Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation.").

Following this approach, this Court has explained that where "Congress did not assign the specific weight the [agency] should accord each of these factors, [it] is free to exercise [its] discretion in this area." *New York v. Reilly*, 969 F.2d 1147, 1150 (D.C. Cir. 1992); *see also Brady v. FERC*, 416 F.3d 1, 6 (D.C. Cir. 2005). Indeed, when Congress requires an agency to "consider" certain factors in its rulemaking, a reviewing court's role is limited. As discussed more fully below, courts are not to find a rule arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A), unless the agency has "wholly failed" to comply with a statutory requirement, or if there is a "complete absence of any discussion of a statutorily

mandated factor." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).[2]

Thus, contrary to Petitioners' claims that the SEC had a duty to "determine" or "analyze" the effects of the Rule, *see* Pet. Br. at 27, Congress chose wording that, on its face and as interpreted by the courts, imposed a limited obligation on the SEC to merely "consider" certain factors. Additionally, it left the agency with broad discretion in how to discharge that obligation.

[2] The Court in *Public Citizen*, 374 F.3d at 1221, suggested that the agency had to "weigh" costs and benefits even though the statute simply required the agency to "consider" costs and benefits. However, this aspect of *Public Citizen* is inapplicable here for multiple reasons. First, the Court's discussion of cost-benefit analysis was pure dicta. The Court made clear that its holding was based solely on the agency's "dispositive" failure "to consider a statutorily mandated factor—the impact of the rule on the health of drivers." *Id.* at 1216. The Court elected to "note" further observations beyond its holding, but only "for the sake of completeness." *Id. at* 1217. Even the dicta is inapposite. The statutes at issue in *Public Citizen* expressly mentioned "costs" and "benefits," yet those terms appear nowhere in the Exchange Act provisions applicable in this case. The Court read the agency's duty as something more onerous than a mere consideration of costs and benefits only because of a separate provision that required the agency not only to consider costs and benefits, but also to "deal with" a long list of specific issues relating to commercial motor vehicle safety. *Id.* at 1221. The Court cited no legal authority for the questionable proposition that "dealing with" a set of factors means analyzing their costs and benefits. In any event, the Exchange Act provisions applicable here contain nothing remotely similar to the phrase "dealing with," so even under the dicta proffered in *Public Citizen*, there is no basis for expanding the SEC's obligation beyond the highly discretionary "consideration" of factors established by the Supreme Court in 1950.

C. Legislative history confirms that Congress intended the SEC's duty to consider factors to be limited and always subordinate to the protection of investors and the public interest.

The legislative history of the securities laws confirms the limited and discretionary nature of the SEC's duty. It also shows that Congress did not intend economic considerations to supersede the SEC's paramount duty to protect investors and the public interest.

The Securities Acts Amendments of 1975, which added Section 23(a)(2) to the Exchange Act, were not passed to curb "costly" rules, but to eliminate anticompetitive **industry** practices **that were harming investors** who could not be assured of efficient and fair execution prices. *See* S. REP. No. 94-75, at 1 (1975); H.R. REP. No. 94-229, at 94 (1975). Thus, Congress was not driven by a desire to limit the SEC's rulemaking capability or to spare industry the costs of regulation, but rather to further protect investors.

Accordingly, in Section 23(a)(2), Congress required the SEC to consider the anticompetitive effects of its rules, but it intended this consideration to be flexible and entitled to deference. For example, Congress did **not** require "the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective." S. REP. No. 94-75, at 13 (1975). Moreover, "[c]ompetition was simply not to 'become paramount to the great purposes of the Act.'" *Bradford*

Nat'l Clearing Corp. v. SEC, 590 F.2d 1085, 1105 (D.C. Cir. 1978) (citing S. REP. No. 94-75, at 14).

Similarly, the National Securities Markets Improvement Act of 1996, which added Section 3(f) to require the SEC to "consider" "efficiency, competition, and capital formation," did not require rigid analysis nor did it subordinate the SEC's primary duty to protect investors. The purpose of the amendments was to eliminate the dual system of state and federal regulation "while also advancing the historic commitment of the securities laws to promoting the protection of investors." H.R. REP. No. 104-864, at 39-40 (1996). In passing Section 3(f), Congress again chose to frame the SEC's duty in terms of a consideration.

During the deliberations over the 1996 amendments, Congress actually considered but rejected a much more prescriptive obligation, which would have required:

> (a) an analysis of the likely costs of the regulation on the U.S. economy, particularly the securities markets and the participants in those markets; and (b) the estimated impact of the rule on economic and market behavior, including any impact on market liquidity, the costs of investment, and the financial risks of investment.

S. REP. No. 104-293, at 28-29 (1996). Congress declined to impose this "mechanical or self-describing" process on the SEC, choosing instead to enact the very limited duty simply to consider certain factors. Congress thus adopted and incorporated the Supreme Court's interpretation of "consider," which affords the

SEC wide discretion in determining what "part" those factors should play in the rulemaking process.

D. Congress's deliberate decision not to burden the SEC with cost-benefit analysis is evident from many other statutes.

The Supreme Court has declared that an agency's duty to conduct cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress. *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981) (stating that "Congress uses specific language when intending that an agency engage in cost-benefit analysis"). Therefore, when Congress intends cost-benefit analysis to apply, it explicitly refers to "costs" and "benefits" and specifies the nature of the analysis.[3] *Id.* (citing the Flood Control Act, 33 U.S.C. § 701a of 1936; the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1312(b)(1)-(2), 1314(b)(1)(B); the Clean Water Act of 1977, 33 U.S.C. § 1314(b)(4)(B) (1976 ed., Supp. III); the Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6295(c) and (d) (1976 ed., Supp. II); the

[3] Congress is equally clear when it wants an agency to quantify the benefits of a rule. *See, e.g.* 42 U.S.C. § 300g-1(b)(3) (explicitly requiring quantification); *FMC Corp. v. Train*, 539 F.2d 973, 978-979 (4th Cir. 1976) (finding quantification of the benefits in monetary terms was not required under the statutes at issue). And even in situations where an agency has a duty to conduct a cost-benefit analysis, this Court has explicitly recognized that an agency's "predictions or conclusions" do not necessarily need to be "based on a rigorous, quantitative economic analysis." *Am. Fin. Services Ass'n. v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985).

Clean Air Act Amendments of 1970, 42 U.S.C. § 7545(c)(2)(B) (1976 ed., Supp. III); and the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1347(b) (1976 ed., Supp. III)); *see also* Safe Drinking Water Amendments of 1996, 42 U.S.C. § 300g-1(b)(3) (imposing a duty on the Environmental Protection Agency to seek public comment on, and use analysis of, specific factors, including the "[q]uantifiable and nonquantifiable health risk reduction benefits," the "[q]uantifiable and nonquantifiable costs" and "[t]he incremental costs and benefits associated with each alternative.").

When Congress wants agencies to be free from those constraints, it imposes a less burdensome requirement, thus giving overriding importance to particular statutory objectives. *See Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 471 (2001) (holding that a statute "unambiguously bars cost considerations"); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012) (statutes in which agencies must "consider" the "economic" impact or "costs" do not require cost-benefit analysis); *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1542 n.10 (9th Cir. 1993) (language in 42 U.S.C. § 7491(g)(1) requiring "consideration" does not require a cost-benefit analysis).[4]

[4] Courts respect these congressional policy choices and even when a statute refers to "costs" and "benefits," they refuse to impose a duty to conduct cost-benefit analysis absent language of comparison in the statute. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978); *see also Am. Petroleum Inst. v.*

This is the approach Congress adopted in the Exchange Act, and it stands in sharp contrast to the statutory provisions in which Congress explicitly mandates a quantification, balancing, or netting of costs and benefits. Congress's decision not to include any such cost-benefit requirements in the securities laws, while expressly including them in other statutes, reflects Congress's long-standing judgment that the benefits of protecting investors and the public interest must not be subordinated to concerns about the costs of regulation.[5]

E. Requiring a stringent economic analysis under the Exchange Act would thwart the SEC's ability to implement Congress's regulatory objectives.

