

## Supreme Court Endorses EPA's Use of Cost-Benefit Analysis in Power Plant Cooling Water Permit Decisions

### Summary

It has been an open question whether Environmental Protection Agency ("EPA") may use cost-benefit analysis when determining the appropriate cooling water system for large power plants. A recent Supreme Court of the United States ("SCOTUS") decision reverses a Second Circuit decision that had rejected EPA's approach of using cost-benefit analysis.

### The Supreme Court Decision

On April 1, 2009, SCOTUS held that EPA's application of cost-benefit analysis in determining the "best technology available" for upgrading cooling water intake systems at existing power plants is permissible.<sup>1</sup> SCOTUS thereby reversed and remanded a Second Circuit ruling that Section 316(b)<sup>2</sup> of the Clean Water Act requires such power plants to use the technology that achieves the greatest reduction in adverse environmental impacts at a cost that can be reasonably borne by the industry.<sup>3</sup> For the moment, *Entergy v. Riverkeeper* allows power plant operators seeking permit renewals to argue that a closed-cycle cooling system for a facility is prohibitively expensive.

The Section 316(b) regulations at issue are part of EPA's "Phase II" rules for permitting cooling water intake systems at existing power plants.<sup>4</sup> Section 316(b) instructs EPA to set standards for cooling water intake structures that reflect the "best technology available" (BTA) for minimizing environmental impact. In setting the Phase II national performance standards, EPA declined to mandate the adoption of closed-cycle cooling systems or other facilities creating an equivalent reduction in the impingement and entrapment of aquatic organisms (as it had for new, Phase I facilities) and instead set a lower target based on "commercially available and economically practicable" remedial technologies. The regulations also permit site-specific variances from the national performance standards if a facility can demonstrate that either i) the costs of compliance are significantly greater than the costs considered by the agency in setting the standards, or ii) the costs of compliance would be significantly greater than the benefits of complying with the applicable performance standards.

SCOTUS concluded that EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in allowing site specific variances from those standards. Although the Second Circuit interpreted "best" technology to mean the technology that produces the greatest reduction in adverse environmental impacts, the Supreme Court concluded EPA could reasonably interpret the Section 316(b) language to mean the technology that most efficiently minimizes adverse environmental impacts.

## Future Implications

It is important to note that the decision does not *require* EPA to conduct cost-benefit analysis nor does it prevent EPA from calling for a Phase II facility to retrofit its existing cooling system with a closed-cycle cooling system.<sup>5</sup> How EPA under the Obama administration will proceed remains to be seen as the Court decision preserves EPA's discretion to modify

its interpretation and implementation of 316(b) of the Clean Water Act in the future.

This case is one of several recent issuances affecting coal-fired generation. For additional information on these issues, please see recent Kirkland & Ellis alerts available on our website in the [energy](#) or [environmental](#) areas.

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- 1 Entergy Corp. v. Riverkeeper, Inc., *et al.*, No. 07-588, 2009 WL 838242 (U.S. Apr. 1, 2009) (Stevens, J., Souter, J., Ginsburg, J. dissenting; Breyer, J. concurring in part, dissenting in part) ("*Entergy v. Riverkeeper*").
  - 2 33 U.S.C. § 1326(b), 69 Fed. Reg. 41576 (2004).
  - 3 *Riverkeeper, Inc. v. E.P.A.*, 475 F.3d 83 (2nd Cir. 2007).
  - 4 The Phase II rules apply to existing facilities that are point sources, whose primary activity is the generation and transmission (or sale for transmission) of electricity, and whose water-intake flow is more than 50 million gallons of water per day, at least 25 percent of which is used for cooling purposes. Phase I rules apply to new facilities with water-intake flow greater than 10 million gallons per day. 66 Fed. Reg. 65256 (2001); see *Riverkeeper, Inc. v. Whitman*, No. 93 Civ. 0314 (AGS), 2001 WL 1505497 (S.D.N.Y., Nov. 27, 2001). Phase III rules apply to facilities not subject to Phase I or Phase II regulations. 71 Fed. Reg. 35006 (2006). A challenge to the Phase III regulations is currently stayed in the Fifth Circuit, pending outcome of *Entergy v. Riverkeeper*. See *ConocoPhillips Co. v. EPA*, No. 06-60662 .
  - 5 See, e.g., the December 17, 2007 settlement between EPA and Dominion Energy Brayton Point, LLC, in which the station owner agreed to retrofit its Brayton Point Station, the largest fossil-fuel burning power plant in New England, with a close-cycle cooling system. Available at <http://yosemite.epa.gov/opa/admpress.nsf/eebfaebc1afd883d85257355005afd19/a5f10f4e71769df6852573b4007d0eb8!OpenDocument>.

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