

ENVIRONMENTAL

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Supreme Court Rules that Cost Can be Used to Determine Best Technology Available



On April 1, 2009, the United States Supreme Court in *Entergy Corp. v. Riverkeeper, Inc.* held that the U.S. Environmental Protection Agency (“EPA”) permissibly relied on cost-benefit analysis in setting standards for cooling water intake structures in its Phase II regulations. Previously, the Second Circuit Court of Appeals had remanded most of the Phase II rule to the EPA, which suspended the entire Phase II rule in July, 2007. In its decision, the Supreme Court reversed the decision of the Second Circuit Court of Appeals in *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2007) and remanded the cases for further proceedings consistent with the

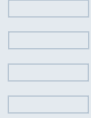
Court’s opinion.

The Clean Water Act (“CWA”) requires that the “location, design, construction, and capacity of cooling water intake structures reflect the best technology available [“BTA”] for minimizing adverse environmental impacts.” 33 U.S.C. § 1326(b). After nearly three decades of determining BTA on a case-by-case basis, the EPA promulgated regulations - the Phase I and Phase II rules. The Phase I regulations govern new cooling water intake structures, while the Phase II rules apply to existing structures 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. In its Phase II rules, the EPA set national performance standards that require most Phase II facilities to reduce impingement mortality by 80 to 95 percent and entrainment by 60 to 90 percent from its baseline.

In the Phase II rules, the EPA expressly declined to require adoption of closed-cycle cooling systems or equivalent reductions in impingement/entrainment, although it had done so in the Phase I rules. This decision was made, in part, because of a recognition of the high cost of converting existing cooling water systems to closed-cycle. Although the Phase II rules have performance standards, they also permit site-specific variances provided that the permit-issuing authority imposes remedial measures that yield results “as close as practicable to the applicable performance standards.” 40 C.F.R. § 125.94(a)(5)(i), (ii).

Respondents, various environmental groups and states, challenged the Phase II rules. The Supreme Court granted certiorari on the limited question of whether section 1326(b) of the CWA authorizes the EPA to compare costs with benefits in determining BTA. The Court found that §1326(b)’s use of the goal of “minimizing

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adverse environmental impact” suggests that the EPA has some discretion to determine the extent of reduction warranted under the circumstances. Thus, the EPA had the discretion to consider the benefits derived from reductions and the costs of achieving them. Further, the Court concluded that, contrary to the assertions of Respondents, there is no statutory basis for limiting the comparison of costs and benefits to situations where the benefits are *de minimis* rather than significantly disproportionate. Accordingly, the Court reversed and remanded the cases for further proceedings consistent with this opinion.

This decision could have significant impacts upon the analysis of BTA in New York. In *Entergy (Indian Point) Interim Decision* (August 13, 2008), the New York State Department of Environmental Conservation (“NYSDEC”) changed the fourth part of its BTA analysis, related to cost, in order for the NYSDEC BTA analysis for cooling water intake structures for existing electric generators to be consistent with the Second Circuit decision in *Riverkeeper*. Now that the Supreme Court has reversed the Second Circuit decision and determined that cost can be used in a BTA determination, the NYSDEC may revisit its Interim Decision to determine consistency with the Supreme Court’s ruling.



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