The fundamental rationale for Congress's determination not to require the SEC to conduct comparative or quantitative cost-benefit analysis in its rulemaking is clear: It would conflict with, and thereby frustrate, the SEC's ability to implement Congress's objectives and protect investors and the public interest.

The process of evaluating the costs and benefits of regulation is complex, speculative, one-sided in its focus on cost, and imprecise. The Office of Management and Budget, the steward of executive branch compliance with cost-

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EPA, 858 F.2d 261, 265 & n.5 (5th Cir. 1988); *Reynolds Metal Co. v. EPA*, 760 F.2d 549, 565 (4th Cir. 1985).

[5] The bills proposed in Congress seeking to impose a cost-benefit analysis duty on the SEC confirm this view. *See, e.g.*, SEC Regulatory Accountability Act, S. 2373, 112th Cong. (introduced Apr. 26, 2012). Courts have found that such proposals support a finding that an agency's statute does not already mandate a cost-benefit analysis. *See Am. Textile Mfrs. Inst*, 452 U.S. 490, 512 n.30.

benefit analysis, acknowledges the inherent difficulty in quantifying regulatory costs and benefits:

> Many rules have benefits or costs that cannot be quantified or monetized in light of existing information. . . . In fulfilling their statutory mandates, agencies must often act in the face of substantial uncertainty about the likely consequences. In some cases, quantification of various effects is highly speculative.

OMB, 2011 REPORT TO CONG. ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES, at 4 (2011).

Thus, under cost-benefit analysis, many **advantages** of regulation, no matter how important to society or to properly functioning markets, may be disregarded or simply not captured in the calculation. *See Am. Fin. Services Ass'n v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985). As a result, cost-benefit analysis can become an "industry-cost only analysis," which inevitably shifts regulatory policy in favor of industry and away from protecting investors or other public interests. Further, the process is not only imprecise but also enormously time consuming, costly, and resource intensive, slowing the regulatory process and diverting a regulator's very limited resources.

Because of these challenges, the application of cost-benefit analysis can delay, dilute, or prevent the achievement of statutory goals, whether it be ridding the financial markets of systemic risk and fraudulent conduct, or alleviating

violence arising from socio-political conflict. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review,* 75 U. CHI. L. REV. 761, 814 n.29 (2008) (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 391-93(1986) for the proposition that "judicial requirements of an exhaustive investigation of alternatives may prevent agencies with scarce resources from making even minor changes," and Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety*, at 149-51 (Harvard 1990), for the proposition that the "hard look" judicial review of cost-benefit analysis led the "National Highway Traffic Safety Administration to avoid rulemaking and focus on product recalls").

In fact, critics of cost-benefit analysis have long warned that it is used as a "device not for producing the right kind and amount of regulation, but for diminishing the role of regulation even when it was beneficial." *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHIC. L. REV. 1, 5-6 (1995). As observed by one court, the imposition of technical and burdensome requirements relating to cost-benefit analysis "serve[s] as a dilatory device, obstructing the agency from proceeding with its primary mission." *FMC Corp. v. Train*, 539 F.2d 973, 978-79 (4th Cir. 1976).

These challenges and uncertainties apply with special force in the context of financial market regulation, where the costs and benefits are often contingent,

unpredictable, and exceedingly difficult to quantify. The costs of compliance will often vary greatly depending on how a market participant chooses to adapt to a new regulation. Assessing the benefits of a financial regulation is even more difficult, since it typically involves crucial yet amorphous benefits such as market integrity or investor confidence. These challenges become especially difficult in the context of a rule designed to achieve other types of social benefits, including reduced conflict and violence in other areas of the world, as in this case.[6]

Even assuming that the SEC had the ability and the resources to identify and quantify all of the costs and benefits of a rule, the results of such an analysis would threaten to second-guess or override Congress's determination that those costs are warranted to achieve certain statutory goals. This threat is obvious where Congress has mandated a rule, as in this case. However, the threat also exists even

[6] One reason for the difficulty in quantifying costs and benefits stems from a lack of accessible data: It "doesn't (sic) exist or [it is] in the hands of market participants who don't want to share valuable intelligence." Josh Boak, *Dodd-Frank foes beating path to courthouse door*, POLITICO.COM, Nov. 29, 2011, http://www.politico.com/news/stories/1111/69353.html. Moreover, industry proponents themselves either cannot or will not develop concrete measurements of costs and benefits, preferring instead simply to criticize the analyses performed by the regulatory agencies. This passive and obstructionist tactic in the application of cost-benefit analysis is evident in other rulemakings criticized by industry. *See, e.g.*, Peter Eavis, *Making a Theoretical Case About Volcker*, DEALBOOK N.Y. TIMES, Feb. 14, 2012, http://dealbook.nytimes.com/2012/02/14/making-a-theoretical-case-against-volcker/; John Kemp, *The Trojan Horse of cost benefit analysis*, REUTERS, Jan. 3, 2012, http://blogs.reuters.com/great-debate/2012/01/03/the-trojan-horse-of-cost-benefit-analysis/.

as to the discretionary aspects of the SEC's rulemaking, since cost-benefit analysis can force a regulatory agency to adopt rules that ultimately subordinate the public interest to the industry's interest in minimizing costs.

That is why Congress chose not to require the SEC to conduct cost-benefit analysis in its rulemakings. Instead, it merely required the SEC to consider the impact of a rule on certain specifically identified economic factors, and it made clear that in any event, such economic considerations must not override the SEC's principal duty to protect the public interest.[7]

II. The SEC reasonably considered the factors in accordance with Exchange Act Sections 3(f) and 23(a)(2).

The SEC considered the impact of the Rule on the protection of investors and the public as well as on efficiency, competition, and capital formation. It also found that any burden on competition was necessary or appropriate in furtherance of the purposes of the statute. Thus, far from a "complete absence of any

[7] If the SEC is required to conduct cost-benefit analysis and the public interest is subordinated to industry's cost concerns, one casualty will be the SEC's ability to fully implement the entire set of regulatory reforms relating to the securities markets that Congress established in the Dodd-Frank Act. Those reforms are necessary to help prevent the recurrence of another financial crisis—an event that has inflicted almost immeasurable harm on our markets and our economy. *See* BETTER MARKETS, THE COST OF THE WALL STREET-CAUSED FINANCIAL COLLAPSE AND ONGOING ECONOMIC CRISIS IS MORE THAN $12.8 TRILLION (Sept. 15, 2012), *available at* http://bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis_0.pdf.

discussion of a statutorily mandated factor," *Pub. Citizen*, 374 F.3d at 1216, the SEC reasonably considered all required factors. Applying the high degree of deference due to the SEC under APA jurisprudence, this consideration should be upheld and the Petitioners' claims should be dismissed. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) [*State Farm*] ("[T]he scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency."); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) ("standard of review is a highly deferential one").

