

## **Supreme Court Restores the Use of Cost-Benefit Analysis Under the Clean Water Act for Cooling Water Intake Structures**

**April 2, 2009**

The U.S. Supreme Court on April 1, 2009 issued its decision in *Entergy Corp. v. Riverkeeper, Inc.* on the issue of whether Section 316(b) of the Clean Water Act (the Act) authorizes the Environmental Protection Agency (EPA) to compare costs with benefits in determining the “best technology available for minimizing adverse environmental impact” at cooling water intake structures. The Court found that EPA acted permissibly in using cost-benefit analysis in the regulations it promulgated to establish national performance standards, and in its allowing site-specific variances to those standards, under Section 316(b) of the Act as applied to existing power plants.<sup>1</sup> The Court’s decision reverses an earlier decision by the U.S. Court of Appeals for the Second Circuit that significantly limited the ability of EPA to consider the costs of control technology in making decisions under Section 316(b). The Court’s decision is significant for existing power plants seeking to renew permits issued under the Act for their cooling water intake structures, as well as more broadly for the use of cost-benefit analysis in establishing environmental standards.

Section 316(b) of the Act requires EPA to set standards such that “the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” EPA adopted regulations in 2004 that established how certain existing power plants must demonstrate compliance with the requirements of Section 316(b) when applying for renewal of National Pollutant Discharge Elimination System (NPDES) permits authorizing the operation of their cooling water intake structures. Under these regulations, an owner or operator of an existing power plant could demonstrate that its cooling water intake structure complied with the “best technology available” requirement of Section 316(b) by demonstrating that it met certain national performance standards for the impingement and entrainment of organisms,<sup>2</sup> or—where the costs of complying with the performance standards were significantly greater than the benefits—could seek a site-specific variance.

Aspects of the regulations, including the site-specific variance provision and EPA’s apparent use of cost-benefit analysis in setting national performance standards, were challenged by several environmental groups and six northeastern states.<sup>3</sup> The Second Circuit heard the challenges and, in January 2007, issued

---

1. A separate set of regulations, which were not before the Court, provides the standards that new power plants must follow in demonstrating compliance with Section 316(b).

2. “Impingement” is the trapping of aquatic organisms against the intake screens of a cooling water intake structure. “Entrainment” is the suctioning of aquatic organisms through the power plant’s cooling system.

3. Representatives of the electric power industry challenged other aspects of the regulations, but defended the use of cost-benefit analysis.

a decision that substantially overturned EPA's Section 316(b) regulations for existing power plants. The Second Circuit determined that the statutory language of Section 316(b) did not permit the comparison of the costs of a technology to its benefits as authorized by EPA's regulations. As a result, the Second Circuit vacated the regulations' site-specific variance option that was based on a cost-benefit analysis, and remanded to EPA the regulations' national performance standards for impingement and entrainment to verify that those standards were not based on an impermissible cost-benefit analysis. EPA suspended the regulations following the decision by the Second Circuit.

The Court's reversal of the Second Circuit's decision allows EPA to use cost-benefit analysis when it re-issues its regulations. The Court examined the language of Section 316(b) and found that nothing within that section, or other sections of the Act, precluded EPA from using cost-benefit analysis when making determinations regarding the best technology available for minimizing adverse environmental impacts. The Court also determined that EPA's practice of comparing the costs of a technology with its benefits, which it has been doing for more than 30 years, is a reasonable and legitimate exercise of its discretion. The absence of cost-benefit analysis in Section 316(b) decision-making could result in NPDES permits requiring existing, once-through cooled power plants to install cooling towers or other extremely costly technology or operational measures to minimize impingement and entrainment of aquatic organisms.

The Court's decision validates the traditional use of cost-benefit analysis by state environmental agencies issuing NPDES renewal permits in states with delegated authority to implement the Section 316(b) program. Prior to the Section 316(b) regulations and the Second Circuit's decision, some states incorporated cost-benefit analysis as part of their best professional judgment in issuing Section 316(b) determinations. Following the Second Circuit's decision and EPA's suspension of the regulations in response to that decision, states reverted to decision-making by best professional judgment, although potentially without the traditional cost-benefit analysis. The Court's action once again allows for the use of cost-benefit analysis in permitting decisions for existing power plants under Section 316(b).

For more information on this issue, please contact the following Morgan Lewis attorney:

**Princeton**

Christopher J. McAuliffe

609.919.6619

[cmcauliffe@morganlewis.com](mailto:cmcauliffe@morganlewis.com)

**About Morgan, Lewis & Bockius LLP**

Morgan Lewis is an international law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis, please visit [www.morganlewis.com](http://www.morganlewis.com).

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered Attorney Advertising in some states.  
Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2009 Morgan, Lewis & Bockius LLP. All Rights Reserved.