

Environment

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Alert

U.S. Supreme Court Rules Cost-Benefit Analysis Permitted Under the Clean Water Act – But Will it Matter in California?

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On April 1, 2009, the United States Supreme Court issued the much-awaited *Riverkeeper* decision.¹ Although early newspaper reports have been declaring the decision a victory for power plants over fish,² it is premature to make that call, especially because the Obama administration is now responsible for issuing new federal regulations in the wake of the decision, and because in California, momentum is lining up against once-through cooling. The decision may give California facilities some breathing room in the immediate term, but California regulators appear unlikely to wait for new federal regulations. Also, California once-through



cooling policy appears unlikely to accommodate cost-benefit analysis, even if such analysis is permissible.

Background

The *Riverkeeper* case arose out of a long fight over the efforts by the Environmental Protection Agency (EPA) to promulgate regulations interpreting Clean Water Act (CWA) Section 316(b), which mandates that “the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”³ Once-through cooling systems are used to cool industrial equipment in facilities such as power plants. In such a system, water enters the facility from a river or ocean through an intake structure, circulates through the facility, and is then discharged back to the water source. EPA’s initial attempt at issuing a regulation was withdrawn in 1977, after the U.S. Court of Appeals for the Fourth Circuit determined that the agency violated the Administrative Procedure Act.⁴ In 1995, after almost 20 years of operating based on draft guidance,⁵ EPA entered into a consent decree

that set a timetable for issuing regulations under CWA Section 316(b).⁶ EPA issued the so-called Phase II Rule, which was applicable to existing power plants, in 2004.⁷

To address the environmental impacts of once-through cooling, EPA set a performance standard that required facilities to reduce impingement by 80 to 95 percent and entrainment by 60 to 90 percent from a calculated baseline.⁸ The regulations then permitted a variance from the performance standard if a facility could demonstrate either that the costs of compliance were significantly greater than the costs considered by the EPA in setting the standard, or significantly greater than the benefits of complying with the applicable performance standards.⁹ The regulation was challenged on a variety of grounds. The U.S. Court of Appeals for the Second Circuit found, among other things, that relying on a cost-benefit analysis would be unlawful, and remanded the rule to the agency for clarification on this point.¹⁰ In response to the Second Circuit decision, EPA withdrew the rule.¹¹ The Second Circuit decision was then appealed to the Supreme Court, which granted certiorari on the limited question of whether CWA Section 316(b) authorizes the EPA “to compare costs with benefits in determining ‘the best technology available for minimizing adverse environmental impact’ at cooling water intake structures.”¹²

The Case

In a 6-3 decision, with Justice Antonin Scalia authoring the majority opinion, the Court reversed the Second Circuit decision and held that the EPA can use cost-benefit analysis in regulations promulgated under CWA Section 316(b).¹³ Justice Scalia and the majority relied on the *Chevron* deference standard, under which courts will defer to an administrative agency’s “reasonable” interpretation of a statute,¹⁴

and principles of statutory construction in holding that even though the statute was silent on whether cost-benefit analysis could be used, the agency retains discretion to utilize the test it had been using for 30 years and determine the extent of impact reduction warranted under the circumstances.¹⁵

In its opinion, the majority analyzed the text of the statute and found that “‘minimize’ is a term that admits of degree and is not necessarily used to refer exclusively to the ‘greatest possible reduction’”; also, that by contrast, other CWA provisions indicate that when Congress wished to mandate the greatest feasible reduction, they used clear terms such as “‘elimination of discharge” or “no discharge.”¹⁶ Accordingly, the justices concluded that failure to use similarly definitive language here left discretion to the agency.¹⁷

The dissenting opinion, authored by Justice John Paul Stevens, also relied on the *Chevron* deference standard and statutory interpretation to reach the exact opposite conclusion. Specifically, the dissent found that “cost-benefit analysis often, if not always, yields a result that does not maximize environmental benefits”; also, because other portions of the CWA specifically allow cost-benefit analysis, the silence in 316(b) “reveals that Congress granted the EPA authority to use cost-benefit analysis in some contexts but not others, and that Congress intend[ed] to control, not delegate, when cost-benefit analysis should be used.”¹⁸

What *Riverkeeper* Means for Once-Through Cooling Facilities in California

The bottom line is that the *Riverkeeper* decision merely grants EPA the permission to use a cost-benefit analysis. The Supreme Court’s ruling does not mandate application of the cost-benefit test anywhere, much less in California, where the State Water Resources Control Board (State Board) has been working on a state policy for implementing CWA section 316(b) since 2006.

The Court’s decision may lend support to the respondents in the pending California Supreme Court case, *Voices of Wetlands v. State Water Board*,¹⁹ in which environmental groups have appealed the lower court’s finding that a cooling tower retrofit was not required for a coastal California power plant where the costs to eliminate once-through cooling were found to be “wholly disproportionate” to the benefits of doing so. However, neither the pending state decision nor the U.S. Supreme Court’s decision are likely to provide much influence over evolving state once-through cooling policy.