First, the agency considered the Rule's impact on **investors and the public**. For example, it observed that "the purpose of [the statute] is furthering the humanitarian goals of reducing violence and advancing peace and security in the DRC and the benefits Congress intended are derived directly from the statute." 77 Fed. Reg. 56,336/2. Thus, the Rule is designed "to help achieve the intended humanitarian benefits in the way Congress directed." *Id.* The SEC also recognized the beneficial impact of providing the required disclosure to investors, which, according to investors themselves, "is material to an investment decision and, therefore, similar to other disclosures required to be filed by issuers." *Id.* at 56,335/3-36/1; *see also id.* at 56,344/2 (noting that the information on the reasonable country of origin inquiry, required to be disclosed under the Rule, will

allow stakeholders to assess the issuer's efforts and, therefore, "stakeholders could advocate for different processes for individual issuers").

Second, the SEC appropriately considered the Rule's impact on **informational efficiency**. Citing commentators' views that the Rule "protects investors by requiring disclosure of information that may be material to their understanding of the risks of investing in an issuer or supply chain," the agency stated that "[t]o the extent that the required disclosure will help investors in pricing the securities of the issuers subject to the [Rule], the [R]ule could improve informational efficiency." *Id*. at 56,350/3.

Moreover, the SEC considered **capital formation** as well as the potential loss in **allocative efficiency** resulting from compliance costs, which could "potentially divert capital away from other productive opportunities." *Id*. at 56,350/3. However, the agency reasonably concluded that any loss in allocative efficiency "could be offset, somewhat, by increased demand for the firm's products and/or shares by socially conscious customers and investors," and that it "[did] not expect that the rule would negatively impact prospects of the affected industries to an extent that would result in a withdrawal of capital from these industries." *Id*. at 56,350/3-51/1.

Lastly, the SEC adequately considered the impact of the Rule on **competition**. For example, it acknowledged that mining companies and private

and foreign companies that operate in the same market but do not have a reporting obligation may have a competitive advantage. But the SEC also observed that this impact may be mitigated, since, in their dealings with reporting issuers, such companies "will bear many of the compliance costs of determining whether their minerals are conflict-free." *Id.* at 56,350/1-3. Also, any competitive advantage of foreign companies "may be diminished" "if foreign jurisdictions implement similar laws or regulations similar to Section 1502 [of the Dodd-Frank Act] or the final rule." *Id.* at 56,350/3. Furthermore, the exclusion of private companies in the Rule "may not unduly burden reporting issuers because the commercial pressure on private companies from issuers that need this information for their reports and from the public in general demanding that issuers make this information available could be sufficient for the private companies to provide voluntarily their conflict minerals information as standard practice." *Id*. at 56,349/3.

The SEC then reasonably concluded that "Congress [had already] determined that [the statute's] costs were necessary and appropriate in furthering the goals of helping end the conflict in the DRC and promoting peace and security in the DRC." *Id.* at 56,350/3. Therefore, "[t]o the extent the final rule implementing the statute imposes a burden on competition in the industries of affected issuers, . . . the burden is necessary and appropriate in furtherance of the purposes of Section 13(p) [15 U.S.C. § 78m(p)]." *Id.* By reasonably considering

the competitive impact of the Rule and explaining why any burden was necessary to fulfill the purpose of the statute, the SEC complied with its statutory duty. *See Bradford Nat'l Clearing Corp.*, 590 F.2d 1085, 1107 (D.C. Cir. 1978) (stating that the court's "task is not to decide whether the Commission made the 'right' (or least anticompetitive) decision or the one that [the] court might have made were it charged with doing so but rather whether the Commission's decision falls within the boundaries of its broad authority").

III. Petitioners' attempt to expand the SEC's duty beyond the statutory requirement to consider certain economic factors has no other basis.

As shown above, the Exchange Act does not in fact require the SEC to perform cost-benefit analysis as contended by Petitioners, and the SEC did all that the law requires in terms of assessing the economic impact of the Rule. In addition, there is no other body of law that would subject the SEC to the far more onerous duty advocated by Petitioners.

A. Petitioners' reliance on *Business Roundtable* and *Chamber I* is mistaken.

Petitioners' claimed authority for imposing a cost-benefit duty on the SEC consists of the aforementioned provisions in the Exchange Act coupled with two recent decisions from this Court, *Business Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011) and *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir 2005) [*Chamber I*]. Pet. Br. at 26-28. Not only is the Petitioners' statutory

interpretation erroneous, as detailed above, but their reliance on *Business Roundtable* and *Chamber I* is also mistaken.

As a threshold matter, in the cases where the SEC's consideration of the economic impact of its rules was at issue, this Court never expressly held that the SEC had a duty to conduct "cost-benefit analysis." *See, e.g.*, *Business Roundtable*, 647 F.3d 1144; *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Chamber I*, 412 F.3d 133. But to the extent those decisions can be read as requiring such a duty, or any duty more onerous than what Congress actually imposed, that interpretation would not be entitled to precedential weight.

The Supreme Court has held that "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511(1925); *Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1374 (D.C. Cir. 2004). Thus, any overly burdensome interpretation of the SEC's obligation ascribed to this Court in *Chamber I* and its progeny should not be considered controlling because in **none of those cases** did the parties argue or the Court address:

- The plain meaning of the applicable statutes and the absence of cost-benefit references in those provisions;

- The Supreme Court's interpretation of "consider;" which affords agencies wide discretion;
- Legislative history, which reaffirms that the SEC's duty is limited, entitled to deference, and subject to the public interest;
- Other statutes, which demonstrate that Congress knows precisely how to impose a cost-benefit obligation; and
- The harmful impact on investor protection and the public interest arising from the imposition of burdensome non-statutory obligations on the SEC.

Because these issues and authorities were neither argued nor addressed, those cases did not resolve or define, with any precedential weight, the SEC's statutory duty to consider the economic factors listed in the Exchange Act.

B. The APA imposes no independent obligation to conduct economic analysis, it strictly limits the scope of judicial review, and the SEC satisfied its requirements.

The APA does not require an agency to conduct cost-benefit analysis. *See Vill. of Barrington v. Surface Transp. Bd*., 636 F.3d 650, 670-671 (D.C. Cir. 2011).[8] Under the APA, a reviewing court's duty is merely to determine whether a

[8] Nor do the various Executive Order provisions governing cost-benefit analysis apply to the SEC. In fact, the SEC and all independent regulatory agencies are expressly **excluded** from executive order provisions requiring cost-benefit analysis. Executive Order 13,579, 76 Fed. Reg. 41,587 (July 14, 2011); Executive

rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A). With respect to assessing an agency's compliance with its organic statutes (here, the Exchange Act), a court may not find a violation of the APA unless the agency has "wholly failed" to comply with a statutory requirement, or if there is a "complete absence of any discussion of a statutorily mandated factor." *Pub. Citizen*, 374 F.3d at 1216.

Beyond that, a court may find agency action to be arbitrary and capricious only when an agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the rule] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

With respect to all aspects of judicial review under the APA, the scope of the court's inquiry "is narrow and a court is not to substitute its judgment for that of the agency." *Id.* As this Court has long recognized, the APA "standard of review

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Order No. 13,563, 76 Fed. Reg. 3,821, § 7 (Jan. 21, 2011); Executive Order 12,866, 58 Fed. Reg. 51,735, § 3(b) (Oct. 4, 1993). A recent order, Executive Order 13,579, addresses the independent agencies, but it does not obligate them to conduct cost-benefit analysis. First, it does not obligate them to do anything, since unlike preceding orders, it uses entirely advisory rather than mandatory language, consistently using "should" rather than "shall." Second, although it encourages agencies to follow certain specified guidelines in prior executive orders, and to conduct retrospective rule review, it carefully excludes from that list any reference to the specific sections dealing with cost-benefit analysis. *Id.* at § 1(c).

is a highly deferential one, which presumes the agency's actions to be valid." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981).

