

## Supreme Court Finds EPA Permissibly Relied On Cost-Benefit Analyses In Its Phase II Cooling Water Intake Rule

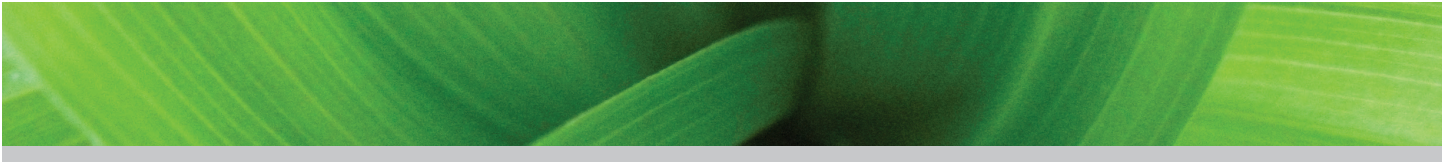
On April 1, 2009, a divided Supreme Court ruled that the Environmental Protection Agency (“EPA”) permissibly relied on cost-benefit analyses under the Clean Water Act (“CWA”) in setting national performance standards to protect aquatic organisms from cooling water intake structures at large, existing power-producing facilities, and in providing for variances from those standards based on cost-benefit comparisons. *Entergy Corp. v. Riverkeeper, Inc.*, No. 07-588 (U.S. 2009) (“*Riverkeeper*”). EPA’s final rule was the second phase of a three-part rulemaking designed to reduce adverse effects at cooling water intake structures. *Final Regulations To Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities*, 69 Fed. Reg. 41,576 (July 9, 2004) (“Phase II Rule”). The Phase II Rule, promulgated pursuant to section 316(b) of the CWA, designated a suite of technologies and five compliance alternatives for existing facilities.

### BACKGROUND

In 1972, Congress enacted section 316(b) to better regulate cooling water intake structures. Section 316(b) requires that “the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for *minimizing adverse environmental impact.*” 33 U.S.C. § 1326(b). This requirement applies to existing point sources and new point sources regulated under the CWA. The EPA’s initial efforts to regulate cooling fell short when, in 1977, the Fourth Circuit remanded EPA’s cooling water intake rules. After many delays, in 1995, EPA eventually entered into a consent decree that established a three-phase timetable for issuing the section 316(b) rules. Phase I addresses new facilities. Phase II—at issue in *Riverkeeper*—covers large, existing power plants. Phase III regulates existing power plants not governed by Phase II, as well as other industrial facilities.

In the Phase II Rule, EPA set national performance standards requiring most Phase II facilities to reduce intake mortality for aquatic organisms by 80 to 95 percent, and requiring a subset of other facilities to reduce intake mortality by 60 to 90 percent. The EPA declined, however, to mandate closed-cycle cooling systems, or equivalent reductions, in part because the cost of converting existing facilities to closed-cycle operation would be nine times the estimated cost of compliance with the Phase II performance standards. In addition, other technologies could approach the performance of closed-cycle operations. The Phase II Rule also permitted site-specific variances from the national performance standards as long as the permit-issuing authority imposed remedial measures that yielded results as close as possible to the applicable performance standards.

Various state petitioners, environmental groups, and industry petitioners challenged numerous aspects of the Phase II Rule. In particular, the state and environmental petitioners claimed that the EPA exceeded its authority in rejecting closed-cycle cooling and selecting instead a suite of technologies as the best technology available (“BTA”) for existing facilities. The petitioners contended that EPA improperly based this decision on cost considerations.



On January 25, 2007, the U.S. Court of Appeals for the Second Circuit vacated in part, and remanded in part, the Phase II Rule. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2007). With respect to EPA's cost-benefit analyses, the court stated that while EPA may consider cost as a factor to a limited degree in establishing BTA, cost cannot be the primary consideration and BTA cannot be based on a cost-benefit comparison. In reviewing EPA's rationale for the Phase II Rule, the court concluded that it was unclear whether EPA had improperly weighed the benefits and costs of requiring closed-cycle cooling. The court thus remanded this aspect of the Phase II Rule and directed EPA to explain its conclusions and, possibly, make a new determination of BTA.

## THE DECISION

The Supreme Court reversed and remanded the Second Circuit's ruling, finding that the EPA permissibly relied on cost-benefit analyses in setting the national performance standards, and in permitting variances from those standards based on a comparison of the costs of compliance with the environmental benefits.

The Court determined that EPA's interpretation of section 316(b)'s BTA standard was permissible under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* 467 U.S. 837, 843-844 (1984). The Court held that even though Congress wished to mandate the greatest feasible reduction in water pollution in various other provisions of the CWA, in section 316(b), Congress set a less ambitious goal of "minimizing adverse environmental impacts". Thus, EPA has discretion to determine the extent of reduction warranted under the circumstances, which may include a comparison of the environmental benefits derived from such reductions with the costs of achieving them. In addition, the Court ruled that EPA's exercise of its discretion was reasonable and consistent with section 316(b).

The Court did not express any opinion regarding the remaining bases for the Second Circuit's remand of the Phase II Rule. Three Justices dissented from the majority's opinion. Justice Breyer agreed with the majority that section 316(b) authorizes the EPA to compare costs and benefits, but would have remanded on the ground that EPA's explanation of its cost-benefit analyses was inadequate.

## SIGNIFICANCE

Although the Court's holding is limited to EPA's interpretation of section 316(b) in the Phase II Rule, it has a broader implication. *Riverkeeper* signals that the Court's current majority is willing to allow EPA discretion to use cost-benefit analyses in implementing the various environmental statutes it administers unless the statute contains language clearly foreclosing the agency from doing so. As a practical matter, the Court's decision is a major victory for the electric power sector because it will allow existing generating facilities to comply with the Phase II rule without necessarily installing cooling towers. This flexibility should substantially lower the cost of complying with the Phase II rule at more than 500 existing power plants around the country, which collectively provide more than half of the country's electricity.

## FOR ADDITIONAL INFORMATION

If you would like more information on this case, please contact Stephen Fotis, Mona Tandon or any other member of the firm's Environmental practice at (202) 298-1800.

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