Efforts to Eliminate Once-Through Cooling in California

Since 2006, there has been a growing movement in California to eliminate once-through cooling. Such efforts began when the California Ocean Protection Council and State

Lands Commission both issued resolutions promoting the elimination of once-through cooling, and the State Board began working on a statewide policy to address once-through cooling permitting issues. The California Ocean Protection Council adopted a resolution in 2006 encouraging state agencies to work together to find alternatives to once-through cooling.²⁰ The State Lands Commission then took up the cause, and issued a resolution declaring that the Commission shall not approve or renew leases for existing power facilities using once-through cooling.²¹ Although that resolution was determined to be an unlawful, underground regulation, the State Lands Commission has continued to press the policy.²²

In 2006, the State Board also began work on a state-wide policy for once-through cooling, which was intended to supplement the EPA Phase II Rule.²³ In March 2007, after the EPA withdrew the Phase II Rule, the State Board revised its policy and released a new proposal. That proposed policy essentially required the installation of closed-cycle cooling and phased out once-through facilities over roughly the next ten years.²⁴ The proposed policy looked at whether retrofitting once-through cooled power plants in California was “technologically and logistically” feasible and did not take into account other factors such as economic feasibility. Notably, while the State Board followed EPA’s lead and carved out some degree of flexibility for California’s nuclear power plants, neither version of the State Board’s proposed policy would have allowed cost-benefit analysis in determining 316(b) compliance for the rest of California’s once-through cooled facilities. The public comment period on the proposed policy closed in May 2008, and no further action has occurred on it.

Meanwhile, the California Public Utilities Commission and California Energy Commission have both incorporated the retirement of once-through cooling power plants in their electricity needs projections,²⁵ and in the current California legislative session, Senator Corbett has introduced SB 42, which would, on and after January 1, 2015, prohibit a power plant from using once-through cooling. The permissibility of cost-benefit analysis may reduce the likelihood of forced plant shutdowns in the immediate term, but California policymakers appear to be marching in step to achieve the gradual phase-out of once-through cooling, irrespective of how once-through cooling policy evolves at the national level in the wake of the *Riverkeeper* decision.

Conclusion

Because the EPA Phase II Rule at issue in *Riverkeeper* was withdrawn and EPA is working on a new version, the decision provides no guarantees for industry. Given the current administration’s focus on environmental protection, its interpretation of 316(b) may reject cost-benefit analysis in the determination of the “best technology available” stan-

dard, notwithstanding *Riverkeeper*. Regardless of how EPA proceeds, California appears poised to continue on its path to phasing out once-through cooling entirely.

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¹ *Entergy Corp. v. Riverkeeper, Inc. et al.* (Entergy), U.S. Sp. Ct. April 1, 2009, Slip Op. No. 07-588.

² See, e.g., “Court Sides With Power Plants Over Fish,” by Mark Sherman, *The Associated Press*, April, 1, 2008; “Power Plants Win at Top U.S. Court on EPA Water Rule,” by Greg Stohr, *Bloomberg.com*, April 1, 2009.

³ Clean Water Act Section 316(b), 33 U.S.C. Section 1326(b).

⁴ See *Appalachian Power Co. v. Train*, 566 F.2d 451 (1997).

⁵ EPA, Office of Water Enforcement Permits Div., [Draft] Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment, Section 316(b) P.L. 92-500 (May 1, 1977).

⁶ See *Riverkeeper, Inc. v. Whitman*, No. 93 Civ. 0314 (AGS) (2001) WL 1505497.

⁷ 69 Fed.Reg. 41576 (2004).

⁸ Impingement occurs when fish and other marine creatures are pinned by the suction against screens located on the intake structure. Entrainment occurs when fish and small organisms, larvae, and eggs are sucked through the intake screens and pass through the facility.

⁹ 40 C.F.R. Section 125.94(a).

¹⁰ *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2007).

¹¹ 72 Fed.Reg. 37107 (2007).

¹² *Entergy* slip op. at 7.

¹³ *Id.* at 2.

¹⁴ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

¹⁵ *Entergy* slip op. 8–9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* slip op. at 2, 6 (Stevens, J., dissenting).

¹⁹ 157 Cal. App. 46h 1268 (2007).

²⁰ “Resolution of the California Ocean Protection Council Regarding the Use of Once-Through Cooling Technologies in Coastal Waters” (April 20, 2006).

²¹ “Resolution by the California State Lands Commission Regarding Once-Through Cooling in California Power Plants” (April 17, 2006).

²² State of California, Office of Administrative Law, 2006 OAL Determination No. 2, File No. CTU 06-0525-01 (Nov. 8, 2006); see also “Resolution by the California State Lands Commission Regarding the Taking of Marine Mammals and Sea Turtles Incidental to Power Plant Operations of Certain Once-Through Cooling Power Plants in California” (May 5, 2008).

²³ Scoping Document: Proposed Statewide Policy on Clean Water Act Section 316(b) Regulations, State Water Resources Control Board, June 13, 2006.

²⁴ Scoping Document: Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, State Water Resources Control Board, March 2008.

²⁵ California Public Utilities Commission Order D. 07-12-052 (Dec. 21, 2007); California Energy Commission, Integrated Energy Policy Report, November 2005.

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