In this case, the SEC satisfied both of its obligations under the APA. First, as demonstrated above, the SEC considered the statutorily mandated economic factors as specifically required under the Exchange Act, and it did so within the broad, discretionary parameters set forth by the Supreme Court in *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950). The SEC therefore complied with both the Exchange Act and the APA as to its statutory duty.

Second, to the extent the SEC went beyond its narrow and limited statutory duty and elected to consider certain costs and benefits of the Rule, either qualitatively or quantitatively, that discretionary consideration met the deferential standard of reasonableness under the APA. The SEC considered appropriate factors, explained its decisions, and arrived at a Rule that was far from "implausible." For example, the SEC reasonably considered the potential humanitarian and informational benefits to the public and investors in qualitative terms, and it explained its decision not to address the benefits quantitatively. *See* 77 Fed. Reg. 56,342/3, 56,350/2 (explaining that the decision not to attempt to quantify the Rule's benefits was based on the absence of data, the agency's inability to assess the effectiveness of the statute in achieving its desired social

benefits, and the fact that the statutory objectives "appear to be directed at achieving overall social benefits and are not necessarily intended to generate measurable, direct economic benefits to investors or issuers generally"); *see also Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) ("The APA imposes no general obligation on agencies to produce empirical evidence.").

The SEC's consideration of costs—again not required—was also reasonable. In particular, the agency: (1) provided a detailed overview of the comments submitted on the costs of each mandatory aspect of the Rule to small and large issuers, private and public issuers, and other distinct subsets of issuers, *id*. at 56,336-42; (2) adequately explained any limitations to commentators' cost estimates, *see*, *e.g.*, *id.* at 56,352/1-53/3 (noting the assumption by commentators that the number of first-tier suppliers impacted by the Rule is calculated using a top-down approach, rather than a bottom-up approach, which appropriately takes into account economies of scale); (3) qualitatively discussed each of the SEC's discretionary components of the Rule and the costs of those components relative to alternatives submitted by commentators, *id.* at 56,343/1-50/1; and (4) provided a range of initial costs and ongoing compliance costs, *id*. at 56,351/2. Accordingly,

to the extent the SEC did engage in a discretionary consideration of costs and benefits, that thorough consideration was reasonable under the APA.[9]

Petitioners fault the SEC for not adopting certain alternatives and for choosing alternatives, without explanation, "that raised the rule's costs **without any showing of marginal benefits**." Pet. Br. at 34 (emphasis added). However, although not required, the agency did in fact reasonably consider various alternatives and their attendant costs; chose alternatives that offered additional benefits; and adequately explained those choices. As permitted in its discretion, the SEC chose the alternatives that it believed were more consistent with the benefit of furthering the purposes of the statutory mandate. *See, e.g.*, 77 Fed. Reg. 56,345/1 (noting that the decision to include within the scope of the Rule issuers that "contract to manufacture" "affects the overall compliance costs and burdens, in particular, on the subset of issuers that contract to manufacture products," but adopting it nonetheless, "based on [the SEC's] interpretation of the statute in light of [its] understanding of the statutory intent and a reading of the statute's text").

[9] Although the SEC "considered" some of the costs and benefits relating to the Rule, 77 Fed. Reg. 56,334/2, it clearly did not undertake a cost-benefit analysis. It certainly did not expressly assume that task. Moreover, the only statutory obligation to conduct any form of economic analysis cited by the SEC was its duty to consider various factors under Sections 3(f) and 23(a)(2) of the Exchange Act. *Id.* at 56,335 (clearly stating what the Exchange Act "requires" of the Commission).

This approach to alternatives was not only reasonable, but an appropriate exercise of agency discretion. Because the rulemaking was mandatory, Congress necessarily had already determined the statute's benefits and had found that they justified the costs.[10] As recognized by the SEC, "the benefits Congress intended are derived directly from the statue." *Id.* at 56,336/2. Therefore, alternatives that further the statutory objectives—by avoiding potential loopholes, for example—necessarily achieve "marginal benefits." Thus, the SEC's discretionary decision to adopt certain alternatives that, notwithstanding their costs, would achieve these marginal benefits was fully explained and entirely reasonable.[11]

Petitioners' arguments ask the Court in effect to exceed the well-established limits on judicial review under the APA. By insisting that the SEC must do more in its rulemaking process, the Petitioners are not only attempting to expand the

[10] As admitted by Petitioners, the SEC did not have the authority to second-guess "the congressional directive to impose a rule." Pet. Br. at 1. But the agency also did not have the authority or need to contradict Congress's determinations of the statute's benefits or its effectiveness at achieving those benefits. Rather, the statute required the SEC to promulgate a rule and expressly delegated to the Government Accountability Office Congress the responsibility of annually reporting to Congress on the effectiveness of the statute. Dodd-Frank Act, § 1502(d).

[11] Congress has never required the SEC to adopt the least costly approach in its rules. On the contrary, it is very clear that the SEC's primary duty is to protect investors and the public interest, and only then to consider whether a rule will promote efficiency, competition, and capital formation. *See* discussion *supra* at Section I. Moreover, Congress made clear that the SEC's regulatory choices need not be the "least anti-competitive manner of achieving a regulatory objective." S. REP. No. 94-75, at 13 (1975).

Exchange Act requirements beyond what Congress intended, they are also seeking to establish hurdles that Congress never intended under the **APA.**

In *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 543 (1978), the Supreme Court held that courts are not to impose procedural requirements on agency rulemaking beyond those set forth in the APA. *Id.* at 543. The Court explained that "if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable." *Id.* at 546.

Petitioners' arguments raise the same fundamental concerns, although their rationale for overturning agency action—and ultimately congressionally enacted goals—has now shifted from the procedural grounds addressed in *Vermont Yankee* to the more substantive interference with agency decision-making based upon economic analysis. *See AFL-CIO v. Marshall,* 617 F.2d 636, 665 n.167 (D.C. Cir. 1979).

However, the threatened harm is the same: hindering the rulemaking process and thwarting the implementation of statutory measures that Congress has deemed necessary to promote human welfare, from establishing sound financial markets to curbing violence and conflict elsewhere in the world.

CONCLUSION

For the foregoing reasons, the Court should uphold the Rule.

Dated: March 8, 2013

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPESTYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d), because this brief contains 6,802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE AS TO THE NECESSITY OF A SEPARATE *AMICUS* BRIEF

Pursuant to Circuit Rule 29(d), the undersigned counsel certifies as follows: Better Markets understands that separate *amicus* briefs are being submitted by Global Witness and by certain members of Congress. Better Markets further understands that the issues addressed in those briefs are materially distinct from those addressed herein, and accordingly, consolidation of the *amicus* briefs in support of the Respondent is not practicable or feasible.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2013, I caused the foregoing "Brief of Better Markets, Inc. as *Amicus Curiae* in Support of Respondent U.S. Securities and Exchange Commission" to be electronically filed using the Court's CM/ECF system, which served a copy of the document on all counsel of record in the case.

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ADDENDUM PURSUANT TO
FED. R. APP. P. 28 AND CIRCUIT RULE 28(a)(7)

Except for the following, all applicable statutes and regulations are contained in the Brief for the Petitioners, and as to 15 U.S.C. § 78c(f) and 15 U.S.C. § 78w(a)(2), in the *amicus* Industry Coalition's Brief:

33 U.S.C. § 701a

an affected State or by the Secretary of the Army pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and section 485h(a) of title 43 and section 590z-1(a) of title 16 are amended accordingly.

(Dec. 22, 1944, ch. 665, § 1, 58 Stat. 887; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; Pub. L. 104-303, title II, § 223, Oct. 12, 1996, 110 Stat. 3697.)

