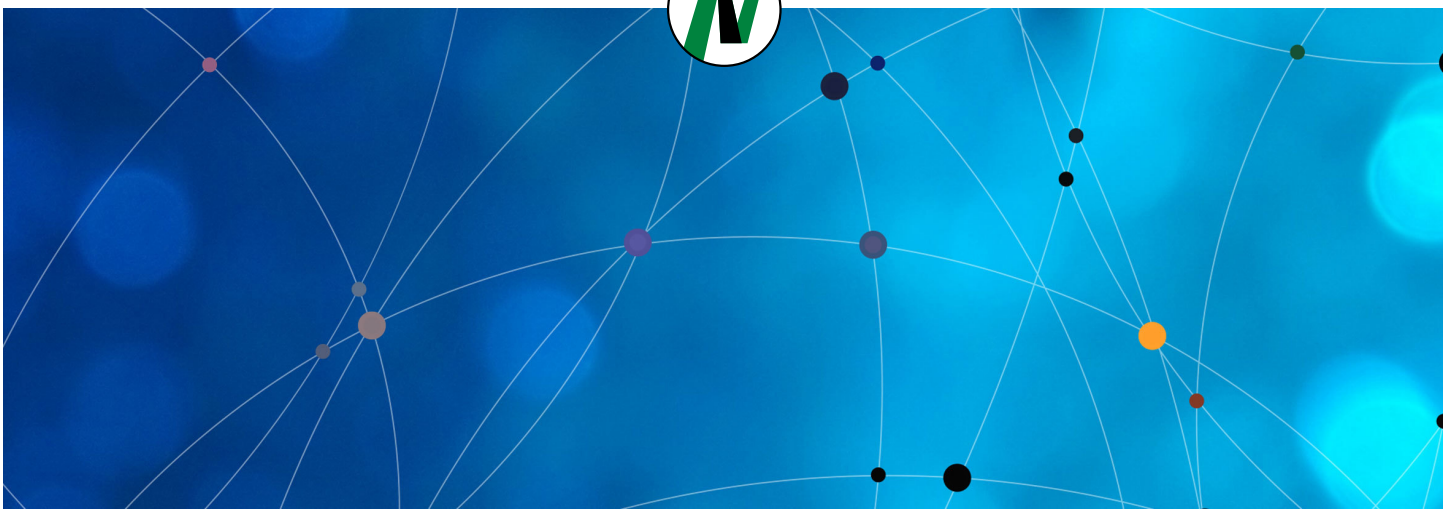

# EPA May Consider Costs and Benefits When Setting Standards Under Section 316 of the Clean Water Act

**05.11.2009 | By Byron P. Gee**

On April 1, 2009, the United States Supreme Court upheld the Environmental Protection Agency's ("EPA") regulations for existing cooling water intake structures at power plants permitted under Clean Water Act ("CWA") § 316. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (2009) ("*Entergy Corp.*"). The decision is important because it affirms EPA's interpretation that the CWA § 316 "best technology available" standard allows EPA to apply a cost-benefit analysis in establishing national performance standards and variances from those standards and provides another example of the application of *Chevron* [1] deference to EPA's interpretation of federal environmental statutes, including the CWA.

At issue in *Entergy Corp.* were regulations promulgated by EPA for cooling water intake structures regulated under CWA § 316, which mandates that "[a]ny standard established pursuant to ... § 316 ... and applicable to point source cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b).

In response to a consent decree requiring EPA to promulgate regulations for cooling water intake structures under CWA § 316 earlier this decade, EPA began issuance of regulations. For nearly thirty years, EPA had made CWA § 316 determinations based on "best technology available" on a case-by-case basis. In 2001, EPA published rules for new cooling water intake structures ("Phase I Rules"). 40 C.F.R. §§ 125.80; 125.81; 66 Fed. Reg. 65255 (December 18, 2001). Then, in 2004, EPA published rules for certain existing cooling water intake structures ("Phase II Rules"). 40 C.F.R. § 125, Subpart J; 69 Fed. Reg. 41576 (July 6, 2004).

The Phase II Rules set national performances standards under CWA § 316 requiring most existing facilities to reduce impingement (trapping of fish on screens) mortality of aquatic organisms by a significant degree; however, the Phase II Rules did not require such facilities to install closed-cycle cooling systems as was

required by the Phase I Rules applicable to new facilities. EPA declined to require the closed-cycle cooling systems for existing facilities on the basis that doing so would be prohibitively expensive and not provide significant environmental benefits. 69 Fed. Reg. 41576, 41605 (2004). In addition, the Phase II Rules permitted site-specific variances from the national performance standards if remedial measures are imposed on the discharger that yield results "as close as practicable" to the applicable performance standards. 40 C. F.R. § 125.94(a)(5).

A number of states and environmental organizations challenged the Phase II Rules on the basis that they failed to comply with CWA § 316. The Second Circuit held that cost-benefit analysis, including the allowance of site-specific variances to the applicable performance standards was impermissible under CWA § 316, and thus rejected the Phase II Rules. *Riverkeeper, Inc. v. EPA*, 475 F. 3d 83, 99-100 (2d Cir. 2007). The Second Circuit interpreted § 316's "best technology available for minimizing adverse environmental impact" standard to require the technology that achieves the greatest reduction in adverse environmental impacts at a cost that can reasonably be borne by the industry. *Id*.

EPA appealed the Second Circuit's decision to the Supreme Court, which upheld the Phase II Rules holding that EPA's interpretation that the "best technology available for minimizing adverse environmental impact" standard of CWA § 316 permits a consideration of the technology's costs and of the relationship between those costs and the environmental benefits produced was reasonable, stating: "[t]he phrase 'best technology available,' even with the added specification 'for minimizing adverse environmental impact,' does not unambiguously preclude cost-benefit analysis." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1506 (2009). In sustaining the Phase II Rules, the Supreme Court applied the *Chevron* deference standards that require Courts to defer to a federal agency's interpretation of a federal statute, stating that EPA's interpretation of CWA § 316 would be upheld, "if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable." *Id*. at 1505. While the Supreme Court conceded that the Second Circuit and those challenging the Phase II Rules had offered a plausible interpretation of CWA § 316, it relied on the fact that Congress had sustained EPA's reading in other provisions of the CWA, noting that where Congress desired to preclude cost-benefit analysis in setting standards it did so specifically in plain language. *Id*. at 1505-1506.

**What this Decision Means to You (Even if You Don't Use or Plan to Use Cooling Water Intake Structures)**

- It is an example of deference given to a federal agency's interpretation of a statute, even if other interpretations are plausible. This can be good or bad, depending on the particular issue.
- It supports the concept that a federal agency may balance costs and benefits so that the cost of meeting regulatory standards is weighed against the environmental benefit received and therefore, compliance costs bear some relationship with the benefits.

*Byron Gee is a Partner that specializes in environmental and water law. He assists clients to resolve site contamination issues and is an experienced CERCLA litigator. He can be reached at 213.612.7843 or bgee@nossaman.com.*
*Alfred E. Smith, II specializes in environmental, water and complex commercial litigation. He represents public and private water purveyors, major water users, corporations and public agencies on matters including environmental compliance, water rights disputes, conjunctive use, public utility regulation, groundwater management and litigation over allegedly contaminated water and soil. He can be reached at (213) 612-7800 or asmith@nossaman.com.*

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