

## Supreme Court Permits Cost-Benefit Analysis to Relax Regulation of Power Plants Under the Clean Water Act

### Breaking Developments In London Market Law 04/08/09

The U.S. Supreme Court has approved the use of cost-benefit analysis to determine which water-intake technologies power plants must employ under the Clean Water Act ("CWA"), 33 U.S.C. Sections 1251-1387 (1977). The decision in *Entergy Corp. v. Riverkeeper, Inc.*, delivered on April 1, 2009, significantly relaxes decades of regulatory practice and reverses a Second Circuit ruling, *Riverkeeper, Inc. v. EPA*, that precluded the Environmental Protection Agency ("EPA") from comparing technology costs and environmental benefits in setting acceptable levels of environmental impact for existing power plants. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. \_\_\_\_ (2009); *Riverkeeper, Inc. v. EPA*, 475 F. 3d 83 (2007).

Riverkeeper, Inc. originally brought suit against the EPA in response to the agency's adoption of a two-phase regulatory scheme that applied different standards depending on whether the power plant at issue was a new or existing facility. For nearly 30 years prior to the scheme, EPA had made "best technology available" determinations, as required under Section 1326(b) of the Act, on a case-by-case basis. The agency's recent two-phase approach opened the door to potentially relaxed environmental standards for over 500 existing power plants supplying more than half the nation's electricity.

The EPA justified the dual standard on the grounds that retro-fitting an existing facility to match new facility standards would create prohibitive cost burdens. The EPA estimated that the cost for an existing facility to meet "Phase I" standards applicable to new facilities would be approximately nine times greater than the cost to meet more lenient "Phase II" standards that the EPA sought to apply to existing facilities.

Central to the Supreme Court's analysis was its interpretation of section 1326(b) of the Act, which requires that cooling water intake structures reflect "the best technology available for minimizing adverse environmental impact." The Second Circuit found that provision to require technology that achieves "the greatest reduction in adverse environmental impacts at a cost that can reasonably be borne by the industry." *Riverkeeper*, 475 F. 3d at 99-100. By contrast, the 6-3 majority opinion, drafted by Justice Antonin Scalia, found that "'minimize' is a term that admits of degree and is not necessarily used to refer exclusively to the 'greatest possible reduction.'" *Entergy*, 556 U.S. \_\_\_\_ (2009).

Further,

'best technology' may also describe the technology that most efficiently produces some good. In common parlance one could certainly use the phrase 'best technology' to refer to that which produces a good at the lowest per-unit cost, even if it produces a lesser quantity of that good than other available technologies.

*Id.*

The majority found it persuasive that in other provisions, Congress saw fit to mandate the greatest feasible reduction "in plain language," as in provisions governing the discharge of toxic pollutants, which require "the elimination of discharges of *all* pollutants if the Administrator finds . . . that such elimination is technologically and economically achievable[.]" *Id.* (quoting CWA at 1311(b)(2)(A)) (emphasis added). Section 1326(b)'s use of the less ambitious goal of merely "*minimizing* adverse environmental impact" suggested to the Court that "the agency retains some discretion to determine the extent of reduction that is warranted under the circumstances[.]" which may reasonably include cost-benefit analysis. *Id.* (quoting CWA at Section 1326(b)) (emphasis added).

### **Potential Impact of the Decision**

On paper, the majority opinion permits the EPA to employ cost-benefit analysis in administering water-intake provisions of the Clean Water Act, which may result in lower technology costs for power companies. However, the holding merely allows the EPA to use its discretion; the EPA is not required to employ cost-benefit analysis in "minimizing adverse environmental impact." CWA at Section 1326(b).

The ruling rests on close analysis of specific Clean Water Act provisions relating to water intake, and should not automatically extend to other provisions of the Act or other environmental legislation. However, the Court's finding of support for cost-benefit analysis here, where none is expressly provided in the statutory text, may provide support for similar cost-benefit challenges to other regulation.

### **For More Information**

[Read](#) the Court's opinion.

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