AMENDMENTS

1996—Par. (a). Pub. L. 104-303 substituted "Within 30 days" for "Within ninety days" and "30-day period" for "ninety-day period".

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued Department of the Army under administrative supervision of Secretary of the Army.

APPLICABILITY OF SECTION TO PROJECTS AUTHORIZED BY FLOOD CONTROL ACTS

Pub. L. 90-483, title II, § 202, Aug. 13, 1968, 82 Stat. 739, provided that: "The provisions of section 1 of the Act of December 22, 1944 (Public Law Numbered 534, Seventy-eighth Congress, second session) [this section], shall govern with respect to projects authorized in this Act [Pub. L. 90-483], and the procedures therein set forth with respect to plans, proposals, or reports for works of improvement for navigation or flood control and for irrigation and purposes incidental thereto shall apply as if herein set forth in full."

Similar provisions were contained in the following prior acts:

Nov. 7, 1966, Pub. L. 89-769, title II, § 202, 80 Stat. 1413.
Oct. 27, 1965, Pub. L. 89-298, title II, § 203, 79 Stat. 1074.
Sept. 3, 1954, ch. 1264, title II, § 202, 68 Stat. 1256.
May 17, 1950, ch. 188, title II, § 202, 64 Stat. 170.

GLENDO UNIT, WYOMING, MISSOURI RIVER BASIN PROJECT

Joint Res. July 16, 1954, ch. 532, § 2, 68 Stat. 466, provided, with respect to the Glendo unit (dam and reservoir), Missouri River Basin Project, at the Glendo site on the North Platte River in Wyoming, for waiver of the provisions of subsec. (c) of this section. Section 1 of the Joint Resolution provided for the construction and operation of such unit by the Secretary of the Interior.

SECTION AS UNAFFECTED BY SUBMERGED LANDS ACT

Provisions of this section as not amended, modified or repealed by the Submerged Lands Act, see section 1303 of Title 43, Public Lands.

§ 701a. Declaration of policy of 1936 act

It is recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions, and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.

(June 22, 1936, ch. 688, § 1, 49 Stat. 1570.)

§ 701a-1. "Flood control" defined; jurisdiction of Federal investigations

The words "flood control" as used in section 701a of this title, shall be construed to include channel and major drainage improvements and flood prevention improvements for protection from groundwater-induced damages, and Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the Department of the Army under the direction of the Secretary of the Army and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

(Dec. 22, 1944, ch. 665, § 2, 58 Stat. 889; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; Pub. L. 99-662, title IV, § 403, Nov. 17, 1986, 100 Stat. 4133.)

AMENDMENTS

1986—Pub. L. 99-662 inserted "and flood prevention improvements for protection from groundwater-induced damages" after "drainage improvements".

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued Department of the Army under administrative supervision of Secretary of the Army.

SAVINGS PROVISION

Authority of Secretary of Agriculture under this section as unaffected by repeal of Secretary's authority under section 701b of this title, see section 7 of act Aug. 4, 1954, set out as a note under section 701b of this title.

SECTION AS UNAFFECTED BY SUBMERGED LANDS ACT

Provisions of this section as not amended, modified or repealed by the Submerged Lands Act, see section 1303 of Title 43, Public Lands.

§ 701b. Supervision of Secretary of the Army; reclamation projects unaffected

Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the Department of the Army under the direction of the Secretary

33 U.S.C. § 1312(b)(1)-(2)

tion] shall not apply to those treatment works which are subject to a compliance schedule established before the date of the enactment of this Act [Feb. 4, 1987] by a court order or a final administrative order."

EFFECTIVE DATE OF 1981 AMENDMENT

Section 22(e) of Pub. L. 97–117 provided that: "The amendments made by this section [amending this section] shall take effect on the date of enactment of this Act [Dec. 29, 1981], except that no applicant, other than the city of Avalon, California, who applies after the date of enactment of this Act for a permit pursuant to subsection (h) of section 301 of the Federal Water Pollution Control Act [33 U.S.C. 1311(h)] which modifies the requirements of subsection (b)(1)(B) of section 301 of such Act [33 U.S.C. 1311(b)(1)(B)] shall receive such permit during the one-year period which begins on the date of enactment of this Act."

REGULATIONS

Section 301(f) of Pub. L. 100–4 provided that: "The Administrator shall promulgate final regulations establishing effluent limitations in accordance with sections 301(b)(2)(A) and 307(b)(1) of the Federal Water Pollution Control Act [33 U.S.C. 1311(b)(2)(A), 1317(b)(1)] for all toxic pollutants referred to in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives which are discharged from the categories of point sources in accordance with the following table:

"Category	Date by which the final regulation shall be promulgated
Organic chemicals and plastics and synthetic fibers	December 31, 1986.
Pesticides	December 31, 1986."

PHOSPHATE FERTILIZER EFFLUENT LIMITATION

Amendment by section 306(a), (b) of Pub. L. 100–4 not to be construed (A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters, (B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 1342(a)(1)(B) of this title, and (C) to affect the authority of any State to deny or condition certification under section 1314 of this title with respect to the issuance of permits under section 1342(a)(1)(B) of this title, see section 306(c) of Pub. L. 100–4, set out as a note under section 1342 of this title.

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION FROM FEDERAL WATER POLLUTION CONTROL REQUIREMENTS; CONDITIONS

Pub. L. 98–67, title II, § 214(g), Aug. 5, 1983, 97 Stat. 393, as amended by Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095, provided that: "Any discharge from a point source in the United States Virgin Islands in existence on the date of the enactment of this subsection [Aug. 5, 1983] which discharge is attributable to the manufacture of rum (as defined in paragraphs (3) of section 7652(c) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954]) [26 U.S.C. 7652(c)(3)] shall not be subject to the requirements of section 301 (other than toxic pollutant discharges), section 306 or section 403 of the Federal Water Pollution Control Act [33 U.S.C. 1311, 1316, 1343] if—

"(1) such discharge occurs at least one thousand five hundred feet into the territorial sea from the line of ordinary low water from that portion of the coast which is in direct contact with the sea, and

"(2) the Governor of the United States Virgin Islands determines that such discharge will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities."

CERTAIN MUNICIPAL COMPLIANCE DEADLINES UNAFFECTED; EXCEPTION

Section 21(a) of Pub. L. 97–117 provided in part that: "The amendment made by this subsection [amending this section] shall not be interpreted or applied to extend the date for compliance with section 301(b)(1)(B) or (C) of the Federal Water Pollution Control Act [33 U.S.C. 1311(b)(1)(B), (C)] beyond schedules for compliance in effect as of the date of enactment of this Act [Dec. 29, 1981], except in cases where reductions in the amount of financial assistance under this Act [Pub. L. 97–117, see Short Title of 1981 Amendment note set out under section 1251 of this title] or changed conditions affecting the rate of construction beyond the control of the owner or operator will make it impossible to complete construction by July 1, 1983."

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1312. Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(*l*) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations

(1) Notice and hearing

Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be ob-

tained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

(June 30, 1948, ch. 758, title III, §302, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100–4, title III, §308(e), Feb. 4, 1987, 101 Stat. 39.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100–4, §308(e)(2), inserted "or as identified under section 1314(l) of this title" after "Administrator" and "public health," after "protection of".

Subsec. (b). Pub. L. 100–4, §308(e)(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows:

"(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

"(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person."

§1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed

33 U.S.C. § 1314(b)(1)(B)

lish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

(4) The Administrator shall, within 90 days after December 27, 1977, and from time to time thereafter, publish and revise as appropriate information identifying conventional pollutants, including but not limited to, pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH. The thermal component of any discharge shall not be identified as a conventional pollutant under this paragraph.

