

A SUPREME VICTORY FOR THE ELECTRIC POWER SECTOR: COURT RULES THE EPA MAY CONSIDER COST-BENEFIT ANALYSIS TO ADDRESS IMPACTS FROM COOLING INTAKES

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To Our Clients and Friends:

On April 1, 2009, the United States Supreme Court held that the EPA could rely on cost-benefit analyses to determine the technology needed to protect fish and other aquatic life from being adversely affected by cooling water intake structures. The Court's decision in *Entergy Corp. v. Riverkeeper, Inc.* addressed a set of rules adopted by the EPA in 2004, which regulated cooling water intake structures at existing electric-power generating facilities. New facilities remain unaffected by the decision.

Over 500 facilities, accounting for approximately one-half of the nation's electric-power generating capacity, fall within the scope of the rules that were the subject of the dispute. The EPA estimated that the covered facilities, on a combined basis, remove on average more than 214 billion gallons of water per day and cause impacts, including death, to over 3.4 billion aquatic organisms per year.

The Court's decision partially reversed a 2007 ruling by the U.S. Court of Appeals for the Second Circuit, which held that no cost-benefit analysis could be used to determine what constituted the "best technology available for minimizing adverse environmental impact" for cooling water intake structures. In adopting the rules for existing electric-power generating facilities, the EPA had expressly declined to mandate implementation of costly closed-cycle cooling systems (or equivalent systems) as it had done for new facilities. Instead, the EPA considered the costs of converting existing electric-power generating facilities to such closed-cycle systems versus less costly, although somewhat less environmentally protective, alternatives. The Supreme Court was asked to resolve whether, under Section 316(b) of the Clean Water Act, which addresses cooling water intake structures, the EPA had discretion to rely on such cost-benefit analysis in promulgating its regulations. A majority of the Court held that the EPA had such discretion. The EPA will now have to issue new regulations that conform to the 2007 decision of the U.S. Court of Appeals for the Second Circuit, as modified by the Supreme Court's ruling.

Compliance costs under the rules in their current form are estimated to be \$389 million per year in the aggregate for all covered facilities, versus \$3.5 billion per year that would have been required to convert such facilities to closed-cycle systems or equivalents. The Court's

decision is expected to resolve a similar dispute in the Fifth Circuit involving the EPA's rules covering cooling water intake structures at certain new offshore oil and gas facilities.

Despite the immediate victory for facilities covered by the current rules, the impact of the Court's decision remains to be seen – largely because it is unknown whether the Obama Administration will adopt more environmentally protective regulations when it reissues the rules. Notably, the EPA's new administrator, Lisa Jackson, previously led the state environmental agency in New Jersey, one of six states that joined the lawsuit in support of invalidating the 2004 rules. Accordingly, the long-term impact of the Supreme Court decision will depend on how the Obama Administration elects to address environmental cost-benefit issues.

Please feel free to contact us with any questions.

Ezra Borut

+1 212 909 7271

eborut@debevoise.com

Stuart Hammer

+1 212 909 6257

shammer@debevoise.com