

Second Circuit Invalidates Key Provisions of EPA's Phase II Cooling Water Intake Rule

January 31, 2007

On January 25th, the U.S. Court of Appeals for the Second Circuit vacated in part, and remanded in part, a final rule promulgated by the Environmental Protection Agency (EPA) intended to protect aquatic organisms from cooling water intake structures at large, existing power-producing facilities. *Riverkeeper, Inc. v. EPA*, No. 04-6692 (2d Cir. 2007). The final rule was the second phase of a three-part EPA 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 Clean Water Act (CWA), designated a suite of technologies and five compliance alternatives for existing facilities. Various state petitioners, environmental groups, and industry petitioners challenged numerous aspects of the Phase II Rule.

Background

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

The Decision

In one of the most significant challenges to the Phase II Rule, the state and environmental petitioners claimed that 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 claimed that EPA improperly based this decision on cost considerations. 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 selected based on a cost-benefit analysis. In reviewing EPA's discussions and decision in 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 petitioners also argued that EPA exceeded its authority by establishing ranges of acceptable performance rather than a single-numeric performance standard. Petitioners claimed that such ranges are inconsistent with Congress' intent that there be a national standard under section 316(b), while EPA defended the ranges because of the uncertainty inherent in predicting the efficacy of any single technology. The Court stated that while EPA may, in certain circumstances, set performance standards as ranges, it must require facilities to minimize the adverse environmental impacts attributable to their cooling water intake structures to the greatest degree possible. In remanding this part of the Phase II Rule, the Court directed EPA to address this issue if it retains performance ranges in its BTA determination.

The Phase II Rule permitted facilities to meet the national performance standards using restoration measures. The state and environmental petitioners argued that EPA exceeded its authority by

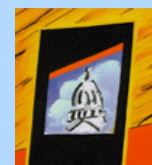
A Professional
Corporation

1050 Thomas Jefferson
Street, NW
Washington, DC
20007-3877
(202) 298-1800
(202) 338-2416

The Millennium Tower
719 Second Avenue
Suite 1150
Seattle, Washington
98104
(206) 623-9372
(206) 623-4986

www.vnf.com

I
S
S
U
E



A
L
E
R
T

allowing restoration measures as a compliance option because the Court's decision in *Riverkeeper Inc. v. EPA*, 358 F.3d 174 (2nd Cir. 2004), held that restoration measures cannot substitute for BTA in cooling water intake structures. The Court agreed with the petitioners and remanded this provision of the Phase II Rule.

The state and environmental petitioners also raised a challenge to the cost-benefit compliance alternative that authorizes a site-specific determination of whether the costs of compliance at a specific facility would be significantly greater than the benefits of complying with the applicable performance standard. In agreeing with the petitioners, the Court concluded that this alternative impermissibly focuses on cost-benefit considerations and impermissibly authorizes EPA to consider the quality of waterways in selecting a site-specific BTA. In addition, the Court found that EPA did not give interested parties the requisite notice and opportunity to comment on this provision.

The Phase II Rule allowed a facility to comply with the standards based on whether the facility had complied with the requirements of its Technology Installation and Operation Plan (TIOP). The petitioners contended that this provision allows a facility's compliance to be determined not by reference to the standards themselves, but by evaluating whether a facility has complied with a plan to achieve the standards, thus allowing for an unauthorized margin of error. The Court remanded the TIOP provision because it was a part of the suite of technologies selected by EPA as BTA, which had been remanded for further explanation (and because EPA failed to provide adequate notice of this provision).

Finally, the Court remanded various other aspects of the Phase II Rule, including the definitions of "new facility" and "existing facility" and a provision that provides that a facility can purchase cooling water only from suppliers whose intake structures comply with the Phase II Rule. The Court agreed with the petitioners that EPA did not provide interested parties sufficient notice and opportunity to comment on these provisions.

The Impact

The Court decision will likely delay implementation of the section 316(b) program for existing facilities because of the uncertainty regarding how EPA will rewrite the rule. Notably, it is possible that the revised regulations could increase the stringency of the BTA requirements for existing facilities. Another important implication of the decision relates to the uncertainty on whether the BTA requirements for new facilities or existing facilities apply to new generating units that are constructed at existing sites. The Court's remand not only may create uncertainty on applicability, but also could potentially bolster litigation by state and environmental groups to block permits for such proposed power plant expansions. Several pending suits over permits for individual power plants could provide an early test of the Court's ruling on the BTA issue.

For Additional Information

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

#

Founded in 1977, **Van Ness Feldman** helps clients in a variety of industries achieve their business goals by designing and complying with the nation's energy and environmental laws. Many of the firm's more than 80 attorneys and public policy professionals served as chief legal counsel to key congressional committees and Members of Congress; high-level officials in the Department of Energy, the Federal Energy Regulatory Commission, the Environmental Protection Agency, The White House, and the Department of the Interior; or as high-ranking officers in major trade associations.