(5)(A) The Administrator, to the extent practicable before consideration of any request under section 1311(g) of this title and within six months after December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and to allow recreational activities, in and on the water.

(B) The Administrator, to the extent practicable before consideration of any application under section 1311(h) of this title and within six months after December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife, and to allow recreational activities, in and on the water.

(6) The Administrator shall, within three months after December 27, 1977, and annually thereafter, for purposes of section 1311(h) of this title publish and revise as appropriate information identifying each water quality standard in effect under this chapter or State law, the specific pollutants associated with such water quality standard, and the particular waters to which such water quality standard applies.

(7) GUIDANCE TO STATES.—The Administrator, after consultation with appropriate State agencies and on the basis of criteria and information published under paragraphs (1) and (2) of this subsection, shall develop and publish, within 9 months after February 4, 1987, guidance to the States on performing the identification required by subsection (*l*)(1) of this section.

(8) INFORMATION ON WATER QUALITY CRITERIA.—The Administrator, after consultation with appropriate State agencies and within 2 years after February 4, 1987, shall develop and publish information on methods for establishing and measuring water quality criteria for toxic pollutants on other bases than pollutant-by-pollutant criteria, including biological monitoring and assessment methods.

(9) REVISED CRITERIA FOR COASTAL RECREATION WATERS.—

(A) IN GENERAL.—Not later than 5 years after October 10, 2000, after consultation and in cooperation with appropriate Federal, State, tribal, and local officials (including local health officials), the Administrator shall publish new or revised water quality criteria for pathogens and pathogen indicators (including a revised list of testing methods, as appropriate), based on the results of the studies conducted under section 1254(v) of this title, for the purpose of protecting human health in coastal recreation waters.

(B) REVIEWS.—Not later than the date that is 5 years after the date of publication of water quality criteria under this paragraph, and at least once every 5 years thereafter, the Administrator shall review and, as necessary, revise the water quality criteria.

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title 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 shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, nonwater quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for

33 U.S.C. § 1314(b)(4)(B) (1976 ed., Supp. III)

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 1311(b)(2)(E) of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

[*See main edition for text of* (c)]

(d) Secondary treatment information; alternative waste treatment management techniques and systems

[*See main edition for text of* (1) *and* (2)]

(3) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall promulgate within one hundred and eighty days after December 27, 1977, guidelines for identifying and evaluating innovative and alternative wastewater treatment processes and techniques referred to in section 1281(g)(5) of this title.

(e) Best management practices for industry

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, may publish regulations, supplemental to any effluent limitations specified under subsections (b) and (c) of this section for a class or category of point sources, for any specific pollutant which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant under section 1317(a)(1) or 1321 of this title, to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage which the Administrator determines are associated with or ancillary to the industrial manufacturing or treatment process within such class or category of point sources and may contribute significant amounts of such pollutants to navigable waters. Any applicable controls established under this subsection shall be included as a requirement for the purposes of section 1311, 1312, 1316, 1317, or 1343 of this title, as the case may be, in any permit issued to a point source pursuant to section 1342 of this title.

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

(g) Guidelines for pretreatment of pollutants

(1) For the purpose of assisting States in carrying out programs under section 1342 of this title, the Administrator shall publish, within one hundred and twenty days after October 18, 1972, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

42 U.S.C. § 300g-1(b)(3)

Rulemaking published in volume 47, Federal Register, page 9352, and in volume 48, Federal Register, page 45502, the Administrator shall publish maximum contaminant level goals and promulgate national primary drinking water regulations—

(i) not later than 1 year after June 19, 1986, for not fewer than 9 of the listed contaminants;

(ii) not later than 2 years after June 19, 1986, for not fewer than 40 of the listed contaminants; and

(iii) not later than 3 years after June 19, 1986, for the remainder of the listed contaminants.

(B) SUBSTITUTION OF CONTAMINANTS.—If the Administrator identifies a drinking water contaminant the regulation of which, in the judgment of the Administrator, is more likely to be protective of public health (taking into account the schedule for regulation under subparagraph (A)) than a contaminant referred to in subparagraph (A), the Administrator may publish a maximum contaminant level goal and promulgate a national primary drinking water regulation for the identified contaminant in lieu of regulating the contaminant referred to in subparagraph (A). Substitutions may be made for not more than 7 contaminants referred to in subparagraph (A). Regulation of a contaminant identified under this subparagraph shall be in accordance with the schedule applicable to the contaminant for which the substitution is made.

(C) DISINFECTANTS AND DISINFECTION BYPRODUCTS.—The Administrator shall promulgate an Interim Enhanced Surface Water Treatment Rule, a Final Enhanced Surface Water Treatment Rule, a Stage I Disinfectants and Disinfection Byproducts Rule, and a Stage II Disinfectants and Disinfection Byproducts Rule in accordance with the schedule published in volume 59, Federal Register, page 6361 (February 10, 1994), in table III.13 of the proposed Information Collection Rule. If a delay occurs with respect to the promulgation of any rule in the schedule referred to in this subparagraph, all subsequent rules shall be completed as expeditiously as practicable but no later than a revised date that reflects the interval or intervals for the rules in the schedule.

(3) RISK ASSESSMENT, MANAGEMENT, AND COMMUNICATION.—

(A) USE OF SCIENCE IN DECISIONMAKING.—In carrying out this section, and, to the degree that an Agency action is based on science, the Administrator shall use—

(i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and

(ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data).

(B) PUBLIC INFORMATION.—In carrying out this section, the Administrator shall ensure that the presentation of information on public health effects is comprehensive, informative, and understandable. The Administrator shall, in a document made available to the public in support of a regulation promulgated under this section, specify, to the extent practicable—

(i) each population addressed by any estimate of public health effects;

(ii) the expected risk or central estimate of risk for the specific populations;

(iii) each appropriate upper-bound or lower-bound estimate of risk;

(iv) each significant uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and

(v) peer-reviewed studies known to the Administrator that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data.

(C) HEALTH RISK REDUCTION AND COST ANALYSIS.—

(i) MAXIMUM CONTAMINANT LEVELS.—When proposing any national primary drinking water regulation that includes a maximum contaminant level, the Administrator shall, with respect to a maximum contaminant level that is being considered in accordance with paragraph (4) and each alternative maximum contaminant level that is being considered pursuant to paragraph (5) or (6)(A), publish, seek public comment on, and use for the purposes of paragraphs (4), (5), and (6) an analysis of each of the following:

(I) Quantifiable and nonquantifiable health risk reduction benefits for which there is a factual basis in the rulemaking record to conclude that such benefits are likely to occur as the result of treatment to comply with each level.

(II) Quantifiable and nonquantifiable health risk reduction benefits for which there is a factual basis in the rulemaking record to conclude that such benefits are likely to occur from reductions in co-occurring contaminants that may be attributed solely to compliance with the maximum contaminant level, excluding benefits resulting from compliance with other proposed or promulgated regulations.

(III) Quantifiable and nonquantifiable costs for which there is a factual basis in the rulemaking record to conclude that such costs are likely to occur solely as a result of compliance with the maximum contaminant level, including monitoring, treatment, and other costs and excluding costs resulting from compliance with other proposed or promulgated regulations.

(IV) The incremental costs and benefits associated with each alternative maximum contaminant level considered.

(V) The effects of the contaminant on the general population and on groups within the general population such as infants, children, pregnant women, the elderly, individuals with a history of serious illness, or other subpopulations that are identified as likely to be at greater risk of adverse health effects due to exposure to contami-

nants in drinking water than the general population.

(VI) Any increased health risk that may occur as the result of compliance, including risks associated with co-occurring contaminants.

(VII) Other relevant factors, including the quality and extent of the information, the uncertainties in the analysis supporting subclauses (I) through (VI), and factors with respect to the degree and nature of the risk.

(ii) TREATMENT TECHNIQUES.—When proposing a national primary drinking water regulation that includes a treatment technique in accordance with paragraph (7)(A), the Administrator shall publish and seek public comment on an analysis of the health risk reduction benefits and costs likely to be experienced as the result of compliance with the treatment technique and alternative treatment techniques that are being considered, taking into account, as appropriate, the factors described in clause (i).

(iii) APPROACHES TO MEASURE AND VALUE BENEFITS.—The Administrator may identify valid approaches for the measurement and valuation of benefits under this subparagraph, including approaches to identify consumer willingness to pay for reductions in health risks from drinking water contaminants.

(iv) AUTHORIZATION.—There are authorized to be appropriated to the Administrator, acting through the Office of Ground Water and Drinking Water, to conduct studies, assessments, and analyses in support of regulations or the development of methods, $35,000,000 for each of fiscal years 1996 through 2003.

(4) GOALS AND STANDARDS.—

(A) MAXIMUM CONTAMINANT LEVEL GOALS.—Each maximum contaminant level goal established under this subsection shall be set at the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.

(B) MAXIMUM CONTAMINANT LEVELS.—Except as provided in paragraphs (5) and (6), each national primary drinking water regulation for a contaminant for which a maximum contaminant level goal is established under this subsection shall specify a maximum contaminant level for such contaminant which is as close to the maximum contaminant level goal as is feasible.

(C) DETERMINATION.—At the time the Administrator proposes a national primary drinking water regulation under this paragraph, the Administrator shall publish a determination as to whether the benefits of the maximum contaminant level justify, or do not justify, the costs based on the analysis conducted under paragraph (3)(C).

(D) DEFINITION OF FEASIBLE.—For the purposes of this subsection, the term "feasible" means feasible with the use of the best technology, treatment techniques and other means which the Administrator finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available (taking cost into consideration). For the purpose of this paragraph, granular activated carbon is feasible for the control of synthetic organic chemicals, and any technology, treatment technique, or other means found to be the best available for the control of synthetic organic chemicals must be at least as effective in controlling synthetic organic chemicals as granular activated carbon.

(E) FEASIBLE TECHNOLOGIES.—

(i) IN GENERAL.—Each national primary drinking water regulation which establishes a maximum contaminant level shall list the technology, treatment techniques, and other means which the Administrator finds to be feasible for purposes of meeting such maximum contaminant level, but a regulation under this subsection shall not require that any specified technology, treatment technique, or other means be used for purposes of meeting such maximum contaminant level.

(ii) LIST OF TECHNOLOGIES FOR SMALL SYSTEMS.—The Administrator shall include in the list any technology, treatment technique, or other means that is affordable, as determined by the Administrator in consultation with the States, for small public water systems serving—

(I) a population of 10,000 or fewer but more than 3,300;

(II) a population of 3,300 or fewer but more than 500; and

(III) a population of 500 or fewer but more than 25;

and that achieves compliance with the maximum contaminant level or treatment technique, including packaged or modular systems and point-of-entry or point-of-use treatment units. Point-of-entry and point-of-use treatment units shall be owned, controlled and maintained by the public water system or by a person under contract with the public water system to ensure proper operation and maintenance and compliance with the maximum contaminant level or treatment technique and equipped with mechanical warnings to ensure that customers are automatically notified of operational problems. The Administrator shall not include in the list any point-of-use treatment technology, treatment technique, or other means to achieve compliance with a maximum contaminant level or treatment technique requirement for a microbial contaminant (or an indicator of a microbial contaminant). If the American National Standards Institute has issued product standards applicable to a specific type of point-of-entry or point-of-use treatment unit, individual units of that type shall not be accepted for compliance with a maximum contaminant level or treatment technique requirement unless they are independently certified in accordance with such standards. In listing any technology, treatment technique, or other means pursuant to this clause, the Administrator shall consider the quality of the source water to be treated.

(iii) LIST OF TECHNOLOGIES THAT ACHIEVE COMPLIANCE.—Except as provided in clause

42 U.S.C. § 6295(c)-(d) (1976 ed., Supp. II)

have the same effect as would a standard prescribed for such type (or class) under this section.

(c) Achievement of maximum improvement in energy efficiency

Energy efficiency standards for each type (or class) of covered products prescribed under this section shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. Such standards may be phased in, over a period not in excess of 5 years, through the establishment of intermediate standards, as determined by the Secretary.

(d) Beneficialness of standards

Before determining whether a standard is economically justified under subsection (c) of this section, the Secretary, after receiving any views and comments furnished with respect to the proposed standard under section 6306 of this title, shall determine that the benefits of the standard exceed its burdens based, to the greatest extent practicable, on a weighing of the following factors:

(1) the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard,

(2) the savings in operating costs throughout the estimated average life of the covered products in the type (or class), compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard,

(3) the total projected amount of energy savings likely to result directly from the imposition of the standard,

(4) any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard,

(5) the impact of any lessening of competition determined in writing by the Attorney General that is likely to result from the imposition of the standard,

(6) the need of the Nation to conserve energy, and

(7) any other factors the Secretary considers relevant.

For purposes of paragraph (5), the Attorney General shall, not later than 60 days after the publication of a proposed rule prescribing an energy efficiency standard, make a determination of the impact, if any, from any lessening of competition likely to result from such standard and transmit such determination in writing to the Secretary, together with an analysis of the nature and extent of such impact. Any such determination and analysis shall be published by the Secretary in the Federal Register.

(e) Exemptions

(1) Subject to paragraph (2), the Secretary may, on application of any manufacturer, exempt such manufacturer from all or part of the requirements of any rule prescribing an energy efficiency standard under this section for any period which does not extend beyond the date which is 24 months after the date such rule is prescribed, if the Secretary finds that the annual gross revenues to such manufacturer for the preceding 12-month period from all its operations (including the manufacture and sale of covered products) does not exceed $8,000,000. In making such finding in the case of any manufacturer, the Secretary shall take into account the annual gross revenues of any other person who controls, is controlled by, or is under common control with, such manufacturer.

(2) The Secretary may not exercise the authority granted under paragraph (1) with respect to any type (or class) of covered product subject to an energy efficiency standard established under this section unless he makes a finding, after obtaining the written views of the Attorney General, that a failure to allow an exemption under paragraph (1) would likely result in a lessening of competition.

(f) Rules specifying levels of energy efficiency

(1) A rule prescribing an energy efficiency standard for a type (or class) of covered products shall specify a level of energy efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary, in his discretion, determines that covered products within such group—

(A) consume a different kind of energy from that consumed by other covered products within such type (or class), or

(B) have a capacity or other performance-related feature which other products within such type (or class) do not have,

justifying a higher or lower standard from that which applies (or will apply) to other products within such type (or class). In determining under this paragraph whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as he deems appropriate.

(2) Any rule prescribing a higher or lower level of energy efficiency under paragraph (1) shall include an explanation of the basis on which such higher or lower level was established.

(g) Priorities respecting establishment of energy efficiency standards

In prescribing energy efficiency standards under this section, the Secretary shall give priority to the establishment of energy efficiency standards for types of products (or classes thereof) specified in paragraphs (1), (2), (4), (5), (6), (7), (9), (12), and (13) of section 6292(a) of this title.

(h) Reevaluation; publication in Federal Register

(1) Not later than 5 years after prescribing an energy efficiency standard under this section (and from time to time thereafter), the Secretary shall—

(A) conduct a reevaluation in order to determine whether such standard should be amended in any manner, and

(B) make, and publish in the Federal Register, such determination.

In conducting such reevaluation, the Secretary shall take into account such information as he

42 U.S.C. § 7491(g)(1)

section (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a "nondiscretionary duty" of the Administrator.

(g) Definitions

For the purpose of this section—

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(3) the term "manmade air pollution" means air pollution which results directly or indirectly from human activities;

(4) the term "as expeditiously as practicable" means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

(5) the term "mandatory class I Federal areas" means Federal areas which may not be designated as other than class I under this part;

(6) the terms "visibility impairment" and "impairment of visibility" shall include reduction in visual range and atmospheric discoloration; and

42 U.S.C. § 7545(c)(2)(B) (1976 ed., Supp. III)

and manufacturer of any additive contained in such fuel; the range of concentration of any additive in the fuel; and the purpose-in-use of any such additive; and

(B) the manufacturer of any additive to notify him as to the chemical composition of such additive.

(2) For the purpose of registration of fuels and fuel additives, the Administrator may also require the manufacturer of any fuel or fuel additive—

(A) to conduct tests to determine potential public health effects of such fuel or additive (including, but not limited to, carcinogenic, teratogenic, or mutagenic effects), and

(B) to furnish the description of any analytical technique that can be used to detect and measure any additive in such fuel, the recommended range of concentration of such additive, and the recommended purpose-in-use of such additive, and such other information as is reasonable and necessary to determine the emissions, resulting from the use of the fuel or additive contained in such fuel, the effect of such fuel or additive on the emission control performance of any vehicle or vehicle engine, or the extent to which such emissions affect the public health or welfare.

Tests under subparagraph (A) shall be conducted in conformity with test procedures and protocols established by the Administrator. The result of such tests shall not be considered confidential.

(3) Upon compliance with the provision of this subsection, including assurances that the Administrator will receive changes in the information required, the Administrator shall register such fuel or fuel additive.

(c) Offending fuels and fuel additives; control; prohibition

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

(2)(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 7521 of this title.

(B) No fuel or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (B) of paragraph (1) except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use and require the proposed control or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition. On request of a manufacturer of motor vehicles, motor vehicle engines, fuels, or fuel additives submitted within 10 days of notice of proposed rulemaking, the Administrator shall hold a public hearing and publish findings with respect to any matter he is required to consider under this subparagraph. Such findings shall be published at the time of promulgation of final regulations.

(C) No fuel or fuel additive may be prohibited by the Administrator under paragraph (1) unless he finds, and publishes such finding, that in his judgment such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.

(3)(A) For the purpose of obtaining evidence and data to carry out paragraph (2), the Administrator may require the manufacturer of any motor vehicle or motor vehicle engine to furnish any information which has been developed concerning the emissions from motor vehicles resulting from the use of any fuel or fuel additive, or the effect of such use on the performance of any emission control device or system.

(B) In obtaining information under subparagraph (A), section 7607(a) of this title (relating to subpenas) shall be applicable.

(4)(A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting use of a fuel or fuel additive in a motor vehicle or motor vehicle engine—

(i) if the Administrator has found that no control or prohibition under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 7543(a) of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 7410 of this title so provides. The Administrator may approve such provision in an implementation

43 U.S.C. § 1347(b) (1976 ed., Supp. III)

(d) Consideration of relevant environmental information in developing regulations, lease conditions and operating orders

The Secretary shall consider available relevant environmental information in making decisions (including those relating to exploration plans, drilling permits, and development and production plans), in developing appropriate regulations and lease conditions, and in issuing operating orders.

(e) Assessment of cumulative effects of activities on environment; submission to Congress

As soon as practicable after the end of each fiscal year, the Secretary shall submit to the Congress and make available to the general public an assessment of the cumulative effect of activities conducted under this subchapter on the human, marine, and coastal environments.

(f) Utilization of capabilities of Department of Commerce

In executing his responsibilities under this section, the Secretary shall, to the maximum extent practicable, enter into appropriate arrangements to utilize on a reimbursable basis the capabilities of the Department of Commerce. In carrying out such arrangements, the Secretary of Commerce is authorized to enter into contracts or grants with any person, organization, or entity with funds appropriated to the Secretary of the Interior pursuant to this subchapter.

(Aug. 7, 1953, ch. 345, § 20, as added Sept. 18, 1978, Pub. L. 95-372, title II, § 208, 92 Stat. 653.)

§ 1347. Safety and health regulations

(a) Joint study of adequacy of existing safety and health regulations; submission to President and Congress

Upon September 18, 1978, the Secretary and the Secretary of the Department in which the Coast Guard is operating shall, in consultation with each other and, as appropriate, with the heads of other Federal departments and agencies, promptly commence a joint study of the adequacy of existing safety and health regulations and of the technology, equipment, and techniques available for the exploration, development, and production of the minerals of the outer Continental Shelf. The results of such study shall be submitted to the President who shall submit a plan to the Congress of his proposals to promote safety and health in the exploration, development, and production of the minerals of the outer Continental Shelf.

(b) Use of best available and safest economically feasible technologies

In exercising their respective responsibilities for the artificial islands, installations, and other devices referred to in section 1333(a)(1) of this title, the Secretary, and the Secretary of the Department in which the Coast Guard is operating, shall require, on all new drilling and production operations and, wherever practicable, on existing operations, the use of the best available and safest technologies which the Secretary determines to be economically feasible, wherever failure of equipment would have a significant effect on safety, health, or the environment, except where the Secretary determines that the incremental benefits are clearly insufficient to justify the incremental costs of utilizing such technologies.

(c) Regulations applying to unregulated hazardous working conditions

The Secretary of the Department in which the Coast Guard is operating shall promulgate regulations or standards applying to unregulated hazardous working conditions related to activities on the outer Continental Shelf when he determines such regulations or standards are necessary. The Secretary of the Department in which the Coast Guard is operating may from time to time modify any regulations, interim or final, dealing with hazardous working conditions on the outer Continental Shelf.

(d) Application of other laws

Nothing in this subchapter shall affect the authority provided by law to the Secretary of Labor for the protection of occupational safety and health, the authority provided by law to the Administrator of the Environmental Protection Agency for the protection of the environment, or the authority provided by law to the Secretary of Transportation with respect to pipeline safety.

(e) Studies of underwater diving techniques and equipment

The Secretary of Commerce, in cooperation with the Secretary of the Department in which the Coast Guard is operating, and the Director of the National Institute of Occupational Safety and Health, shall conduct studies of underwater diving techniques and equipment suitable for protection of human safety and improvement of diver performance. Such studies shall include, but need not be limited to, decompression and excursion table development and improvement and all aspects of diver physiological restraints and protective gear for exposure to hostile environments.

(f) Coordination and consultation with Federal departments and agencies; availability to interested persons of compilation of safety regulations

(1) In administering the provisions of this section, the Secretary shall consult and coordinate with the heads of other appropriate Federal departments and agencies for purposes of assuring that, to the maximum extent practicable, inconsistent or duplicative requirements are not imposed.

(2) The Secretary shall make available to any interested person a compilation of all safety and other regulations which are prepared and promulgated by any Federal department or agency and applicable to activities on the outer Continental Shelf. Such compilation shall be revised and updated annually.

(Aug. 7, 1953, ch. 345, § 21, as added Sept. 18, 1978, Pub. L. 95-372, title II, § 208, 92 Stat. 654.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1334, 1348 of this title.